Response to a Call for Evidence

SEND Bill – Committee Stage

Children's Law Centre

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Introduction

The Children's Law Centre (CLC) is an independent charitable organisation which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve their full potential.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a legal advice, information and representation service. We have a dedicated free phone legal advice line for children and young people and their parents and carers called CHALKY and a youth advisory group called Youth@clc. Within our policy, legal, advice and representation services we deal with a range of issues in relation to children and the law, including the law with regard to some of our most vulnerable children and young people, such as looked after children, children who come into conflict with the law, children with special educational needs, children living in poverty, children with disabilities, children with mental health problems and children and young people from ethnic minority backgrounds.

Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC), in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

From its perspective as a children's rights organisation working with and on behalf of children, both directly and indirectly, CLC is grateful for the opportunity to respond to the Education Committee's call for evidence in relation to the Committee Stage of the SEND Bill.

SEND Bill

CLC has extensive experience in working with and on behalf of children with SEN and disabilities. We would like to provide our evidence to the Committee by giving both written and oral evidence.

CLC welcomes the introduction of the SEND Bill and welcomes the proposed extension of the legal rights of children and young people who have Special Educational Needs (SEN) and/or disabilities.

We know from our casework experience that listening to the child, enabling meaningful participation and giving appropriate weight to the child's views can have significant positive and lasting effects upon outcomes.

This extension of legal rights and responsibilities is in our view likely to encourage and enhance the ongoing development of a culture of inclusion which respects the child as a holder of legal rights within the education system.

CLC views the development of the SEND Bill and underpinning subordinate legislation and statutory guidance as a key measure to improve equality of opportunity and the quality of life of children and young people who have SEN and/or disabilities. CLC acknowledges the ongoing engagement between the DE and stakeholders and is hopeful that with further scrutiny and consideration, the measures proposed will effect positive change for children with SEN and disabilities.

CLC notes that the DE has indicated to the Committee that the subordinate legislation and statutory guidance will be developed in "discussion with key stakeholders" and that formal consultation will follow. We are aware there has been discussion with ELBs/EA. We are not aware either ourselves or via our membership of CDSA (which represents the children's disability sector) of any other stakeholder engagement. We recommend that the DE explains what it means by "key stakeholders" and sets out the arrangements for discussions during the development of the subordinate legislation and statutory guidance.

CLC believes that there is much work still to be done to ensure this policy can fulfil its aims.

Aims of the Policy

The policy screening documentation in its description of this policy records at paragraph 1.3 that:

"*Sitting within Every School a Good School, the revised policy aims to provide a framework to promote earlier identification and assessment of, and provision for, SEN children in order for them have the necessary educational support so that they can achieve to their potential*".

The SEND Bill, though it carries positive change in certain respects, and augments a statutory framework which is fairly robust in any event, may be hindered in delivering upon the intended policy aims which the DE sets out to achieve for the reasons set out below.

Key Concerns

1. Screening Decision

The DE, despite expressing an intention to benefit all children equally, has in our view, reached the wrong screening decision in relation to the SEND Bill, (which was screened out) and therefore has not carried out full and proper consideration of the **equality impacts** flowing from the current proposed legislation. CLC recommends

that the DE should review its screening decision (please see discussion below under the heading "Equality Screening").

2. Proactive Measures

Proactive measures, including through improvements to the **operation** of the SEN and Inclusion frameworks, are essential to bring about the required changes in operational practices to achieve **realisation of the rights to full and equal access to the curriculum, inclusion and participation** in all aspects of schooling by children with special educational needs and disabilities.

3. Operational Deficits

It is noted within the Equality Screening documentation (at Page 22 re the Section 75 category of "disability") that the reasons the policy will have a positive impact generally include that:

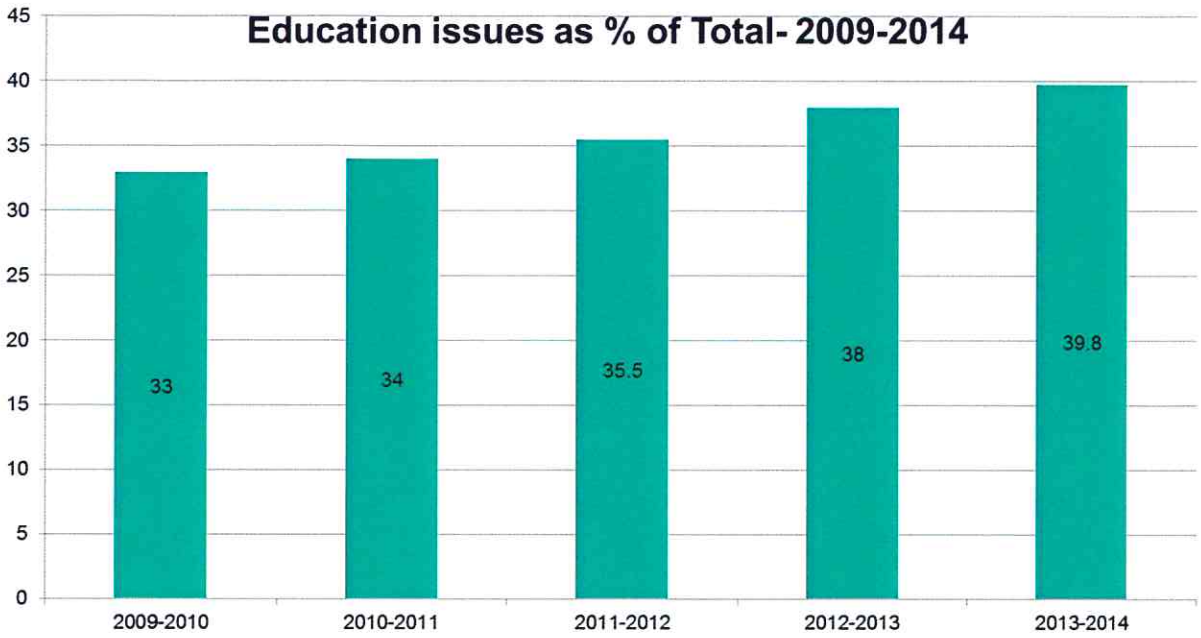
"It is anticipated that there will be a positive impact on all SEN children regardless of their disability or regardless of whether they have both SEN and disability. This positive impact will be as a result of ***more timely assessment and appropriate interventions*** *by schools and the Authority. Interventions will be delivered as a result of strengthened Board of Governor and Education Authority duties and the improved capacity of the school workforce".*

There is no evidence to our knowledge that the operational deficits which we have encountered within the current system (which have been highlighted by respondents to the SEN and Inclusion Review throughout the consultation process) shall be addressed through the SEND Bill or through revisions to the regulations and statutory guidance which flow from it.

Examples of operational issues include failure to comply with the legal duty to specify provision in statements under Article 16 the 1996 Order; barriers to accessing statutory assessments; failure to properly take into account parental evidence as in **LC's Application [2015 NIQB 15]** (full judgment and press article attached); difficulties in accessing Allied Health therapies and the imposition of a time allocation system which inhibits access to educational psychology assessment at the school-based stages of SEN, creating a significant barrier to early intervention.

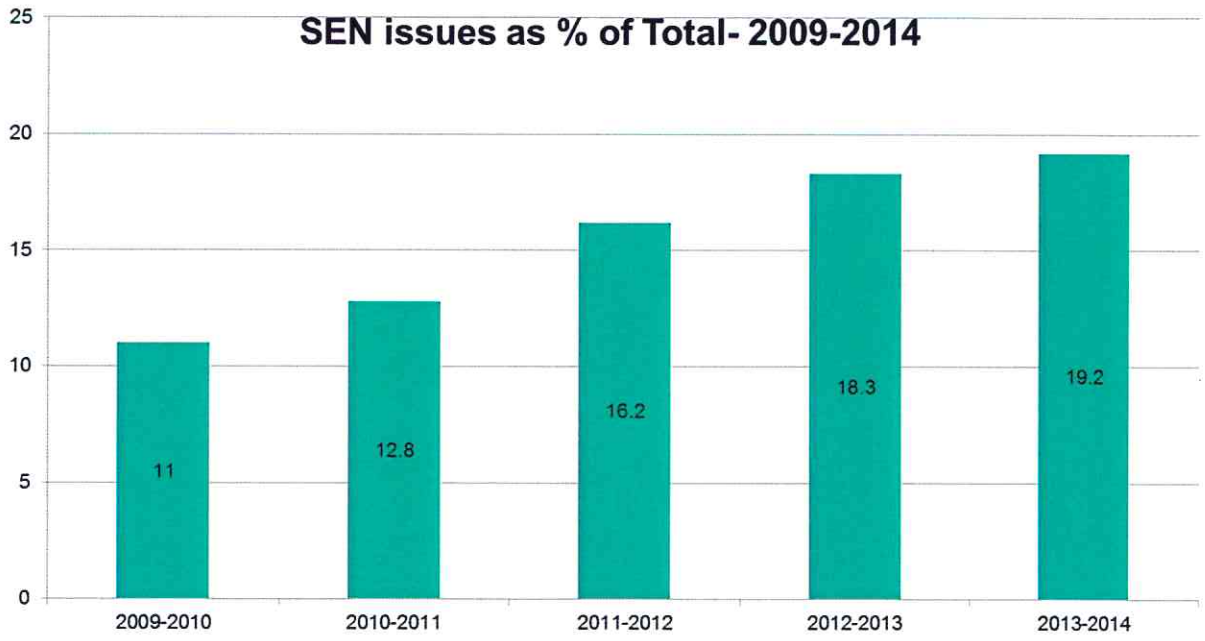
CLC has been experiencing ongoing increases in demand in relation to educational issues as well as an unprecedented escalation of demand upon its free legal advice and information service ("CHALKY") in the last 6 month period in terms of education matters. **We believe that this is evidence of ongoing and increasing difficulties within the operation of the system and that resources rather than the needs of the child are often at the heart of decisions taken.**

