



NORTHERN
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HUMAN
RIGHTS
COMMISSION

**Response of the Northern Ireland Human Rights Commission to
the Consultation on the Special Educational Needs and Disability
(SEND) Bill**

Summary

The Northern Ireland Human Rights Commission (the Commission):

(para 12) welcomes the introduction of the duty to seek and have regards to the views of the child but advises that the qualification defence of 'reasonably practicable' and the requirement to 'have regard to the importance' of participation, are not consistent with the DENI's duty under article 12 UNCRC and article 7 UNCRPD to assure to the child the right to express their views.

(para 13) recommends that the phrase 'so far as reasonably practicable' is removed from the bill at clause 1 and the provision is amended to strengthen the duty to seek and have regard to the views of the child so as to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.

(para 23) welcomes the intention in clauses 2 – 5 to improve the level of individualised support available to children with SEN and disabilities. The Commission advises that the Assembly Committee support these clauses which will;

- place a duty on the Education Authority to publish a plan of arrangements for special educational needs provision including details of resources and advisory support available and arrangements for staff training in grant-aided schools; (clause 2)

- place a duty on Boards of Governors to prepare and review personal learning plans for every SEN pupil, to designate a teacher as the learning support coordinator and to inform parents or pupils over compulsory school age of the arrangements relating to disagreements with the Board of Governors; (clause 3)
- place a duty on Boards of Governors to 'take reasonable steps to identify and provide' the necessary support for SEN pupils and share information with all those involved in supporting pupils; (clause 3)
- reduce statutory time limits for completing assessments of need. (clause 5)

(para 25) recommends that the Assembly Committee seek assurance from DENI that they will expedite the revised statutory Code of Practice along with details of other subordinate legislation to be introduced to the Northern Ireland Assembly in relation to SEN provision.

(para 27) advises the Assembly Committee to seek assurance from DENI that there will be no retrogression in the level of SEN provision as a result of this bill and subordinate legislation. The Commission also recommends that the Committee considers further the need for the Bill to require that the Code of Practice and other subordinate legislation should be enacted by way of the affirmative resolution procedure. This process of requiring that statutory rules must be approved by the Assembly before becoming law would allow the Assembly Committee to provide full scrutiny of the human rights and any other implications of the revised SEN and inclusion framework as a whole before the Code of Practice can come into effect.

(para 31) advises that the Assembly Committee support the provisions in clauses 6 and 7 introducing new appeal rights for parents as they represent progressive measures towards fulfilling the human rights obligation to provide robust and effective access to redress regarding violations of the right to education.

(para 34) recommends that an additional clause should be included in the bill to establish a procedural duty upon the tribunal to fulfil the right of the child to be heard in the appeals process in accordance with UNCRC article 12(2).

(para 41) recommends that, given the impact of clauses 9 and 10 on determining the capacity of children to exercise their rights, the Assembly Committee should consider the need for subsequent regulations to be enacted by the affirmative resolution procedure.

(para 45) acknowledges the progressive intention of clause 11 and nevertheless recommends that the Assembly Committee consider if the power conferred upon DENI at clause 11 (1) would be more effective as a duty. The Commission further advises that clause 12 should be amended to establish a duty rather than an enabling power due to the risk of retrogression should appeal rights that were available to children under the pilot scheme subsequently be removed. Such provisions should also include a duty to promote the scheme and ensure meaningful and effective access for children to exercise their right of appeal.

(para 46) advises that, it is now 7 years since the UN Committee on the Rights of the Child made a Concluding Observation on children's appeal rights in special educational needs tribunals (see paragraph 43 of this response). As a result, an additional period of up to 10 years is not an appropriate length of time to allow for the establishment of the pilot scheme. In the event that the initiation of the pilot scheme could take 10 years from the date of the bill receiving Royal Assent, this could result in a total delay of 17 years in the implementation of the UN Committee's 2008 recommendation.



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**Response of the Northern Ireland Human Rights Commission to
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(SEND) Bill**

Introduction

1. The Northern Ireland Human Rights Commission (the Commission) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.¹ In accordance with this function the following statutory advice is submitted to the Northern Ireland Assembly Committee for Education (the Assembly Committee) in response to its consultation on the SEND bill.
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
 - the CoE European Convention on Human Rights, 1950 (ECHR)²;
 - the International Covenant on Economic, Social and Cultural Rights (ICESCR)³;
 - the UN Convention on the Rights of the Child (UNCRC)⁴;
 - the UN Convention on the Rights of Persons with Disabilities (UNCRPD)⁵.

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

² Ratified by the UK in 1951.

³ Ratified by the UK in 1976.

⁴ Ratified by the UK in 1991

⁵ Ratified by the UK in 2009

3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, the Northern Ireland Act 1998, section 26 (1) provides that 'if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall not be taken.'⁶
4. The Commission further recalls that the Northern Ireland Act 1998, section 24(1) states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.⁷
5. In accordance with the Northern Ireland Act 1998, section 6(2) it is outside the legislative competence of the Northern Ireland Assembly to enact laws that are incompatible with any of the ECHR rights.
6. In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
 - UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties obligations;
 - UN Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities
 - UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to Education
 - UN Committee on the Rights of the Child, General Comment No. 9: The rights of children with disabilities
 - UN Committee on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard

The views of the child – Clause 1

7. The Commission welcomes the introduction of a duty to seek and have regard to the views of the child in clause 1 in relation to decisions affecting the child.

⁶ Northern Ireland Act 1998, Section 26 (1)

⁷ Ibid, Section 24 (1)

8. The UNCRC article 12 and the UNCRPD article 7(3) place a responsibility on the DENI to ensure that any child capable of forming his or her own views is accorded the opportunity to express these views and that these views will be given due weight. Article 12 states in full,

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

General Comment 12 of the UN Committee on the Rights of the Child regarding the child's right to be heard makes the following recommendations with regard to education and school:

Respect for the right of the child to be heard within education is fundamental to the realization of the right to education.⁸

Education authorities have to include children's and their parents' views in the planning of curricula and school programmes.⁹

In decisions about the transition to the next level of schools or choice of track or streams, the right of the child to be heard has to be assured as these decisions deeply affect the child's best interests. Such decisions must be subject to administrative or judicial review.¹⁰

9. The Commission notes the use of the qualifying statement in clause 1 of the bill 'so far as reasonably practicable'. The Commission is concerned at the potential this statement presents for a broad range of social and economic considerations that could present mitigating factors allowing the child's right to be restricted or dismissed. The removal of this phrase would not remove a defence based on

⁸ UN Committee on the Rights of the Child, *General Comment 12 The Right of the Child to be Heard* (1 July 2009) para. 105

⁹ *Ibid*, para. 107

¹⁰ *Ibid*, para. 113

considerations regarding the capacity of a child to form their own view but would ensure that other administrative factors cannot interfere with the right of the child to be heard.

10. General Comment 12 notes in this regard,

While difficulties are experienced by many children, the Committee particularly recognizes that certain groups of children, including younger boys and girls, as well as children belonging to marginalized and disadvantaged groups, face particular barriers in the realization of this right.¹¹

States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views.¹²

11. The Commission notes that clause 1 would require the Authority to 'have regard to the importance of that child participating in decisions.' This language does not uphold a duty to prioritise the participation of the child over other practical considerations. It therefore is more suggestive of a statutory *power* than a statutory *duty*.

12. **The Commission advises that the defence of 'reasonably practicable' and the requirement to 'have regard to the importance' of participation, are not consistent with the DENI's duty under article 12 UNCRC and article 7 UNCRPD to assure to the child the right to express their views.**

13. **The Commission recommends that the phrase 'so far as reasonably practicable' is removed from the bill at clause 1 and the provision is amended to strengthen the duty to seek and have regard to the views of the child so as to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child,**

¹¹ Ibid, para. 4

¹² Ibid, para. 21

the views of the child being given due weight in accordance with the age and maturity of the child.’¹³

Access to support – Clauses 2-5

14. The Commission notes that the draft bill includes provisions in clauses 2 to 5 that are aimed at improving access to support for children facing barriers to enjoyment of their right to education. The following international standards demonstrate the duty on DENI to take measures to ensure that sufficient individualised support is provided to children with special educational needs (SEN) and disabilities to enable them to exercise their right to an effective education without discrimination.

15. DENI is obligated to respect, protect and fulfil the right to education. The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.¹⁴ The UN Committee on Economic, Social and Cultural Rights notes in General Comment 13 on the right to education that,

The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education... As a general rule, State parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.¹⁵

16. General Comment 13 stresses the requirement that educational institutions and programmes must be ‘accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds’.¹⁶

17. This duty requires DENI to ensure that children with SEN and disabilities are able to access their right to an effective education on an equal basis. While the right to education itself is subject to progressive realisation and therefore its fulfilment depends on the availability of

¹³ UN Convention on the rights of the child, Article 12 (1)

¹⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to Education* (8 December 1999) para. 46

¹⁵ *Ibid*, para. 47

¹⁶ *Ibid*, para. 6(b)(i)

resources, the UN Committee is clear that this does not apply to the obligation to provide access to education without discrimination;

The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.¹⁷

18. Furthermore, the UN Committee identifies that violations of Article 13 include 'the failure to take measures which address de facto educational discrimination'¹⁸ highlighting the fact that the duty not to discriminate in the provision of education has both negative and positive dimensions.
19. The UNCRPD article 7 requires that 'children with disabilities have the same rights as other children'¹⁹ and article 24 protects the right to education without discrimination on the grounds of disability. Article 24 also obligates DENI to ensure an 'inclusive education system' that children with disabilities can access 'on an equal basis with others in the communities in which they live.'²⁰
20. In realising the right to education for children with disabilities, UNCRPD places a specific duty on DENI to provide 'effective individualised support measures...in environments that maximise academic and social development, consistent with the goal of full inclusion.'²¹
21. The UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child have also highlighted the requirement to provide individualised support to children with disabilities. For example, General Comment 5 of the UN Committee on Economic, Social and Cultural Rights on persons with disabilities recommends;

States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary

¹⁷ Ibid, para. 31

¹⁸ Ibid, para. 59

¹⁹ *United Nations Convention on the Rights of Persons with Disabilities, 2006 Art 7(1)*

²⁰ Ibid, Art 24(2)(b)

²¹ Ibid, art 24(2)(e)

equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.²²

22. General Comment 9 of the UN Committee on the Rights of the Child notes the importance of individualised support plans with effective monitoring;

As children with disabilities are very different from each other, parents, teachers and other specialized professionals have to help each individual child to develop his or her ways and skills of communication, language, interaction, orientation and problem-solving which best fit the potential of this child. Everybody, who furthers the child's skills, abilities and self-development, has to precisely observe the child's progress and carefully listen to the child's verbal and emotional communication in order to support education and development in a well-targeted and most appropriate manner.²³

23. **The Commission welcomes the intention in clauses 2 – 5 to improve the level of individualised support available to children with SEN and disabilities. The Commission advises that the Assembly Committee support these clauses which will;**

- **place a duty on the Education Authority to publish a plan of arrangements for special educational needs provision including details of resources and advisory support available and arrangements for staff training in grant-aided schools; (clause 2)**
- **place a duty on Boards of Governors to prepare and review personal learning plans for every SEN pupil, to designate a teacher as the learning support coordinator and to inform parents or pupils over compulsory school age of the arrangements relating to disagreements with the Board of Governors; (clause 3)**

²² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities* (1 Jan 1995) para. 35

²³ UN Committee on the Rights of the Child, *General Comment No. 9: The rights of children with disabilities* (27 Feb 2007) para. 63

- **place a duty on Boards of Governors to 'take reasonable steps to identify and provide' the necessary support for SEN pupils and share information with all those involved in supporting pupils; (clause 3)**
- **reduce statutory time limits for completing assessments of need. (clause 5)**

24. The Commission notes that all of the proposed measures intended to improve the available support for children with SEN and disabilities will have to be considered within the broader regulatory framework set out in a statutory Code of Practice and other subordinate legislation. The detail of these is not known to the Commission but they will have implications for the realisation of human rights. For example, since the format of Personal Learning Plans and arrangements for their implementation, monitoring and evaluation will be defined in the Code of Practice it is not possible for the Commission to assess the extent to which this provision will improve the support available.