Increase in Education Queries to CLC



Note: Recent figures as at March 2015 show that Education Issues are now 52% of the total (see below)

Increase in SEN Queries



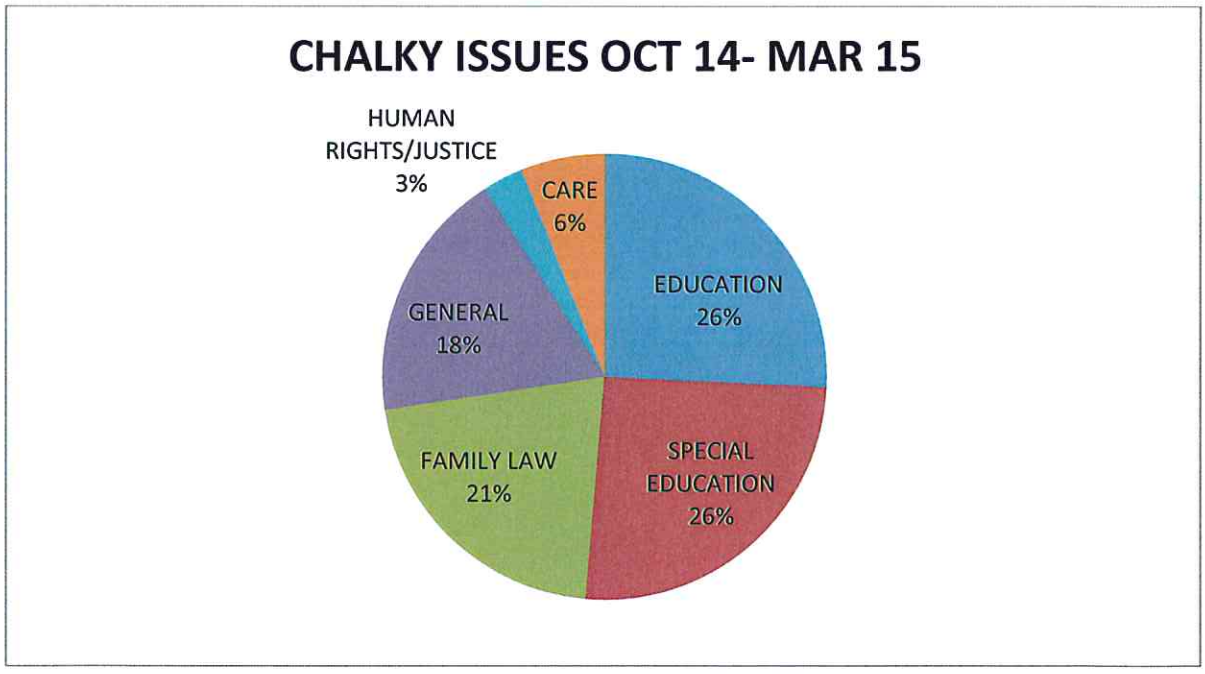
Note: Recent figures as at March 2015 show that Special Education Issues are now 26% of the total (see below)

Escalating Demand

In the six month period from October 2014 to March 2015 the CHALKY Advice and Information Service dealt with 1279 issues. This represents a 34.9% increase on the same six month period from October 2013 to March 2014.

Looking at the broader picture, the number of Education issues dealt with increased from 403 in 2013/14 to 657 in 2014/15, which is an increase of 63%.

In relation to Special Educational Needs in the same 6 month period in 2013/14 we dealt with 186 issues and this has increased to 328 from October 2013 to March 2014, which is an increase of 76%.



4. Early Intervention

CLC welcomes the reference within the Equality Screening documentation (at page 21) to the DE's intention to **"mainstream" the SEN Early Years pilot** in order to produce a positive equality impact for children with SEN and disabilities in Early Years settings. **Further information on the extent of this "mainstreaming" and the source and security of funding available would be welcome.**

It is likely that early intervention (regardless of the child's age) **will continue to be significantly constrained if the operational issues outlined above are not assessed and addressed. It is likely that inequalities within education for children with SEN and disabilities shall remain, shall not be remedied and may become further entrenched. This would be in direct conflict with the DE's intentions in relation to this policy.**

The Committee is aware of the steady increase in the numbers of children with SEN as outlined in the introduction to the Bill Paper of 5th March. Recent figures show that 73,435 children are registered as having SEN. 15,997 have a statement, with arrangement of provision being the legal responsibility of the EA. 57,438 are within the school-based stages of the Code of Practice, with arrangement of provision being within the legal responsibility of their school.

CLC became aware at a recent stakeholder event in relation to *"Health Services and Access to the Education Curriculum"* (on 18th March 2015) that nationally, upwards of 50% of children may start school with impoverished speech, language and communication skills (Lee, "Talk of the Town Evaluation Report" 2013) and that there is strong evidence that the prevalence of speech, language and communication needs is much higher in socially disadvantaged areas.

In Northern Ireland a base-line study of nursery school children across 4 wards found 57% had speech and language difficulties. This is a very stark figure which we believe highlights very well the importance of early intervention. The majority of these children do not require speech and language therapy but may require early advice and strategies at the school based stages of the Code of Practice to enable them to catch up with peers, which is only likely to be possible within a certain window of opportunity.

The DE's SEN and Inclusion policy recognises that early identification and early intervention are critical in terms of maximising outcomes for children with SEN. **CLC believes that training opportunities for early years providers and teachers in schools are vital, as well as the direction of a flow of resources towards early intervention at the "non-statutory" stages of the Code of Practice.** This will enable providers to identify which children require basic intervention or referral to a specialist for advice. Early intervention and prevention of escalating difficulties, particularly for younger children will enable many to progress through school without the need for complex packages of support.

5. Delegation of Powers

CLC notes that the regulations and statutory guidance shall be subject to equality screening and consultation and we acknowledge that primary legislation does not necessarily contain all of the detail on the subject-matter of the legislation. However we also bear in mind that the DE shall have a significant degree of control over the operational impacts of the SEND Bill due to the fact that a very significant proportion of detail which is lacking in the Bill will be "filled in" through the drafting of the regulations and revised statutory guidance.

In essence, the balance between the content of the primary legislation and the subordinate legislation and statutory guidance is weighted in a manner which inhibits scrutiny on substantive key issues due to the fact that there is insufficient detail available on what DE intends to put into the regulations and guidance.

For example, we have no information on key substantive issues including how the proposal to reduce the number of Stages of the Code of Practice from 5 to 3 is to operate and how access thresholds and criteria are to be framed. We have no information about the form that a CSP will take. We have very little information about what the provisions are for early intervention via pre-school placement. We do not know what arrangements are proposed for mediation, including who will provide mediation services arranged by the EA, timescales, what their experience in dealing with children with SEN and disabilities shall be or how this mediation is to operate in tandem with appeal rights and access to DARS.

It is difficult to envisage how the DE might have considered the equality impacts of the primary legislation effectively without considering the draft regulations and statutory guidance as these will contain the majority of the detail about how the revised frameworks underpinning the SEND legislation shall impact upon children and young people with SEN and disabilities.

We understand the regulations and guidance are currently being drafted by the DE following on from early consultation with the EA. **The regulations and statutory guidance should be subject to extensive pre-consultation with stakeholders and ongoing scrutiny by the Committee to ensure that the SEN and Inclusion Review fulfils its purpose**, which is to effect positive change and improve outcomes for children with SEN and disabilities so that they may reach their full potential within an inclusive education system.

Given the balance of primary and subordinate legislation in this matter with the significant delegation of powers to the DE, in particular in relation to the novel and substantive changes which could be effected and considering therefore the primary role of the DE in designing the provisions for operation of a significantly revised framework, CLC is concerned to ensure that proper scrutiny and proper consideration of the equality impacts relating to all stages of development of the **future proposed regulations and statutory guidance** relating to the SEN and

Inclusion framework are carried out through extensive pre-consultation with stakeholders, proper screening and EQIA.

It seems likely that the DE will have considered in some detail at this stage how it plans to give effect to the SEND Bill. CLC recommends that the DE should therefore clarify now to the Committee and stakeholders significantly more detail on the proposals for giving effect to the SEND Bill, to enable full and proper consideration of the likely impacts of the Bill.

6. Legal Enforceability of Statements/Coordinated Support Plans (CSPs)

CLC takes the view that it is not possible to properly progress the SEND Bill without sight of the proposed amended format of a statement along with the arrangements for finalising its content in consultation with parents and children.

CLC has raised serious concerns about the enforceability of statements/"CSPs" under the proposals that led to the SEND Bill and whether there would be any dilution of legal rights. We have also taken the view that proactive measures are required to ensure that the longstanding practice of the ELBs/EA drafting vague, potentially unenforceable statements is remedied so that provision written into statements is specified, as required by Article 16 of the 1996 Order.

The DE intends to change the format and content of statements by amending the regulations which set out what a statement should look like. The SEND Bill itself is silent about whether "CSPs" are to be introduced and it appears from correspondence sent to the Committee on 23rd March 2015 that the **DE's intention is to introduce the CSP using existing amending powers under Article 16(2) of the 1996 Order to change the "form and content of a statement" so that the statement shall be in the format of a CSP.**

The SEND Bill continues to refer to the "statement" and the 1996 Order would therefore still speak in the language of statements and statementing. It seems incongruent that the SEND Bill does not refer to CSPs at all and that there is no proposal to amend the 1996 Order to change the word "statement" to "CSP". **CLC wonders whether there is any need to use the term "CSP" and whether the term statement should simply be used to avoid confusion.**

CLC has very strong reservations about this approach to introducing a novel and substantive change for statemented children and feels that very close scrutiny of this proposal is required. It is likely that many stakeholders, given the silence in the proposed primary legislation, are not aware that the CSP is to be introduced in this manner.