25. **The Commission recommends that the Assembly Committee seek assurance from DENI that they will expedite the revised statutory Code of Practice along with details of other subordinate legislation to be introduced to the Northern Ireland Assembly in relation to SEN provision.**

26. The Commission has previously expressed concern about proposals arising from the SEN review regarding changes to the number of stages at which additional statutory assistance can be accessed and the introduction of Coordinated Support Plans as these may result in fewer children being able to access statutory protections, support and resources.²⁴ Having met with DENI the Commission understands that these changes will be dealt with by the Code of Practice and other subordinate legislation. As this is not yet available, the Commission remains concerned that strengthening the duty to provide support to children who meet the SEN criteria might be undermined by any move to narrow the criteria and remove access to support for a significant number of children. Such a move would contradict a fundamental principle of human rights protection as it would constitute a retrogressive measure.

²⁴ NIHRC Education Reform in Northern Ireland – A Human Rights Review, pg 17 para. 3.2.6

27. **The Commission advises the Assembly Committee to seek assurance from DENI that there will be no retrogression in the level of SEN provision as a result of this bill and subordinate legislation. The Commission also recommends that the Committee considers further the need for the Bill to require that the Code of Practice and other subordinate legislation should be enacted by way of the affirmative resolution procedure. This process of requiring that statutory rules must be approved by the Assembly before becoming law would allow the Assembly Committee to provide full scrutiny of the human rights and any other implications of the revised SEN and inclusion framework as a whole before the Code of Practice can come into effect.**

Right of Appeal

- Clauses 6 and 7

28. The Commission welcomes the proposed introduction of new appeal rights for parents where the decision has been made not to amend a statement following annual review or not to make a statement for a child under 2 following an assessment of needs.

29. The ECHR article 13 outlines the following duty to provide access to an effective remedy where human rights have been violated;

Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

30. Although the text of ICESCR does not refer to remedies, the UN Committee on Economic, Social and Cultural Rights has stated that the enjoyment of the rights recognised within ICESCR, including the right to education, 'will often be appropriately promoted, in part, through the provision of judicial or other effective remedies'.²⁵

²⁵ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: the nature of States parties obligations, para. 5

31. **The Commission advises that the Assembly Committee support the provisions in clauses 6 and 7 introducing new appeal rights for parents as they represent progressive measures towards fulfilling the human rights obligation to provide robust and effective access to redress regarding violations of the right to education.**

- **Children participating in appeals**

32. The Commission refers the Assembly Committee to the advice it provided to the Minister of Education in June 2012 on the subject of access to redress (see attached). At that time the Commission stated that;

To satisfy the procedural requirements of a human rights compliant redress system, **it is advised that where an affected child is capable of forming his or her own views, that he or she has a right, notwithstanding the permission of the Tribunal, to speak at any relevant hearing.** As mentioned, the ability of a child to bring an appeal in his or her own name was highlighted by the UN Committee on the Rights of the Child to be especially important where a child is in alternative care. This is because although the local authority has parental responsibility in this regard, it commonly does not assert these rights. There are also instances of parents who do not assert their parental rights of appeal or operate in the best interests of the child. In order to comply with the recommendation of the Committee, **the Minister may wish to consider instituting appeal rights for children capable of forming their own views.**

33. The Commission welcomes the fact that, since giving this advice in 2012, consideration has been given to instituting appeal rights for children and the bill contains a number of clauses to that effect. However, the Commission notes that the bill does not include any legislative provision to ensure that a child capable of forming his or her own views is facilitated to be able to exercise their right in practice to speak at a relevant tribunal. This is a notable absence in the bill.

34. **The Commission recommends that an additional clause should be included in the bill to establish a procedural duty**

upon the tribunal to fulfil the right of the child to be heard in the appeals process in accordance with UNCRC article 12(2).

- Clauses 9 and 10

35. The Commission notes and welcomes the proposal in the draft bill to provide appeal rights to all children over compulsory school age in relation to special educational needs provision and disability discrimination claims.
36. The Commission notes the regulation-making powers contained within clauses 9 and 10 and the fact that the impact of these legislative measures on the child's rights to be heard in formal proceedings will rely heavily on the amendments to the tribunal regulations and other regulations made by DENI.
37. Clauses 9 and 10 include reference to the introduction of regulations that will set out how determinations will be made regarding a child's capacity to exercise their right to appeal. Such regulations will engage human rights and would have to be compliant with the international human rights standards on the issue of the evolving capacities of children.
38. For example, the UNCRPD article 3(h) stipulates that one of the general principles guiding its implementation must be 'respect for the evolving capacities of children with disabilities.'
39. The UNCRC article 12 is also underpinned by respect for the evolving capacities of children and in General Comment 12 the UN Committee on the Rights of the Child notes that the phrase 'capable of forming his or her own views',

'...should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to

express them; it is not up to the child to first prove her or his capacity.²⁶

40. The UN Committee emphasises that age alone should not be used to determine the capacity of the child to have their views heard and sets out a number of recommendations that should be considered in such determinations, including:

'it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.'²⁷

41. **The Commission recommends that, given the impact of clauses 9 and 10 on determining the capacity of children to exercise their rights, the Assembly Committee should consider the need for subsequent regulations to be enacted by the affirmative resolution procedure.**

- Clauses 11 and 12

42. The Commission welcomes the proposed introduction of a pilot scheme to enable children below the upper limit of compulsory school age to bring an appeal in relation to special educational needs provision and disability discrimination claims and the proposed arrangements for follow-up provision. This is a progressive measure that could improve the ability of children to exercise their rights.

43. In the 2008 concluding observations on the UK, the UN Committee on the Rights of the Child expressed concern that the participation of children in all aspects of schooling was inadequate, since children have few consultation rights and in particular, no right to appeal their exclusion from educational facilities or the decisions of a special educational needs tribunal. In this regard, the Committee recommended that the UK Government,

²⁶ UN Committee on the Rights of the Child, *General Comment 12 The Right of the Child to be Heard* (1 July 2009) para. 20

²⁷ *Ibid*, para. 21

Ensure that children who are able to express their views have ...the right, in particular for those in alternative care, to appeal to special educational needs tribunals.²⁸

44. The Commission notes that clause 11 establishes a power whereby DENI 'may by regulations' introduce a pilot scheme. It further notes that this power will have effect following Royal Assent and would be repealed after 10 years. In addition the Commission notes that clause 12 also establishes an enabling power whereby DENI 'may by regulations' make provisions for children to exercise their right of appeal following the completion of the pilot scheme.
45. **The Commission, acknowledging the progressive intention of clause 11, nevertheless recommends that the Assembly Committee consider if the power conferred upon DENI at clause 11 (1) would be more effective as a duty. The Commission further advises that clause 12 should be amended to establish a duty rather than an enabling power due to the risk of retrogression should appeal rights that were available to children under the pilot scheme subsequently be removed. Such provisions should also include a duty to promote the scheme and ensure meaningful and effective access for children to exercise their right of appeal.**
46. **The Commission advises that, it is now 7 years since the UN Committee on the Rights of the Child made a Concluding Observation on children's appeal rights in special educational needs tribunals (see paragraph 43 of this response). As a result, an additional period of up to 10 years is not an appropriate length of time to allow for the establishment of the pilot scheme. In the event that the initiation of the pilot scheme could take 10 years from the date of the bill receiving Royal Assent, this could result in a total delay of 17 years in the implementation of the UN Committee's 2008 recommendation.**

²⁸ UN Committee on the Rights of the Child, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (20 October 2008), para. 67



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Mr John O'Dowd MLA
Minister for Education
Department of Education
Rathgael House
43 Balloo Road
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BT19 7PR

12 June 2012

Dear Minister,

The Northern Ireland Human Rights Commission is required, pursuant to section 69(3) of the Northern Ireland Act 1998, to advise the Executive on legislative and other measures that should be taken to protect human rights. In accordance with this function and following the conversation held between Commission staff and yourself on the 1 May 2012, I am writing to provide you with advice on the particular issue of redress within the special educational needs ('SEN') system and the corresponding international human rights obligations. Concerning the proposals generally, you will be aware of the Commission's response to the consultation document *'Every School a Good School - The Way Forward for Special Educational Needs and Inclusion'* in November 2009. I am also mindful that the Department's proposals have been further developed in your presentation to the Committee for Education on 16 May 2012.

In the attached advice, it is noted that redress under international human rights law has two components: where a human right has been violated, there exists a substantive right to an effective remedy; and, the process by which that remedy is accorded should ensure to the recipient the procedural right of access to justice. This advice proceeds to identify seven mechanisms which may be argued as constituting an avenue of redress for children with SEN, highlighting strengths and weaknesses when compared to the standards required by international human rights law. The mechanisms considered are as follows: the Special Educational Needs and Disability Tribunal ('Tribunal'); the Board of Governors; Judicial review; the Dispute Avoidance and Resolution Service ('DARS'); the Department of Education ('DE'); the NI Commissioner for Complaints; and the NI Commissioner for Children and Young People ('NICCY').

I hope you find this document of assistance as you finalise your proposals. Should any further information be required, please do not hesitate to contact me here at the Commission.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael O'Flaherty".

Professor Michael O'Flaherty
Chief Commissioner



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Redress within the special educational needs system and the requirements of international human rights law

In this advice, the Commission notes that redress under international human rights law has two components: where a human right has been violated, there exists a substantive right to an effective remedy (section A); and, the process by which that remedy is accorded should ensure to the recipient the procedural right of access to justice (section B). This advice proceeds to identify seven mechanisms which may be argued as constituting an avenue of redress for children with SEN, highlighting strengths and weaknesses when compared to the standards required by international human rights law (section C). The mechanisms considered are as follows: the Special Educational Needs and Disability Tribunal ('Tribunal'); the Board of Governors; Judicial review; the Dispute Avoidance and Resolution Service ('DARS'); the Department of Education ('DE'); the NI Commissioner for Complaints; and the NI Commissioner for Children and Young People ('NICCY').

A. Substantive redress

Where a human right has been breached, the first requirement of redress is the substantive right to an effective remedy. An effective remedy will depend upon the individual case and in particular the circumstances under which the violation has occurred.

1. The right to education

In the context of the SEN system, the requirement for redress from a human rights perspective is most likely to concern a violation of the child's right to education as recognised by Article 26 of the Universal

Declaration on Human Rights ('UDHR'), Article 13 of the UN International Covenant on Economic, Social and Cultural Rights ('ICESCR'), Article 28 of the UN Convention on the Rights of the Child ('UNCRC') and Article 2, Protocol 1 of the ECHR.