This CSP will form the basis of the statemented child's legal entitlements to provision and we have consistently expressed concerns around the operation of the threshold for access to CSPs and concerns about any dilution in legal rights to access services and to access appeal rights on the contents. We note that the current format of a statement includes "non-educational needs/provision" and that health provision

enabling access to the curriculum is regularly placed incorrectly in this section to avoid legal responsibility upon EA to provide. **We currently have no idea what is proposed in terms of the CSP including whether provision will be specific, detailed and quantified and whether therefore both health and educational services shall be given the status of a legal entitlement.**

CLC notes with increasing concern, the DE's assertion in correspondence of 23rd March 2015 to the Committee and to stakeholders more generally at meetings that health professionals should not make recommendations about the educational provision that a child requires.

We can only speculate without more information that this signals an intention to create an increased degree of separation between health providers' responsibilities and EA's responsibilities, which may save EA from the legal responsibility of having to "arrange" (whether through the Trust or a private provider) all of the educational provision in a statement. If this is correct, it is not a child-centred approach. **Professionals should be free to make recommendations as they see fit, using their professional judgment. Failure to do so may well amount to breach of the duty of care owed to the child by the therapist.**

In our experience, Statementing Officers in the EA will not draft into a statement any specific health provision unless it is recommended by the health professional. The Officer will draft to the effect of "*Child shall have access to paramedical therapies as recommended by therapists*" – a phrase which is empty of any specific educational provision the child may be assessed as requiring. This is because statementing officers are not qualified to say what health provision a child needs to access the curriculum and health providers (in our experience) are discouraged by education from making any specific recommendation. It is also due to the fact that specific provision is enforceable provision. Education does not want to be legally responsible to arrange health provision when there is no guarantee that Health Trusts will assist in making services available to the child.

If Health cannot be held responsible for providing for children (due to the lack of a mandatory duty to "help" education on request, under Article 14 of the 1996 Order) and Education cannot be held responsible for arranging the health aspects of educational provision (e.g. SLT or OT to enable access to the curriculum) due to improper drafting practices, then **children will continue to face immense barriers to receipt of holistic, coordinated special educational provision**.

The DE has expressed a view that HSC Trusts should not recommend educational provision to be made by the EA or by a school. If a health trust professional cannot say specifically what is required in terms of therapeutic input within the school environment to access the curriculum, who can?

For example, CLC is aware that the SHSCT is setting up Sensory Motor Groups in schools (where schools consent) for children who have been assessed as having OT needs. They are designing programmes and training classroom assistants to work regularly on exercises with groups of children who need to improve their motor skills. Presumably this is because those children need regular intervention. Should the OT professional here refrain from making a recommendation for intervention? If the

school refuses to accommodate in-school group work, should the child then receive no intervention?

If a child with Down's Syndrome is assessed as needing OT once per week in a special school setting, should the therapist refrain from making that specific recommendation. If the recommendation is not made, how is the statementing officer to include it in the statement?

Many parents provide medical evidence in support of their contentions that a child needs particular intervention within school. Are medical staff to refrain from writing down their professional opinion on the child's need for specific interventions?

This is simply not a child-centred approach. It appears to us to be a resources-led approach with which we strongly disagree.

Until parents can rely upon properly joined up working for the benefit of their children, they must rely upon the enforceability of their child's statement to assure to that child the provision that they are entitled to receive. The statement should set out provision that is specific, detailed and quantified, how that provision is to be targeted and how outcomes are to be measured. It simply does not matter to the child who is providing. It matters that the provision is received.

To illustrate the impact on the child of failures of joint working and child-centred decision-making, CLC would like to refer the Committee to a short video presentation made by one of our young clients, Carla, who has cerebral palsy and who experienced 2 years and 8 months of legal wrangling and attended a Tribunal to access regular physiotherapy and physical movement activities in a mainstream grammar school.

Carla's video can be accessed from the "home" page of our website or using the following link:

http://www.childrenslawcentre.org.uk/index.php/component/zoo/item/bbc-broadcast-appeal-for-clc-copy

7. Education Authority

The amalgamation of the five Education and Library Boards (ELBs) into one Education Authority (EA) has created an opportunity to effect positive equality impacts through careful scrutiny of the legislation, regulations, statutory guidance and regional policies to ensure that these are formulated in compliance with statutory equality duties and human rights obligations owed to children and young people. CLC believes that the process of scrutinising the SEND Bill and related regulations and guidance presents an opportunity to encourage the development of best practice for the benefit of Children with SEN and disabilities.

Paragraph 12 of the Schedule to the SEND Bill requires the EA to make provision for advice and information to be provided to parents and children. This is to be welcomed. **Access to early advice and information and the encouragement for parents and children to communicate with the EA is the key to avoiding many unnecessary disputes, as this enables informed choices to be made from the outset.**

8. Funding

It may well be that a portion of the increase in need within the school population is due to the failure to provide effective early intervention across all pre-school and education settings.

The DE's Equality Screening documentation (at page 27) states that *"the revised framework will improve the capacity of mainstream schools to meet the needs of the majority of SEN children in their classes…"*

CLC agrees that there should be ongoing capacity building for mainstream schools. Learning Support Coordinators (LSCs) in particular need to be able to dedicate sufficient time to cater for the increasing multi-faceted needs of children with SEN within the school population.

The SEN and Inclusion policy rests upon the foundation of an "enhanced mainstream sector" which should enable Boards of Governors and school staff to meet their legal duties effectively.

We are concerned that while the numbers of children with SEN are increasing year on year, the DE budget is facing cuts year on year. We can see this impacting upon frontline services with our own increasing caseload and we can see it in the changing structures of local schools with composite classes, greater class sizes, greater difficulty in accessing adult assistance, recent industrial action by classroom assistants, staff redundancies and so on.

On the one hand capacity is being built and on the other hand it is being dismantled. This needs to change, with appropriate resource allocation (perhaps including pooled budgets) which reflects the growing numbers of children who require special educational provision.

9. Statutory Duty to Cooperate

CLC continues to support the progress of the Children's Services Cooperation Bill and has given evidence to the OFMDFM Committee (on 22nd April 2015) in this regard. CLC believes that a statutory duty to cooperate as well as a statutory duty to pool budgets is required to ensure that children's services are provided in an efficient and effective manner which complies with minimum children's rights standards.

There are models of good practice and multi-disciplinary working which some children with SEN are benefitting from through a variety of pilot schemes and projects. For example in the Belfast region the Children's Interdisciplinary Schools (CIDS) Team targets certain children in the 3 years old to 8 years old age group in nursery, primary and special schools. In the Northern Region the Multi-agency Support Team for Schools (MASTS) provides services for certain children from P1 to P4.

Nonetheless, many children who require support are simply not accessing properly coordinated services.

There is currently little coherence or meaningful coordination in relation to EA, school and health provision for children with SEN and disabilities.

In general terms, we have seen in our casework that each provider may be concerned with protecting their own shrinking budget to the extent that parents' concerns are ignored and the child is almost entirely overlooked. Whether via the SEND Bill or the Children's Services Cooperation Bill or in both, **it is of critical importance that if the SEND Bill is to have real positive impact for the children to whom it applies then the coordination of service provision must be prioritised. Such coordination simply has not occurred as it has not been a priority for Departments in the absence of clear statutory duties.**

Schools, though they have a crucial role to play, are not equipped to remedy the defects in the current system without support. While we fully recognise the need to strengthen the legal duties owed by schools to children with SEN and disabilities, **it is not sufficient to place strengthened duties upon schools without simultaneously placing strengthened duties upon the EA and Health Trusts.**

CLC recommends that Article 14 of the 1996 Order is amended to place a mandatory statutory duty upon Health Trusts to assist the EA on request, in place of the current qualified statutory duty that is currently upon Health Trusts (which can opt out of "helping" on the basis of resources).

The failure to achieve this outcome to date should be subject to full scrutiny in order to secure a solution which ensures the best interests of the child is a primary consideration in all actions taken by the Executive in line with its obligations under Article 12, UNCRC.

CLC would like to see the Children's Services Cooperation Bill amended through the usual procedures and enacted with a statutory duty upon Departments to cooperate in the exercise of their functions and a statutory duty to pool children's services budgets.

Clause by Clause Analysis

Clause 1 Duty upon Education Authority – Views of the Child

In our experience the guidance in the current Code of Practice around seeking the views of the child and enabling participation is routinely overlooked both by the Education Authority and by schools. The importance of asking the child for his/her views cannot be overstated. It is the child who is in the classroom every day trying to keep up with peers. We find in our casework that enabling participation of children with special educational needs in decisions about their education enables decision-makers to keep the child at the centre of the decision, simplifies the decision-making process by focusing attention on the crux of the matter and has positive and long-lasting impacts upon outcomes, as well as equipping the child with important life skills.

CLC therefore very much welcomes the creation of a statutory duty upon the EA to seek and have regard to the views of the child who has special educational needs and the emphasis upon the importance of enabling participation.

In deciding upon how this clause will operate in practice it will be necessary to take proper account of Articles 12 and 13 of the UNCRC and Articles 7 and 21 of the UNCRPD which state, amongst other provisions, as follows:

Article 12 UNCRC
"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."

Article 13 UNCRC
"The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, **regardless of frontiers**, either orally, in writing or in print, in the form of art, or through any other media of the child's choice".

Article 7 UNCRPD
"States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with **disability and age-appropriate assistance** to realize that right."

Article 21 UNCRPD
"States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all **forms of communication of their choice**..."

CLC recommends that Clause 1 is amended so that the duty can be strengthened to provide for "due regard" for the child's views.

Recent figures (set out in the Bill Paper) show that 73,435 children are registered as having SEN of whom 15,997 have a statement, with arrangement of provision being the legal responsibility of the EA. The remaining 57,438 are within the school-based stages of the Code of Practice, with arrangement of provision being within the legal responsibility of their school and they will not therefore be likely to benefit from the duty to be imposed upon the EA by Clause 1.

Due to our casework experience that the statutory guidance has in general not been sufficiently adhered to in terms of the child's role in decision-making and that the rights of the child are therefore not respected sufficiently, **CLC recommends that the duty is widened in scope or that a separate duty is formulated in terms of the views of the child to include duties upon schools and education providers, since the vast majority of children with SEN are provided for under the remit of their school**.