The UK Government has however entered a reservation to Article 2, Protocol 1 ECHR, which accepts the right of everyone to education 'only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'.¹

(i) Inclusion

The right to education is equally applicable to children with disabilities and the NI Executive is obligated under Article 24 of the UN Convention on the Rights of Persons with Disabilities ('UNCRPD') to ensure to such persons access to an inclusive education system. Although the UK Government has entered a reservation to Article 24 stating that it, 'reserves the right for disabled children to be educated outside their local community where more appropriate education is available elsewhere', it has nonetheless committed itself in a declaration that accompanies Article 24 'to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children'.²

To facilitate the principle of inclusion within the right to education, the UN Committee on Economic, Social and Cultural Rights stated in General Comment No. 5 that,

States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.³

The UN Educational, Scientific and Cultural Organisation ('UNESCO'), 'Guidelines for Inclusion: Ensuring Access to Education for All' state that a rights-based approach to education is founded on three principles: access to free and compulsory education; equality, inclusion and non-

¹ The reservation was made at the time of signature, 20 March 1952.

² The reservation and the declaration were made at the time of ratification, 8 June 2009.

³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 5 on persons with disabilities (9 December 1994), paragraph 35.

discrimination; and the right to quality education, content and processes.⁴ 'Inclusion' in the Guidelines is described as 'a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion from education'.⁵ According to the Salamanca Statement and Framework for Action on Special Educational Needs,

Regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately cost-effectiveness of the entire education system.⁶

The Committee on the Rights of the Child in General Comment No. 9 gave recognition to the fact that the extent of inclusion for children with disabilities within the general educational system may vary but that nevertheless 'a continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future'.⁷ Similarly, on the issue of special schools, the Council of Europe ('CoE') Committee of Ministers in its 'recommendation to member states on deinstitutionalisation and community living of children with disabilities' stated that,

Where special schools or units are deemed necessary or appropriate, these should be linked to ordinary schools, be helped to build bridges and be open to their local communities.⁸

(ii) Implementation

As with all human rights, the state parties are obligated to respect, protect and fulfill the right to education. The obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide.⁹

⁴ UNESCO Guidelines for Inclusion: Ensuring Access to Education for All (2005), p12.

⁵ Ibid, p13.

⁶ UNESCO, Salamanca Statement and Framework for Action on Special Educational Needs, (7-10 June 1994), Article 2.

⁷ UN Committee on the Rights of the Child, General Comment No. 9 on the rights of children with disabilities (27 February 2007), paragraph 66.

⁸ Council of Europe, Committee of Ministers, Recommendation to member states on deinstitutionalisation and community living of children with disabilities, CM/Rec (2010) 2, paragraph 27.

The obligation to fulfill (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education... As a general rule, State parties are obliged to fulfill (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.¹⁰

Although the ICESCR and the UNCRC place a duty on the Government to achieve progressively the full realization of the right to education, the UN Committee for Economic, Social and Cultural Rights, has stated progressive realization to mean, "that States parties have a specific and continuing obligation 'to move as expeditiously and effectively as possible' towards full realization" and that, 'there is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education.'¹¹

Similarly, the European Court of Human Rights ('ECHR') has repeatedly articulated the effectiveness principle which requires that the rights guaranteed by the ECHR, including the right to education, must be implemented by the NI Executive in a manner that is 'effective and not illusory'.¹²

2. Right to an effective remedy

Where the child's right to education has been violated, the NI Executive is required under international human rights law to provide an effective remedy. Article 8 of the UDHR states,

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Although the text of ICESCR does not refer to remedies, the UN Committee on Economic, Social and Cultural Rights has stated that the

⁹ See UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 (8 December 1999) UN Doc. E/C.12/1999/10, paragraph 46.

¹⁰ Ibid, paragraph 47.

¹¹ Ibid, paragraphs 44 and 45.

¹² *Moreno Gómez v Spain*, European Court of Human Rights, Application no. 4143/02 (16 November 2004), paragraph 61; *Case of Seyidzade v Azerbaijan*, European Court of Human Rights, Application no. 37700/05, (3 December 2009), paragraph 33.

enjoyment of the rights recognised within ICESCR 'will often be appropriately promoted, in part, through the provision of judicial or other effective remedies'.¹³

Mirroring Article 8 UDHR, Article 13 of the ECHR states,

Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

On the scope of Article 13, the CoE Committee of Ministers has stated that,

Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.¹⁴

The ECtHR has stated that the remedy in question need not be judicial, but can include parliamentary and executive bodies, so long as the remedy is effective¹⁵ and while 'effectiveness' is a context-sensitive term, the remedy at the national level must be capable of dealing with the substance of the relevant ECHR complaint and grant appropriate relief.¹⁶

B. Procedural redress: access to justice

Where a human right has been breached, the second requirement of redress is the procedural right of access to justice. This means that the process by which the effective remedy is obtained for a violation of the right to education must involve a fair hearing and the participation of the child.

¹³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: the nature of States parties obligations, paragraph 5.

¹⁴ Council of Europe, Committee of Ministers, Recommendation to member states relating to public liability, Cm/Rec (84) 15, Principle I.

¹⁵ *Silver v United Kingdom*, European Convention on Human Rights, Application no. 5947/72 (25 March 1983), paragraph 113.

¹⁶ *Soering v United Kingdom*, European Court of Human Rights, Application no. 14038/88 (7 July 1989), paragraph 120.

1. A fair hearing

Article 14(1) of the UN International Covenant on Civil and Political Rights ('ICCPR') states,

All persons shall be equal before the courts and tribunals. In the determination ... of his civil rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.

The principle of equality outlined in the first sentence of Article 14(1) applies regardless of the nature of the proceedings and incorporates the concepts of equal access and equality of arms.¹⁷ The right of equal access to a tribunal concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.¹⁸

The application of the second sentence of Article 14(1) is more complex and there exists no definitive conclusion on its application to education rights. The Human Rights Committee in General Comment No.32 notes that its application will be assessed on a case by case basis in light of the nature of the right in question¹⁹ but that it 'does not apply where domestic law does not grant any entitlement to the person concerned.'²⁰ Conversely, given that the HRA accords domestic protection to the fundamental right of every child to education and to parallel recent Article 6 ECHR case-law below, strong argument can be made that children with SEN should be entitled to a hearing before a competent, independent and impartial tribunal as per Article 14(1) ICCPR where their right to education has been infringed.

Elaborating on the concept of a fair hearing, the Human Rights Committee notes that,

Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.

...

¹⁷ UN Human Rights Committee, General Comment No. 32: right to equality before courts and tribunals and to a fair trial, paragraphs 3 and 8.

¹⁸ Ibid, paragraph 12.

¹⁹ Ibid, paragraph 16.

²⁰ Ibid, paragraph 17.

An important aspect of the fairness of a hearing is its expeditiousness...delays in civil proceedings that cannot be justified by the complexity of the case or behaviour of the parties detract from the principle of a fair hearing.²¹

Similarly, Article 6 of the ECHR states,

In the determination of his civil rights... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

There is evidence that the ECtHR is increasingly predisposed to accept the right to education as a civil right within the meaning of Article 6 rather than a matter restricted to the domain of public law. In the 2010 case of *Oršuš v Croatia*,²² the court stated,

In its judgment *Emine Araç v. Turkey*... the Court explicitly recognised, for the first time, that the right of access to higher education is a right of a civil nature and, in so doing, it abandoned the case-law of the Commission...which had concluded that Article 6 was inapplicable to proceedings concerning the laws on education... The Court considers that the same reasoning applies *a fortiori* in the context of primary education.²³

In addition, the court quoted the judgment of *Kok v. Turkey*, in which it determined that, where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6.²⁴

2. Participation of the child

There are two elements to the effective participation of the child in the SEN redress system required by international human rights law: first, that the views of the child are heard throughout the process; and second, that the child has the ability to bring an action in his or her own name.

(i) The right to be heard

²¹ Ibid, paragraphs 25 and 27.

²² *Oršuš and Others v. Croatia*, European Court of Human Rights, Application no. 15766/03 (16 March 2010).

²³ Ibid, paragraph 104.

²⁴ Ibid, paragraph 105.

Article 12 of the UNCRC and Article 7(3) of the UNCRPD place a responsibility on the NI Executive to ensure that any child capable of forming his or her own views is accorded the opportunity to express these views during the redress process and that these views will be given due weight. Article 12 states in full,

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The UN Committee on the Rights of the Child states in General Comment No. 12, that Article 12 requires five steps to be taken for the effective realisation of this right were the child is invited to give views in formal proceedings. These steps fall under the following headings: preparation; the hearing; assessment of the capacity of the child; information about the weight given to the views of the child; and, complaints, remedies and redress.²⁵

The preparation stage requires that a child is informed about his or her right to express an opinion and the impact this will have in a judicial or administrative process.²⁶ The hearing stage requires that the context in which the child exercises this right must be enabling and encouraging.²⁷ Assessing the capacity of the child means that were a child is capable of forming his or her own views in a reasonable and independent manner, the decision-maker must accord the child's views due weight by considering them as a significant factor in the settlement of the issue.²⁸ To ensure the child's views are given the appropriate weight, the decision-maker is then required to give the child feedback on the outcome

²⁵ UN Committee on the Rights of the Child, General Comment No.12 on the right of the child to be heard (20 July 2009), UN Doc. CRC/C/GC/12, paragraphs 41-47.

²⁶ Ibid, paragraph 41.

²⁷ Ibid, paragraph 42-43.

²⁸ Ibid, paragraph 44.

of the process and how his or her views were considered.²⁹ Finally, the Committee stipulates that legislation is needed to provide children with complaints procedures and remedies when their right to be heard is disregarded and violated.³⁰

(ii) The right to appeal

In the 2008 concluding observations on the UK, the UN Committee on the Rights of the Child expressed concern that the participation of children in all aspects of schooling was inadequate, since children have few consultation rights and in particular, no right to appeal their exclusion from educational facilities or the decisions of a special educational needs tribunal.³¹ In this regard, the Committee recommended that the UK Government,

Ensure that children who are able to express their views have ...the right, in particular for those in alternative care, to appeal to special educational needs tribunals.³²

C. Mechanisms for redress within the current SEN system

• The Special Educational Needs and Disability Tribunal

A parent of a child with SEN can challenge a decision of the relevant board through the Tribunal. A parent's appeal rights are triggered: when a statement is first made; if an amendment is made to a statement; or, if, after conducting a statutory assessment the board decides not to amend a statement.³³ An appeal in any of these contexts can be made against: the description in the statement of the board's assessment of the child's SEN; the special educational provision specified in the statement, including the name of any school; and, the fact that no school has been

²⁹ Ibid, paragraph 45. The Committee also encourages States to introduce legislation requiring judicial or administrative decision-makers to explain the extent of the consideration given to the views of the child, see paragraph 33.

³⁰ Ibid, paragraph 46.

³¹ UN Committee on the Rights of the Child, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (20 October 2008), paragraph 66.

³² Ibid, paragraph 67.

³³ The Education (Northern Ireland) Order 1996 ("the 1996 Order"), Article 18 (1) (as amended by The Special Educational Needs and Disability (Northern Ireland) Order 2005 ("SENDO 2005"), Article 7.

named in the statement.³⁴ In addition, a parent of a child with SEN can appeal to the Tribunal if the board decides not to carry out a formal statutory assessment,³⁵ or if, having conducted such an assessment, decides not to issue a statement.³⁶ To this end, it does not matter whether the parent, the board or the Board of Governors requested the statutory assessment.³⁷

The written statement of case sent by the parent to the Tribunal *may* include the views of the child on the matter,³⁸ while the statement of case by the board *should* include the views of the child on the matter or the reasons why these views have not been ascertained.³⁹ The child has the right to attend the Tribunal hearing,⁴⁰ and *may* be permitted by the Tribunal to give direct evidence.⁴¹

The remedies afforded by the Tribunal can be of high practical assistance to the parent, for example, where the appeal has been brought on the required grounds, the Tribunal can order the board to: arrange for an assessment of a child;⁴² make and maintain a statement;⁴³ and, amend a statement.⁴⁴ However, although a duty exists on the board to comply with orders of the Tribunal,⁴⁵ the only way to enforce these orders is by judicial review. Nevertheless, evidence suggests that boards do fulfil their duty in this regard.