Clause 2 Duty upon Education Authority – Publish a Plan

CLC welcomes this additional duty upon the EA which may enable greater transparency in terms of the services available to children and the way in which resources are prioritised and allocated.

Clause 3 Duties upon Boards of Governors/Teachers

CLC had expected to see a strengthening of the duty placed upon the Boards of Governors of ordinary schools by Article 8(1)(a) of the 1996 Order to use its "**best endeavours**" to secure that special educational provision is made for pupils with special educational needs. In terms of legal problems that may arise, this provision mainly (though not exclusively) affects those children with SEN who are at the school-based stages of the Code of Practice (i.e. the school is legally responsible for their provision rather than the EA as they do not have a statement of SEN).

In fact this comparatively weak duty to exercise "best endeavours" under Article 8 of the 1996 Order has not been changed at all. In our view the phrase "best endeavours" is somewhat ambiguous, does not sit well with the other proposed duties imposed under Article 8 and may be open to litigation. When for example might a school be said to be doing its best in circumstances where it decides not to direct resources to special educational provision? Is a school doing its best if it decides not to refer a child for Educational Psychology assessment because of restrictions placed upon it by the EA using a time-allocation system?

CLC recommends that Article 8(1)(a) of the 1996 Order is amended to clarify the threshold which the Board of Governors is to meet when securing that special educational provision is made for children with special educational needs.

The scope of the duties under **Article 8(1)(b)** of the 1996 Order has been extended under the SEND Bill to ensure that all those concerned with the pupil's education are aware of the child's SEN. CLC welcomes this development as it is likely to ensure that avoidable misunderstandings do not occur, thus protecting and promoting the child's interests and saving time and energy for staff and parents in dealing with avoidable incidents.

The duty under **Article 8(1)(c)** of the 1996 Order has been strengthened under the SEND Bill to ensure that teachers, rather than simply being "*aware of the importance of*" identifying and providing for children with SEN, actually "take **reasonable steps** to **identify and provide**" for pupils with SEN. CLC believes that this change is a necessary change which provides important clarification for teachers about the extent of their role within the framework, particularly as it sits comfortably with the disability discrimination protections within SENDO 2005 (wherein there is a duty to take reasonable steps to secure that disabled pupils are not substantially disadvantaged). Further, use of the word "reasonable", while protecting the child, also provides the flexibility to allow for the wide range of different circumstances to be found in different schools. **It is difficult to see what objection there could be in asking a teacher or a school to do what is "reasonable" in all the circumstances of the case.**

While we do agree that a "reasonable steps" duty is appropriate we have a number of concerns about how this can be effectively operated. There may be confusion due to the separation of the duties of the teacher (reasonable steps duty) and the Board of Governors (best endeavours duty). How can a teacher be expected to provide what the Board of Governors has not secured?

CLC recommends that the Board of Governors' duty should be reconsidered perhaps to the effect that they should take "reasonable steps" to provide generally within school rather than using "best endeavours" to ensure there is no ambiguity and that the duties of teachers in the classroom are aligned with the duties of Boards of Governors in the school as a whole.

The strengthening of these duties is proposed in order to increase accountability within schools and CLC agrees that this is necessary since schools have a high degree of autonomy around the allocation of resources to children with SEN from within the school budget. A high degree of accountability is necessary to ensure that spending on special educational provision is appropriately prioritised by schools, to better enable compliance with legal duties owed to children with SEN and disabilities.

The duties will also serve to develop further a culture of inclusion of children with SEN and disabilities in mainstream schools as the "norm". We welcome the DE's digital media project which aims to promote inclusion of children with disabilities and acceptance of diversity but we believe that sustained promotion and development of such a culture is needed and should be encouraged and facilitated at every opportunity.

Given the number and variety of children that may present with SEN or disability in every mainstream classroom, it is **essential that all school staff and Boards of**

Governors are given, on an ongoing basis, the time, training and resources to enable them to build sufficient capacity to properly fulfil their legal duties and provide for every child with SEN.

The initial capacity building measures put in place by the DE to date to support the SEN and Inclusion Policy are being undermined by the ongoing budget cuts and the potential dismantling of even the most basic SEN infrastructure within our schools through lack of resources.

Further there requires to be a sufficient pool of EA and Health service resources to enable a teacher to fulfil the duty to "take reasonable steps to provide" for SEN through referral to specialists via the EA (such as educational psychologists, behaviour support services, ASD support, home tuition services, speech and language therapy, occupational therapy, literacy support etc)

CLC welcomes the introduction of **PLPs** for all children with SEN. We remain concerned about how this provision can be maximised through the subordinate legislation and revised statutory guidance so that the PLP is drawn up in every case, is well designed to enable measurement of outcomes, has a format that schools can easily adapt for each child and is in fact reviewed regularly (preferably within a stated timeframe) and reviewed properly in consultation with parents and carers and the child where appropriate.

Clause 3 also imposes a duty upon schools to designate a teacher as a ""Learning Support Coordinator" (LSC). The importance of the role of the LSC within a school cannot be overstated, particularly given the ongoing growth in numbers of children with SEN in Northern Ireland. CLC welcomes this measure as it seeks to ensure proper co-ordination of provision. **The caveat is that in order to be effective, an LSC requires the support of senior management and requires protected time, a high level of knowledge of the SEN system and about the needs of children who may have SEN, ongoing training and the ability to make referrals to a pool of specialist EA and health resources when required in order to be enabled to coordinate provision.**

Children with SEN are often under the care of an array of education and health professionals and it usually the parent who gathers and shares the information ad hoc. If the parent is unable to do this or if the child is "looked after" and has moved around different placements, the information is often not shared. **Appropriate cooperation between health, education and parents might facilitate the role of the LSC by making available "pooled information" about the child.**

CLC remains concerned about the lack of formal redress available to parents when there is a dispute about what the child's provision ought to be at the school based stages of SEN provision (i.e. where there is no statutory assessment or no statement of SEN). For example, what if a child at the school based stages requires access to a daily occupational therapy group but a school refuses to facilitate such a group? What if a school refuses to register a child as having SEN when a parent feels assistance is needed? What if the PLP is not of an appropriate quality or is not reviewed regularly as required?

Parents can seek an independent "second opinion" from SENDIST in relation decisions made within the legal responsibilities of the EA (at the current Stages 4 and 5 of the Code of Practice) but have no way of securing an early independent review of a school decision if they believe their child's SEN (at the current Stages 1-3 of the Code of Practice) are subject to unfair or inappropriate decisions made by a school. Given that the majority of children receive their provision at the school based stages, this difficulty requires further consideration, taking into account the proposed Clause 3.

Clause 4 Duty upon Education Authority – Help from Health/Social Care

CLC takes the view that Clause 4 has very little useful impact in terms of ensuring provision for the needs of children with SEN and disabilities who require health input to access education. It is our experience through casework that there is no significant difficulty with the EA requesting help from Health Trusts. **The difficulty lies in ensuring that health comply with the request.**

CLC is aware that Allied Health Services for children with SEN and disabilities are provided using a wide range of disparate models of provision. These services appear to be stretched beyond capacity to provide for the level of need amongst the population of children with SEN and disabilities (both with and without statements). We have encountered significant difficulty in accessing therapies for children in both special schools and mainstream schools. **It is clear that greater access to resources, including potentially through pooling of children's services budgets and improved children's services planning (which takes account of the scale of need in the school population) are required to enable the health service providers to work together with education providers to meet the needs of children with SEN**.

As discussed above in our "Key Concerns":

It is not sufficient to place strengthened duties upon schools without simultaneously placing strengthened duties upon the EA and Health Trusts.

CLC recommends that Article 14 of the 1996 Order is amended to place a mandatory statutory duty to assist the EA on request, in place of the current qualified statutory duty that is currently upon Health Trusts (who can opt out of "helping" on the basis of resources).

The failure to achieve this outcome to date should be subject to full scrutiny in order to secure a cross-departmental solution which ensures the best interests of the child is a primary consideration in all actions taken by the Executive in line with its obligations under Article 12, UNCRC.

CLC would like to see the Children's Services Cooperation Bill amended and agreed through the usual procedures and enacted with a statutory duty to cooperate and a clear statutory duty to pool children's services budgets being placed upon the DE and the DHSSPS.

Clause 5 Reduction of 26 Week Timeframe for Statutory Assessment

CLC has always taken the view that the statutory assessment process is a robust process with a clear pathway for decision-makers to follow. A certain amount of time is required in order to complete the thorough multi-disciplinary assessment of a child with significant and/or complex needs.

It appears to be the case that there are difficulties in the response times when Health Trusts are asked to provide statutory advices during a statutory assessment. It may be helpful to consider, in Liaison with the DHSSPS, **considering the imposition of targets upon health providers based upon the time limits for response in the regulations**. **These targets could then be subject to monitoring with a view to speeding up the statutory assessment process. Such targets would better enable health providers to prioritise input for children with significant and complex needs who are undergoing a statutory assessment**.

The bureaucracy and delay that parents and advocates often face is generally not, in our experience, a product of the statutory framework itself and is not related to the timescales in the current legislation (which in most cases seem to us to be adhered to by the EA).

We believe from our casework experience that the difficulties are the product of potentially unlawful and damaging practices which have evolved and become entrenched within the system. For example, many parents face a lengthy battle to gain access to a statutory assessment because there are insufficient Educational Psychology time slots to meet demand and schools are instructed by the EA to limit referrals using a time allocation system. Many parents who have come to us find that statutory assessment is refused despite the fact that they have provided ample evidence that one is needed so that an appeal has had to be lodged with SENDIST (as in our recent judicial review in **LC's Application [2015] NIQB 15** – full judgment and press article appended). Once assessments begin there are often delays in response by health services which may not readily respond or may not provide sufficient information or make specific recommendations about the type and level of therapy required. If a statement is to be made, sufficient time must be afforded to enable proper consultation with parents. If the final statement is drafted with vague wording (which is the norm) or without appropriate provision then further negotiations are required and a further appeal to SENDIST may become necessary in order to ensure the statement is in fact an enforceable document with specific provision within it (as in **LC's Application**, mentioned above).