After the Tribunal has concluded on the matter, the parent can request that the Tribunal 'review' its decision.⁴⁶ There are four grounds for review, the two most important being that there was an obvious error in

³⁴ Ibid, Article 18(1)(A)

³⁵ Ibid, Article 20(3)(b). See also the 1996 Order, Article 20A (8), (inserted by SENDO 2005, Article 10).

³⁶ Ibid, Article 17.

³⁷ Ibid, Article 20A.

³⁸ The Special Educational Needs and Disability Tribunal Regulations (Northern Ireland) 2005 ("Tribunal Regulations 2005"), Clause 9.

³⁹ Ibid, Clause 13.

⁴⁰ Ibid, Clause 40(2)(a).

⁴¹ Ibid, Clause 40(7).

⁴² The 1996 Order, Article 20 (4)(b). See also the 1996 Order 20A (10)(b) (inserted by SENDO 2005, Article 10).

⁴³ Ibid, Article 17(3)(b).

⁴⁴ Ibid, Article 18(3)(b).

⁴⁵ Ibid, Article 23A (inserted by SENDO 2005, Article 6). For time limits regarding adherence see The Education (Special Educational Needs) Regulations (Northern Ireland) 2005, Clause 23.

⁴⁶ Tribunal Regulations 2005, Clause 47(1): This must occur within 10 working days from the date of decision.

the decision and in the interests of justice.⁴⁷ The chairperson of the Tribunal that decided the case can refuse the application if in his opinion it has no reasonable grounds for success.⁴⁸ The review mechanism cannot therefore be classed as a right of appeal.

There does however exist a right of appeal on a point of law to the High Court, both after the Tribunal has concluded and after a Tribunal review.⁴⁹ However, no such appeal has been brought before the High Court to date.

To satisfy the procedural requirements of a human rights compliant redress system, **it is advised that where an affected child is capable of forming his or her own views, that he or she has a right, notwithstanding the permission of the Tribunal, to speak at any relevant hearing.** As mentioned, the ability of a child to bring an appeal in his or her own name was highlighted by the UN Committee on the Rights of the Child to be especially important where a child is in alternative care. This is because although the local authority has parental responsibility in this regard, it commonly does not assert these rights.⁵⁰ There are also instances of parents who do not assert their parental rights of appeal or operate in the best interests of the child. In order to comply with the recommendation of the Committee, the Minister **may wish to consider instituting appeal rights for children capable of forming their own views.**

- **Board of Governors**

At Stages 1 to 3 and at Stage 4 while the relevant Education and Library Board ('board') is considering whether or not to make the statutory assessment, the legal responsibility for a child's SEN provision remains with the school. The Board of Governors has a qualified duty to, 'use its best endeavours, in exercising its functions in relation to the school, to secure that if any registered pupil has special educational needs the special educational provision which his learning difficulty calls for is made.'⁵¹

⁴⁷ Ibid.

⁴⁸ Ibid, Clause 47(3).

⁴⁹ The 1996 Order, Article 24.

⁵⁰ UN Committee on the Rights of the Child, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (20 October 2008), paragraph 66.

⁵¹ The 1996 Order, Article 8(1). It is noted that the Minister has expressed an intention to strengthen this duty, see Minister's presentation to the Committee for Education, 16th May 2012.

In this regard, it should be noted that Boards of Governors act in a voluntary capacity and as a body corporate have responsibility for managing the school.⁵² Complaint to the Board of Governors is therefore the most immediate form of redress for parents who are discontent with a child's school-based SEN provision. Given the managerial responsibility of the Board of Governors, they have the authority to provide a child with an effective remedy at the school based stages.

However, while Boards of Governors are advised to operate as a 'critical friend' to the principal, research suggests that many function only as a consultative sounding board.⁵³ There is further evidence to imply that close working relationships between the Board of Governors and the principal has led to a reluctance on parents to complain to the Board of Governors regarding their child's SEN provision, particularly where the child is difficult, for fear that this may have a negative impact on the child. As a consequence, complaint to the Board of Governors for parents of children at the school-based stages could lack the independence recognised as a core component of an effective redress mechanism. Fairness of proceedings entails the absence of any direct or indirect influence.

In the recent case *L's Application*,⁵⁴ the court granted leave for a judicial review from a child at Stage 3 despite the fact that the parent's could have first acquired appeal rights to the Tribunal by requesting a statutory assessment and having that request turned down. The court noted that although this option is open to the parent, in reality, where the child is at Stage 3 (or below) and has not yet had external assistance from the board, the Tribunal is likely to refuse the appeal. It does so on the basis that the board is required by the Code of Practice, before deciding to make a statutory assessment, to ask itself the question, 'whether there is convincing evidence that, despite relevant and purposeful action by the school, with the help of external specialists, the child's learning difficulties remain or have not been remedied sufficiently'.⁵⁵ Where the board decides to delay the external assistance required by the child, the requisite evidence will be unavailable to the board to enable it to satisfy

⁵² See the Education and Libraries (Northern Ireland) Order 1986, Articles 10-13.

⁵³ See NI Assembly, Research Paper 86/11, 'School Governors' (August 2011), p10-12.

⁵⁴ *L's Application*, [2012] NIQB 18.