In more severe cases where we feel that the child cannot await the outcome of the assessments, CLC asks for interim measures to be put on place to enable attendance and participation at school. **It may be useful to consider whether there ought to be a legal provision or further detail within the revised statutory guidance to govern seeking interim support pending the outcome of a statutory assessment.**

CLC supports the provisions in Clause 5 which enable the EA to proceed before the expiry of time limits (with written consent). This in itself should be helpful in reducing time taken. In light of this provision CLC does not believe that it is necessary to cut the time available for parental representations and parental evidence from 29 to 22 days.

Clause 6 New Right of Appeal – Refusal to Amend Statement

CLC welcomes this provision which cures an existing anomaly in terms of available appeal rights which regularly causes significant delay when a statement needs to be reopened and potentially amended.

It appears from paragraph 12(4) of the Schedule to the SEND Bill that the relevant Notices (including notice of refusal to amend and advising of the appeal right), as well as being sent to the child over compulsory school age should also copied to parents if the child is under 18 years. It may be best in the interests of consistency to consider whether that age limit, rather than being 18 years should be aligned with the age limit for the maintenance of a statement (at least for children who have a statement).

Clause 7 New Rights of Appeal – Child Under 2 Years Old

CLC fully supports this provision.

Clause 8 Duty Upon Education Authority – Independent Mediation Service

CLC is a member of CDSA and we refer to the CDSA evidence paper which highlights some of the key aspects of the mediation system which operates in England. We believe that the DE intends to propose a similar system in this jurisdiction.

CLC would value having sight of any evidence the DE may be able to provide to demonstrate that mediation will assist parents and children who wish to lodge a Notice of Appeal with SENDIST. While we are generally supportive of any opportunity to enable a fair and proper early resolution we are unable to assess this proposal without full information about how the service would operate, who would provide mediation advice, who would act as a mediator, what the impact would be on timescales, how would parents/children be supported etc.

CLC takes the view that the key to resolving dispute in the majority of these cases, without the need for a Tribunal hearing, is good quality, regular, open, constructive communication between EA Officers and parents.

For example, the EA Officer who receives Notice that an appeal has been filed may either contact the parent, listen carefully to the concerns, advise of the reasons for the EA's position and seek to resolve matters or alternatively may allow the process

to run on with no direct communication. It is clear that the first approach of trying to deal with the difficulty early is far more likely to result in the avoidance of dispute.

In our experience, parents will not always realise that they can simply pick up the phone and speak to the EA Officer informally at any time, or they may lack confidence in doing so. On occasion parents have contacted the EA and the communication from the EA has not been as effective as it should be and parents have required support from CLC or others in order to have concerns properly addressed and to receive clarification in relation to EA procedures, criteria and decision-making processes.

Part of the solution to enable resolution of more disputes may well be to require EA Officers to make contact and/or offer a meeting to a parent or child who lodges a Notice of Appeal or indicates an intention to do so. Parents or children in this situation should be supported and given information and advice or signposted to relevant services to enable fully informed decision-making.

We would have some concerns about applying mediation to disputes about special education provision if that were to follow the negotiation style that results in "compromise" or the finding of a "middle ground". While there are some situations where compromise is the appropriate option, there are many situations in SENDIST cases in which CLC has represented where compromise would not appropriate. That is, the child either has a statutory assessment, or not. The child has a statement or they don't. The child has adult assistance at a level that meets needs, or has not. The child has access to therapies or he does not. The statement is specific or it is not.

In a situation where resources and knowledge are not equally held by the parties, it is likely to be the parent or child who moves position and "compromises". This may not serve the child well.

When there is a dispute about a child's SEN, time is of the essence. **In terms of timescales, CLC understand from a stakeholder meeting that the DE does not intend that mediation will impact on the timescale for a hearing. However, a parent/child is expected to cross the new hurdle of demonstrating that they have taken mediation advice and are in receipt of a certificate.** Further, if mediation is arranged, there is likely to be a delay caused if the parent/child has to wait for an appointment. We would like some further clarification on this point as it seems there are already significant barriers in the way of parents and children who are trying to access special educational provision and that making the process more onerous is not desirable.

It would seem appropriate that if mediation were to be brought forward then it should <u>follow the lodgement of a Notice of Appeal</u> to SENDIST and should take place within the normal timescale for a hearing. If parties agree that an adjournment would be constructive at a later point to enable further discussion, then an adjournment can be sought. The lodgement of a Notice is a straightforward process, places the parent/child in a more balanced position than would otherwise be the case relative to the EA, whose decision is now going to be

scrutinised, and is most effective in terms of focussing any discussions between the parties.

In relation to training and qualifications a mediator should be required to have appropriate expertise and understanding of the issues relating to children with SEN and disabilities and should at all times be required to act in manner which serves the best interests of the child.

CLC would be happy to consider mediation further if the DE can provide sufficient detail to enable us to do so.

Clause 9 New Rights for Children over Compulsory School Age – SEN
Clause 10 New Rights for Children over Compulsory School Age – Disability
Schedule Amendments to reflect Transfer of Rights to Children

CLC very much welcomes the DE's commitment to recognising the child as an individual rights holder with the SEN and Inclusion framework. This legal recognition will act as an important indicator to children, parents, schools, EA providers and DHSSPS providers that it is the child who should be at the centre of all decisions made and that the child is equipped not only with their existing rights but also with the tools to seek redress if their rights are not respected.

Too often in our experience, the child is not even consulted when decisions are being made. The current culture within our SEN system which often takes the focus away from the child needs to change if children with SEN and disabilities are to be treated with respect, to develop the life skills they will require to protect their own rights, to challenge unfair decisions and to seek redress as necessary.

It appears from paragraph 12(4) of the Schedule to the SEND Bill that the relevant Notices and the information about appeal rights, as well as being sent to the child over compulsory school age shall also copied to parents if the child is under 18 years. **This copying of the Notices will act as an important safeguard to the child's rights.** As mentioned above, it may be best in the interests of consistency to consider whether that age limit, rather than being 18 years should be aligned with the age limit for the maintenance of a statement (at least for children who have a statement).

The SEND Bill provides that certain legal rights should be transferred away from the parent to the child (over compulsory school age). CLC is extremely supportive of this recognition of the child as a rights holder. However, in cases where a child does not want to, or lacks the confidence to exercise appeal rights, CLC suggests that the child should be enabled to choose whether to exercise their rights in person, or in the alternative via a parent. In other words, there ought to be an alternative available which protects the child who does not wish to avail of the transfer of rights. This will guard against the loss of essential appeal rights and will ensure that all children are comfortable with exercising their appeal rights in the most appropriate manner which they may choose.

Further, if a child is assessed as lacking capacity to appeal or make the necessary decisions, the parent will need to retain the right to appeal on the child's behalf. This protection is in fact dealt with via Clause 9(3) and 9(4) which sets out that Regulations may provide for this eventuality so that a parent may retain appeal rights in the event the child does not have capacity.

The provisions of Clause 11(3) in relation to the power to make a pilot scheme for younger children (i.e. those under the upper limit of compulsory school age) enable regulations to be made **for concurrent appeal rights and the enabling of a person to exercise appeal rights on the child's behalf**. Children over compulsory school age who have SEN and/or disabilities and may also require to have available alternative means of exercising their rights and **we suggest that consideration is therefore given to similar regulation-making powers in relation to those over compulsory school age**.

CLC would like to see more detailed scrutiny to enable full consideration of the implications of these clauses with a view to ensuring that children are enabled to hold and exercise their rights effectively in line with their individual needs.

We note also that the majority of the cases we deal with are in relation to children below the upper limit of compulsory school age so that the impact of the provision on children's rights will be limited, pending the exercise of powers to extend appeal rights to younger children.

There is a considerable amount of work to be done by the DE in determining via Regulations how children are to be supported and determining how to deal with cases where a child might lack capacity to exercise appeal rights. It is difficult to comment further without having access to more detail about the exact nature of the proposals.

Clause 11 Power - Pilot Scheme – Younger Children

While a potential pilot on the workings of an extension of legal rights for children under the upper limit of compulsory school age is welcome (this being the group of children who are more likely to be the subject of an appeal) it is difficult to comment in detail on this clause without further information about the pilot scheme including how it will operate in practice and in particular about the types of advocacy and other support services which would be made available to children.

Clause 12 Power – Appeal Rights – Younger Children

While we welcome this clause as a follow-up provision to Clause 11, we would require further details to make a full assessment. We would welcome further detail, in particular about the types of advocacy and other support services which would be made available to children.

Clause 13 Amendment - Maintenance of Statement – 19th Birthday

CLC supports Clause 13 in relation to the maintenance of a statement to the end of the school year following the child's 19th birthday. This cures an anomaly which had potential to cut short the educational support for young people with SEN, in some cases jeopardising school placement.

Equality Screening

CLC believes that the Department has reached the wrong screening decision with regard to its Special educational Needs and Inclusion Policy. While we appreciate that it is the intention of the Department that the proposals are universal in their impact and will apply to all pupils equally, it is clear from the screening which has been carried out on the policy that differential adverse impact has been identified for a number of the Section 75 groups by virtue of higher prevalence of SEN under particular Section 75 categories, including on grounds of race and disability.

While we appreciate that it is the intention of the Department that the policy will be equally beneficial to all, intention is irrelevant for the purposes of compliance with Section 75, with rather the potential for adverse impact being the issue engaged. This was the view of the Equality Commission in its findings of a complaint taken to the Commission by the Children's Law Centre and nine other organisations under Schedule 9 of the Northern Ireland Act, stating that the NIO, upon introducing the ASBO legislation, did not discharge its Section 75 obligations correctly. The Equality Commission, in its decision approved on 27th April 2005, found that while adverse impact may not be the intention of a public authority, in order to comply with its approved Equality Scheme public authorities must undertake an Equality Impact Assessment where there is the *potential* for adverse impact on children and young people.