⁵⁵ Code of Practice on the Identification and Assessment of Special Educational Needs (1 September 1998), paragraph 3.21.

the Code of Practice criterion for making a statutory assessment. In *L*, the court described this event as a 'frustrating circularity' and stated,

'The catch 22 would be that [the parents] could not satisfy the Board that their child fulfilled the criteria for statutory assessment because the Board had not provided the specialist help he needed in order to generate the proof.'⁵⁶

The court concluded in *L* that the scope of the general duty on the board to identify children for whom it is responsible⁵⁷ includes a duty to find a way to prioritise the demands on its resources for specialist support (which is non-statutory intervention) for children at Stage 3.⁵⁸ On the facts, a delay of one year in the provision of an external literacy specialist was classed as unreasonable because it would have the effect on *L* of making his difficulty more severe and entrenched than would otherwise be the case. The court noted however, that the test for whether or not a delay is unreasonable will be context-sensitive.⁵⁹

To satisfy the procedural requirements of a human rights compliant redress system, **the Minister is advised to ensure that there is an independent and impartial redress process available to parents of children at the school-based stages.**

- **Judicial Review**

Decisions by the Tribunal, the board, Boards of Governors and the Department of Education ('DE') can be challenged on judicial review grounds. Although the courts often stipulate that judicial review is a remedy of last resort and limited to considerations of fairness in the decision-making process, for example, its procedural propriety, legality, and rationality,⁶⁰ it is noted that violation of the ECHR standards within the SEN redress process will constitute an illegality and therefore a ground for review. Further, the courts commonly grant leave for judicial review where any alternative remedies do not provide effective or efficient redress.⁶¹

⁵⁶ *L's Application*, paragraph 50-51.

⁵⁷ This duty is found in The 1996 Order, Article 13.

⁵⁸ *L's Application*, paragraph 58.

⁵⁹ *Ibid*, paragraphs 57-59.

⁶⁰ See, *Re Bow Street Mall's Application & Ors*, [2006] NIQB 28 (10 May 2006), paragraph 110.

⁶¹ See *Re Ballyedmond Castle Farm Ltd's Application; Re DPP for Northern Ireland's Application*, [2000] NI 174.

The *L* case is demonstrative of the typical remedy offered by the court in a judicial review on special educational needs - a declaratory order concerning the rights and obligations of the parties and remittal to the Tribunal for a re-decision in accordance with the order. While the court has at its discretion the power to offer such remedies, which are of high practical value to the child, **it is noted that judicial review is not a first instance redress mechanism and can be expensive.** Furthermore, the remittal process can be time-consuming.

- **Dispute Avoidance and Resolution Service**

The DARS was established as a consequence of the statutory duty on the boards to 'make arrangements' in an effort to avoid disputes.⁶² The DARS is available for disputes between boards and the parents or Boards of Governors about its responsibilities towards children with SEN, and between parents and schools about the provision being made for children with SEN. Despite its success at settling low level disputes and the important role played by dispute resolution mechanisms, **DARS does not constitute a redress mechanism due to its voluntary and mediatory nature.**

- **NI Department of Education**

A parent of a child with SEN or any other body can complain directly to the DE against a board or a Board of Governors that has acted or proposes to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by the Education Orders.⁶³ In this context, where the DE considers that the board or Board of Governors acted unreasonably, it shall give directions that the relevant power conferred or duty imposed by statute be exercised in a specified manner.⁶⁴ An example of when this avenue of redress may be used would be where a school specified in a statement refuses to accept the child in defiance of its statutory duty.⁶⁵ The Commission is aware that complaint to the DE concerning SEN has occurred on only a small number of occasions. The process is also time-consuming and may be ineffective in providing a remedy for individual children.

⁶² The 1996 Order, Article 21(B) (inserted by SENDO 2005, Article 5).

⁶³ The Education and Libraries (Northern Ireland) Order 1986, Article 101(4). See also extension of application under SENDO 2005, Article 25.

⁶⁴ Ibid, Article 101(4).

⁶⁵ This duty is imposed by The 1996 Order, Article 16(5)(b).

- **NI Commissioner for Complaints**

The Commissioner can investigate a complaint made against a board in the exercise of their administrative functions to determine if maladministration has occurred.⁶⁶ The Commissioner is unable to investigate complaints where an individual has a legal remedy or may bring a reference or appeal to a Tribunal.⁶⁷ However, notwithstanding the above, the Commissioner may investigate a complaint where he is satisfied that it is not reasonable to expect the complainant to resort to his other remedy.⁶⁸ Similarly, even if the complainant has a right of appeal the Commissioner may investigate the complaint where he believes the injustice sustained remains unremedied.⁶⁹ The outcome of an investigation by the Commissioner may take the form of a report and/or recommendations to the board where maladministration has occurred. In this regard, the Commissioner is not limited in *recommending* an appropriate remedy but cannot compel compliance. Importantly however, where a board does not follow the recommendations of the Commissioner, the injured person can apply to the county court for compensation.⁷⁰ The court may award damages or where appropriate make a direction that the board take a specific remedial action.⁷¹

Although such mechanisms have the potential to provide the individual with an effective remedy, **the Minister's attention is drawn to the fact that Commissioner investigations (and any subsequent county court application) can take a lengthy period of time. As a consequence the procedural redress for an individual child with SEN in the current school year may be affected.**

- **NI Commissioner for Children and Young People**

NICCY can investigate a complaint made by a child or young person that their rights have been infringed or their interests adversely affected by

⁶⁶ The Commissioner for Complaints (Northern Ireland) Order 1996, Articles 7, 8 and Schedule 2.

⁶⁷ Ibid, Article 9(3).

⁶⁸ Ibid, Article 9(4)(a).

⁶⁹ Ibid, Article 9(4)(b).

⁷⁰ Ibid, Article 16.

⁷¹ Ibid.

the action of a board or a school.⁷² However, despite NICCY's investigatory powers, it does not satisfy the substantive requirements for a human rights compliant redress mechanism because of an inability to grant an effective remedy that is of appropriate and practical relief to a child where his or her right to education has been infringed.

⁷² The Commissioner for Children and Young People (Northern Ireland) Order 2003, Article 16.