Section 75 places a proactive duty on designated public authorities to have due regard to the need to promote equality of opportunity between members of the nine Section 75 categories. The Section 75 equality obligations will not be fulfilled by implementing this policy equally to all and the argument that the Department makes with regard to the policy applying equally to all young people fails to recognise the societal inequalities which exist with regard to children and young people from various Section 75 categories and the prevalence of SEN for different groups of young people.

The existence of Section 75 is an acknowledgement by Parliament that inequalities exist for members of the nine Section 75 categories in society and places an obligation on Government to eliminate these inequalities when introducing polices and legislation. **It is not enough for a designated public authority such as the Department of Education to simply state that where inequalities have been identified that no additional action is required other than the adoption of a blanket policy which will impact on all young people equally.**

Section 75 requires all designated public authorities to address the potential for adverse impact where this has been identified regardless of the cause of the

inequality in the interests of the creation of a more equal, peaceful society for all of the citizens of Northern Ireland.

In order to comply with this element of its statutory equality obligations under Section 75 we would expect the Department to address the potential adverse impacts which clearly exist and have been identified in its screening exercise and carry out a comprehensive EQIA, including direct consultation with children and young people.

In order to comply with Section 75 the Department is under a statutory obligation to address the inequalities which are identified through mitigation or the adoption of alternative policies. This will require the Department putting in place proactive measures to ensure for example that young people with disabilities and Traveller children are able to fully participate in their education by taking proactive measures to address inequalities experienced in education due to the disproportionate levels of SEN experienced by these groups of children and young people.

Despite the identification of disproportionate numbers of children in certain Section 75 categories with SEN, we are disappointed that the Department does not propose to take proactive measures to promote equality of opportunity for members of any of these Section 75 groups. Section 75 of the Northern Ireland Act 1998 requires more than avoidance of adverse impact, it also requires a proactive approach to be taken by designated public bodies to ensure the promotion of equality of opportunity. The Equality Commission's Guide for public authorities on implementing Section 75 states that,

"The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities."

Designated public bodies are required to not only ensure that there is no adverse impact suffered by members of any of the Section 75 categories as a result of the proposed policy, but also to have due regard to the need to promote equality of opportunity among members of the nine groups.

This means that there is a statutory obligation on the Department as a designated public authority for the purposes of Section 75 of the Northern Ireland Act 1998 to take action to mitigate adverse impact or inequality as well as to proactively promote equality of opportunity in order to comply with Section 75 of the Northern Ireland Act 1998.

As stated above, proactive measures may need to be taken to comply with Section 75 to address disadvantage among particular sections of society and further, such action may be the appropriate response to addressing inequalities. CLC therefore

believes that there is a very clear legal basis for the provision of enhanced or additional protections to be given purely on the basis of a pupil's identification within one or more Section 75 categories if it is evidenced, as in this case, that members of certain Section 75 groups have disproportionately higher levels of SEN.

Examples of areas where CLC believes equality of opportunity could have been better promoted include a strengthening of the duty on Boards of Governors to ensure greater protection for children with SEN who fall within the Section 75 categories. Further, there is potential for adverse impact to be suffered by younger children with SEN who should be protected under the age category as a result of the decision not to include under-16s in the appeals provisions.

CLC would therefore request that the Department reviews its screening decision in this instance. If the potential for differential adverse impact is found (which we believe it has been) on the grounds of race, disability and should have been on grounds of age and if ways to better promote equality of opportunity are identified, which we believe should be given the disproportionate levels of SEN in certain Section 75 groups, the Department should proceed to carry out a full and comprehensive Equality Impact Assessment (EQIA) on its SEN and Inclusion Policy using comprehensive disaggregated data sets and child accessible information. This will involve the Department consulting publicly and widely as part of this process, including carrying out direct consultation with children and young people. This will greatly assist the Department in mitigating any identified adverse impact on equality of opportunity and in the promotion of equality of opportunity as is required by Section 75.

Endorsement of CDSA Evidence Paper

CLC is a member of CDSA (Children with Disabilities Strategic Alliance). CDSA has submitted a paper to the Committee. CLC endorses that paper and in particular draws attention to the "Issues of Concern" outlined under the headings:

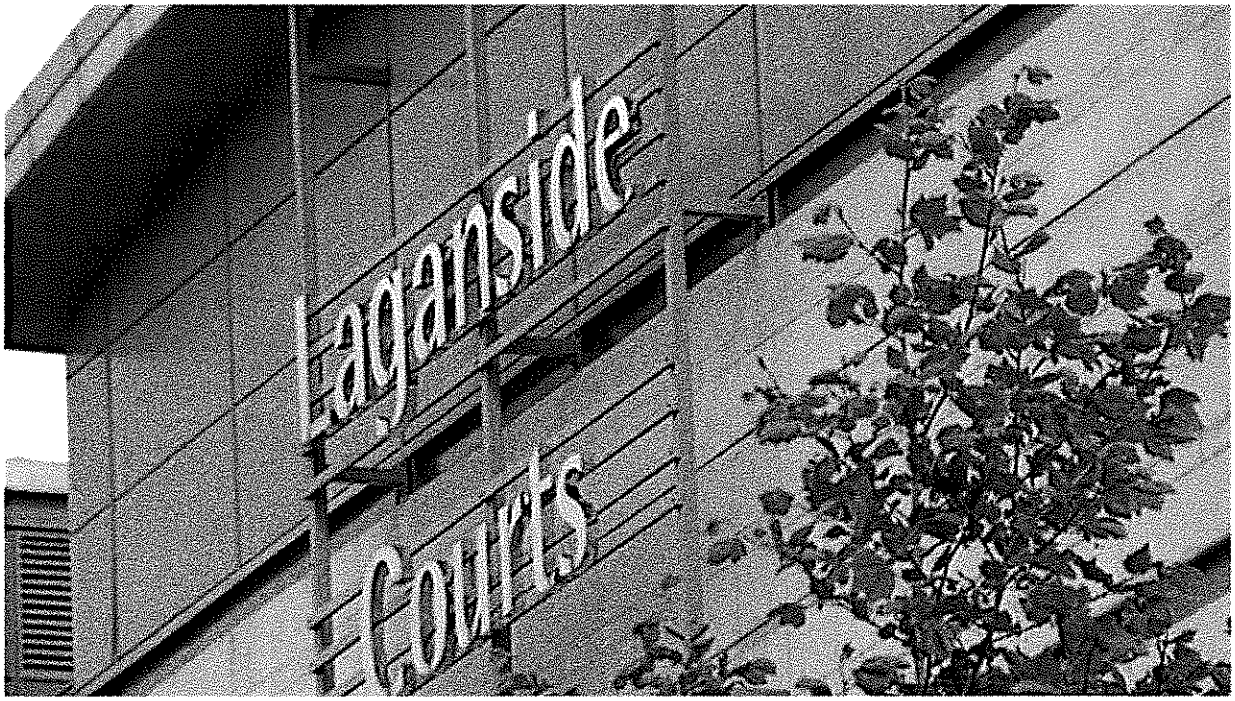
- Outcomes for Children with SEN
- Appeal to SENDIST at PLP Level
- Specification and Quantification Retained on Statements
- Review of Assessments
- SEN Resourcing
- Improved Inspections and Quality Assurance of SEN in Schools

Conclusion

CLC is grateful to have this opportunity to respond to the Education Committee's Call for Evidence on the SEND Bill. We look forward giving oral evidence to the Committee as the Bill progresses and are hopeful that steps can be taken to ensure the Bill delivers the important policy aims set out by the Department of Education.

Battle with education board was like 'boxing match' says mother

5 March 2015 | Northern Ireland



The mother of a child with special education needs has said the fight to get him properly assessed was like "a boxing contest".

The High Court has ruled that the Northern Eastern Education and Library Board unlawfully refused a statutory assessment of the child's needs.

The judge said the child's mother had gone through "a bruising experience" trying to get the right support.

Mr Justice Mark Horner said the NEELB had "paid lip service" to the parents.

The case involved a seven-year-old boy, known only as LC, who has speech difficulties, epilepsy, autism and motor skills problems.

His mother documented in detail his problems and asked the board for a statutory assessment. But this was refused. She pursued the case through the Children's Law Centre and was eventually granted the assessment.

However, she took the case to a judicial review in the High Court.

She said her motivation was to ensure that no other parent had to go through what she and her husband suffered. It was an ordeal that she described as being "akin to a boxing contest".

In his ruling, the judge said the mother's motivation was "to make sure that the board complies with its statutory duties towards vulnerable children such as the applicant".

"This is a laudable aim," he said.

In his ruling, he defended the right of the parents of a child with special needs to have their voices heard by the education boards.

He noted that the NEELB denied that its behaviour was driven by budget considerations and did not refuse appeals in the hope that would discourage parents from seeking assistance to which the child was lawfully entitled.

The judge said the board had acted in what they believed was a lawful and fair way.

However, he said it seemed that, in this case, the board had "paid lip service to parental involvement and that the information provided by the applicant's mother was ignored".

"To ignore their contribution as not worthy of consideration or to attach a little importance to it, is to do them a grave disservice," Mr Justice Horner said.

"In this case the board, by ignoring the representations of the applicant's parents, failed to carry out their statutory duty and thus acted unlawfully.

"It is important to stress that the board, to comply with its statutory duty in the future, must act on all the evidence it has available to it at the time and this should include any representations made by the parents."

Rachel Hogan, the lawyer with the Children's Law Centre who took the case on behalf of the parents of LC said: "The board rejected the parents' report and said there was no evidence. We have experienced this in many of the cases that we deal with, not only in this board but in others, and we are asking why.

"My question is what about those parents who accept what the board tells them and do not have the skills to challenge the decision?"

Ms Hogan said parents' voices were being "ignored and stifled".

"Parents are not second class, their views should be heard," she said.

A spokesperson for the NEELB said it was considering the judgement which had just been issued.

More Northern Ireland stories

Neutral Citation No. [2015] NIQB 15

Ref: HOR9544

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: 23/02/2015

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

LC's (a minor) Application [2015] NIQB 15

IN THE MATTER OF AN APPLICATION BY LC (A MINOR) BY HIS MOTHER AND NEXT FRIEND LT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTH EAST EDUCATION AND LIBRARY BOARD MADE ON JANUARY 2013 AND 29 OCTOBER 2013 AND CONTINUING

HORNER J

A. INTRODUCTION

[1] The applicant, LC, was born on 13 February 2008. He is aged seven years. His mother, LT, has acted as his next friend during these proceedings. The parents of the applicant have endeavoured to ensure that adequate provision has been made for the applicant's educational needs. Indeed, these proceedings relate to the "special educational needs" of the applicant arising out of a number of different medical conditions including epilepsy, severe speech and language disorder/dyspraxia, central hypotonia and Autism Spectrum Disorder ("the medical conditions").

[2] In January 2014, the applicant secured an agreed special educational needs package which included personal assistance from a dedicated classroom assistant. The Board had sought to argue that the court should not grant leave for any judicial review given that the applicant's complaints had been resolved. However, the court considered that there was at least one issue which was of general public importance relating to the approach which the Board should adopt when deciding whether to carry out an assessment of any child's special educational needs under Article 15 of the Education (Northern Ireland) Order 1996. There was also an additional ground which, it was claimed, gave rise to an issue which should also have more general consequences for other children with special educational

needs. The court declined to grant leave on any ground which might have involved the court in making an assessment of the applicant's special educational needs.

[3] The two issues argued before this court and on which leave was granted, were:

(i) Whether a declaration should be granted that the decision of the Board made in January 2013 not to make a statutory assessment in the applicant's case was unlawful, ultra vires and of no force or effect?

(ii) Whether a declaration that the Board's decision about classroom assistance unlawfully fettered its discretion and failed to give individualised consideration to the applicant's special educational needs?

[4] I should at this point record my thanks for the helpful written and oral submissions made by counsel on behalf of both the applicant and the Board. I should also note that the applicant is blessed to have had the full-hearted support of his mother and father in his quest for such assistance as may be required to help him overcome his medical conditions and allow him to fulfil his educational potential. His mother, in particular, could not have done more to look after his best interests. In truth she has fought his corner every step of the way. She realised that delay was inimical to the best interests of her child. She appreciated that in these cases there is an obvious risk that once any child, and especially one with special educational needs, falls behind that he will struggle to cope, never mind catch up with his fellow students. The Board had also recognised this and had provided strict time limits for it to make assessments and statements under the Code of Practice which it operates pursuant to the statute: see paragraphs 3.34-3.37.

B. BACKGROUND

[5] The applicant started at a mainstream primary school controlled by the Board in September 2012. He had a host of difficulties which he had to overcome to access the learning on offer due to his medical conditions. These included a severe communication disorder, reduced core and proximal stability which affected his balance and which caused him to fall easily, and he also had problems with his fine motor skills. During his time at the school he developed absence episodes consistent with epilepsy.

[6] On 30 October 2012 his parents requested a statutory assessment under Article 15 of the Education (NI) Order 1996 ("the 1996 Order"). In support of the request for a statutory assessment, the applicant's mother, LT, drafted a letter dated 30 October 2012. This is a most comprehensive and impressive document. In it LT sets out in detail the applicant's particular difficulties – these include, his inability to concentrate due to excessive tiredness, his speech and language problems, his behavioural and social issues including his inability to interact fully with his peers

and how that affects his ability to learn. Importantly she also drew attention to investigations which were to be carried out for his suspected epilepsy. The letter highlighted periods when the applicant seemed to go into a trance. This had been observed both by his parents and his school teacher. She advised the Board that Dr Macleod, the applicant's consultant paediatrician, had ordered further tests for suspected epilepsy. There are also reports available from Dr Doherty of the Community Health Office dealing with his Autism Spectrum Disorder and Dr McGuckin, educational psychologist, dealing with his educational difficulties.

[7] At that time under his Individual Educational Plan ("IEP") he had contact with his teacher or classroom assistant 1-2 times per day. His mother did not think this was sufficient to meet his needs. Both parents wanted his exact special educational needs assessed so that the plan devised might be tailored to his precise educational needs. This, they hoped, would unlock his potential and "prevent him falling behind as he and his peers moved through the key stages".

[8] In response the Board sought on 1 November 2012 information from the school's Principal, from Dr Doherty, from Ms Bradley, Superintendent III psychotherapist (paediatrics), Dr Macleod, consultant paediatrician, Mr McGuckin, educational psychologist, and the team leaders of MASTS (Multi-Agency Support Teams for Schools).

[9] On 7 December 2012 Dr Macleod had written to the applicant's GP and copied it to his parents in the following terms:

> "Whilst it is reassuring in a way that his EEG is normal, his mum continues to describe on-going episodes of what sounds clearly like absence episodes. In addition, he has been wetting himself. Given the complexity of LC's clinical picture and in light of the most recent NICE guidelines, diagnosis and management of paediatric epilepsy, I think it would be worthwhile if my colleague, Dr Nicola Bailie, were to look at LC."

On 30 October 2012 LT had stated:

> "Investigation in Epilepsy – Recently we have noticed LC experiencing staring/blank episodes. This has also been observed by his teacher, Mrs C. Mrs C explained that she had asked LC to put on his coat and he starred straight ahead – she then decided that perhaps he didn't understand the instructions so she simply said **LC, coat** and he continued to stare with a blank expression on his face – after sometime he did walk to the cloakroom but he continued to stare

> blankly ahead. Our most recent example was at a friend's birthday mid-September. Dr Macleod (consultant paediatrician) has ordered additional tests. (October 2012)."

[10] The Board says that, "it is required by statute to decide within a period of six weeks whether or not to make the assessment". It claims that it was unable to make a decision on whether or not to carry out a statutory assessment of the applicant because it had insufficient information to demonstrate whether the applicant had special educational needs "such that it was necessary or probably necessary that the Board should determine the special education provision which his needs called for." The Board's view was that those needs could be met "within the school environment with access to specialist support from the Board, if required, in accordance with stage 3 of the Department's Code of Practice on the Identification of Assessment of Special Educational Needs". The parents were advised of the refusal by letter dated 10 January 2013.

[11] This letter states that the "evidence presented indicated that LC's educational needs can be met from within the resources (including external specialist support) normally available in a mainstream school". It goes on to advise that:

> "Should further evidence be provided by the school that LC has not responded to the relevant and purposeful measures taken by the school and external specialists and that statutory assessment would appear to be appropriate, the Board may be willing to reconsider the matter".

[12] The parents immediately appealed the decision to the Special Educational Needs and Disability Tribunal ("SENDIST"). Following a meeting between Bernadette Dorrity, special educational advisor with the Board, the principal educational psychologist, and the statementing officer and the parents it was agreed to conduct a statutory assessment. Therefore the appeal did not need to proceed. It was claimed that the tipping point was the letter from Dr Macleod dated 7 December 2012 which has already been referred to and which the Board had not obtained a copy of until after their refusal of 10 January 2013. Thus the appeal was resolved by agreement and there was no hearing before SENDIST.

[13] The Board then commissioned further advice from various bodies, it carried out the statutory assessment and decided to make a statement of special educational needs. The proposed statement was issued by the Board on 26 June 2013. This was not acceptable to the parents. Following further representations from the parents and other experts, a second proposed statement was issued on 5 August 2013. There then followed further representations from the parents. This resulted in a final statement being issued by the Board on 23 September 2013.

[14] The parents considered that this statement was inadequate and it was appealed to SENDIST on the basis that the applicant required 1:1 classroom assistance. Further updated advice was received from Dr Bailie, consultant paediatrician, who had treated the applicant's epilepsy. She said on 21 October 2013:

> "For the time being I can fully support the family's need to know LC is safe in the school setting and achieving educational progress. I do not anticipate 1:1 assistance will be required beyond the short to medium term ..."

[15] Mrs Dorrity says that the Board spoke to CM, the SEN co-ordinator in the applicant's primary school who indicated that there already was a classroom assistant and that "provision short of full-time assistance would be adequate to meet the applicant's needs". The parents and the Board then agreed that the applicant should have 20 hours of one-to-one assistance from his own classroom assistant. This was based, the Board claims, on needs not resource allocation. The appeal to SENDIST was resolved by agreement on this basis. Further agreements have subsequently been reached between the Board and the parents. The court was told that at present the applicant enjoys the benefit of a classroom assistant on a one-to-one basis for some 20 hours per week. Consequently the parents are satisfied that the applicant's special educational needs are being properly looked after while he is at mainstream school. However, it has been a bruising experience for LT. Her motivation in continuing with this application for judicial review of the Board's decisions is, she claims, to ensure that no other parent has to go through what she and her husband went through, which she describes as being somewhat akin to a boxing contest. In effect, it is to make sure that the Board complies with its statutory duties towards vulnerable children such as the applicant. This is a laudable aim.

[16] It is important to recognise the limits of judicial review. It is not intended to be and cannot be a merits-based appeal. Judicial review is concerned primarily with whether a process is lawful. It proceeds on affidavits and the averments in those affidavits cannot be tested on cross-examination. It is singularly ill-suited to determining whether a child should have a special educational needs statement or whether the appropriate support offered in a statement meets that child's particular needs. There is a statutory scheme designed specifically to deal with such issues. Lying at its heart is the SENDIST. It is best placed to deal with such issues. It has the necessary expertise to test the evidence so as to enable it to reach a measured judgment. This court does not intend, if at all possible, to trespass on its domain.

[17] The case was made that the Board's decision was budget driven and that it had a policy to refuse statutory assessments in the hope that parents would not appeal. There is no doubt that budgets are tight in these days of austerity. Ms Dorrity has been frank and open about this. However she has

expressly stated that the Board's behaviour is not driven by budget considerations and that it does not refuse appeals in the hope that will discourage parents from seeking such assistance to which their child is lawfully entitled. I have no reason to doubt that the Board and its representatives have acted in what they believe is a fair and lawful way. The applicant has decided, wisely in my view, not to proceed with the claim that the Board operates a policy to refuse claims for assessments in the hope that such recalcitrance would put off prospective parents from seeking a statutory assessment. Further, the court is not equipped on the basis of one case and limited statistics to make any findings on such an issue. This court is impressed that the Board, through its servants and agents, has tried and continues to try to find out how the special educational needs of the children for whom it has a responsibility can have their educational needs best dealt with in a fair and lawful manner.

C. STATUTORY PROVISIONS AND CODE OF PRACTICE

[18] It is necessary to set out as briefly as possible the relevant statutory provisions and those paragraphs from the Code of Practice ("the Code") which provide the framework for this application.

(i) Article 3 defines the meaning of "special educational needs". It is straightforward. It states:

> 3. - (1) For the purposes of the Education Orders, a child has "special educational needs" **if he has a learning difficulty which calls for special educational provision to be made for him.**
>
> (2) For the purposes of this Part, subject to paragraph (3), 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 within sub-paragraph (a) or (b) when he is of compulsory school age.**
>
> (3) A child is not to be taken as having a learning difficulty solely because the language (or form of, the language) in which he is, or will be, taught is different from a language (or form of a language) which has at any time been spoken in his home.

(4) In the Education Orders, "special educational provision" means-

(a) in relation to a child who has attained the age of two years, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in ordinary schools, and
(b) in relation to a child under that age, educational provision of any kind.

(5) In the Education Orders, "special school" means a controlled or voluntary school which is specially organised to make special educational provision for pupils with special educational needs and is recognised by the Department as a special school.

(6) In this Part, "ordinary school" means a grant-aided school which is not a special school.

(7) In this Part, "child" includes any person who has not attained the age of nineteen years and is a registered pupil at a school.

(8) For the purposes of paragraph (7) a person who attains the age of nineteen years at any time during a school term at any school shall be deemed not to have attained that age until the day after the end of that school term.

(9) In this Part, "the Tribunal "has the meaning assigned to it by Article 22(1)."
[*emphasis added*]

(ii) Article 4 requires the Department to issue a Code giving practical guidance to, inter alia, the boards. It provides:

"4. - (1) The Department shall issue, and may from time to time amend, a code of practice giving practical guidance in respect of the discharge by boards and the Boards of Governors of grant-aided schools of their functions under this Part.

(2) It shall be the duty of-

(a) boards and Boards of Governors of grant-aided schools exercising functions under this Part, and
(b) any other person exercising any function for the purpose of the discharge by boards and Boards of Governors of grant-aided schools of functions under this Part,

to have regard to the provisions of the code.

(3) On any appeal, the Tribunal shall have regard to any provision of the code which appears to the Tribunal to be relevant to any question arising on the appeal.

(4) The Department shall publish the code as for the time being in force."

I will come back and look at the Code which has been produced in a little detail.

(iii) Article 13 deals with the duty of the Board to children with special educational needs who require special educational provisions. It provides:

"13. - (1) A board shall exercise its powers with a view to securing that, of the children for whom it is responsible, it identifies those to whom paragraph (2) applies.

(2) This paragraph applies to a child if-
(a) he has special educational needs, and
(b) it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for.

(3) For the purposes of this Part a board is responsible for a child if he is in the area of the board and-
(a) he is a registered pupil at a grant-aided school, or
(b) he has attained the age of two years, is not over compulsory school age and has been brought to the attention of the board as having, or probably having, special educational needs."

(iv) Article 15 sets out how the assessment of educational needs should take place. It states:

"15. - (1) Where a board is of the opinion that a child for whom it is responsible falls, or probably falls, within paragraph (2), it shall serve a notice on the child's parent informing him-

(a) that the board is considering whether to make an assessment of the child's educational needs,

(b) of the procedure to be followed in making the assessment,

(c) of the name of the officer of the board from whom further information may be obtained, and

(d) of the parent's right to make representations, and submit written evidence, to the board within such period (which shall not be less than twenty-nine days beginning with the date on which the notice is served) as may be specified in the notice.

(2) A child falls within this paragraph if-

(a) he has special educational needs, and

(b) it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for.

(3) Where-

(a) a board has served a notice under paragraph (1) and the period specified in the notice in accordance with paragraph (1)(d) has expired, and

(b) the board remains of the opinion, after taking into account any representations made and any evidence submitted to it in response to the notice, that the child falls, or probably falls, within paragraph (2),

the board shall make an assessment of his educational needs.

(4) Where a board decides to make an assessment under this Article, it shall give notice in writing to the child's parent of that decision and of the board's reasons for making it.

(5) Schedule 1 (which makes provision in relation to the making of assessments under this Article) shall have effect.

(6) Where, at any time after serving a notice under paragraph (1), a board decides not to assess the educational needs of the child concerned it shall give notice in writing to the child's parent of the board's decision and the reasons for making it."

(v) Article 16 deals with the Statement of Special Educational Needs. It states:

16. - (1) If, in the light of an assessment under Article 15 of any child's educational needs and of any representations made by the child's parent, it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for, the board shall make and maintain a statement of his special educational needs.

(2) The statement shall be in such form and contain such information as may be prescribed.

(3) In particular, the statement shall-

(a) give details of the board's assessment of the child's special educational needs, and
(b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by paragraph (4).

(4) The statement shall-
(a) specify the type of school or other institution which the board considers would be appropriate for the child,
(b) if the board is not required under Schedule 2 to specify the name of any grant-aided school in the statement, specify the name of any school or institution (whether in Northern Ireland or elsewhere) which it considers would be appropriate for the child and should be specified in the statement, and
(c) indicate any provision for the child for which it makes arrangements under Article 10(1)(b) otherwise than in a school or institution and which it considers should be indicated in the statement.

(4A) Paragraph (4)(b) does not require the name of a school or institution to be specified if the child's parent has made suitable arrangements for the special educational provision specified in the statement to be made for the child.

(5) Where a board maintains a statement under this Article-

(a) unless the child's parent has made suitable arrangements, the board-

(i) shall arrange that the special educational provision indicated in the statement is made for the child, and

(ii) may arrange that any non-educational provision indicated in the statement is made for him in such manner as it considers appropriate, and

(b) if the name of a grant-aided school is specified in the statement, the Board of Governors of the school shall admit the child to the school.

(6) Paragraph (5)(b) does not affect any power to suspend or expel from a school a pupil who is already a registered pupil there.

(7) Schedule 2 (which makes provision in relation to the making and maintenance of statements under this Article) shall have effect."

(vi) Article 17 deals with an appeal against a decision not to make a statement. This appeal is determined by SENDIST whose lay members have a special expertise in this particular area.

"17. - (1) If, after making an assessment under Article 15 of the educational needs of any child for whom no statement is maintained under Article 16, the board does not propose to make such a statement, it shall give notice in writing of its decision, of the reasons for making it, to the child's parent.

(2) In such a case, the child's parent-

(a) shall have the right to receive, on request, a copy of any advice given to the board on which the decision is based; and

(b) may appeal to the Tribunal against the decision.

(2A) A notice under paragraph (1) shall inform the parent of the right of appeal under paragraph (2) and contain such other information as may be prescribed.

(2B) Regulations may provide that where a board is under a duty under this Article to serve any notice, the duty must be performed within the prescribed period.

(3) On an appeal under this Article, the Tribunal may-

(a) dismiss the appeal,

(b) order the board to make and maintain such a statement, or

(c) remit the case to the board for it to reconsider whether, having regard to any observations made by the Tribunal, it is necessary for the board to determine the special educational provision which any learning difficulty the child may have calls for."

(vii) Article 18 deals with any appeals against the contents of a statement. It provides:

"18. - (1) The parent of a child for whom a board maintains a statement under Article 16 may appeal to the Tribunal-

(a) when the statement is first made,

(b) if an amendment is made to the statement, or

(c) if, after conducting an assessment under Article 15, the board determines not to amend the statement.

(1A) An appeal under this Article may be against any of the following-

(a) the description in the statement of the board's assessment of the child's special educational needs,

(b) the special educational provision specified in the statement (including the name of a school so specified),

(c) if no school is specified in the statement, that fact.

(2) Paragraph (1)(b) does not apply where the amendment is made in pursuance of-

(a) paragraph 11 (change of named school at request of parent) or 13(4)(b) (amendment ordered by Tribunal) of Schedule 2; or

(b) directions under paragraph 2 of Schedule 13 to the 1986 Order (revocation of school attendance order);

and paragraph (1)(c) does not apply to a determination made following the service of notice under paragraph 3 (amendment by board) of Schedule 2.

(3) On an appeal under this Article, the Tribunal may-

(a) dismiss the appeal,

(b) order the board to amend the statement, so far as it describes the board's assessment of the child's special educational needs or specifies the special educational provision, and make such other consequential amendments to the statement as the Tribunal thinks fit, or

(c) order the board to cease to maintain the statement.

(4) On an appeal under this Article the Tribunal shall not order the board to specify the name of any school in the statement (either in substitution for an existing name or in a case where no school is named) unless-

(a) the parent has expressed a preference for the school in pursuance of arrangements under paragraph 5 of Schedule 2, or

(b) in the proceedings the parent, the board or both have proposed the school.

(5) Before determining any appeal under this Article the Tribunal may, with the agreement of

the parties, correct any deficiency in the statement."

(viii) Article 18A deals with unopposed appeals. This is what happened in the instant case. In this case Article 18A provides that the appeal is to be treated as having been determined in favour of the appellant, here the parent when, it is unopposed.

(xv) Finally, Article 20 deals with the assessment of educational needs at the request of a child's parents. It states:

"20. - (1) Where-

(a) the parent of a child for whom a board is responsible asks the board to arrange for an assessment to be made in respect of the child under Article 15,

(b) such an assessment has not been made within the period of six months ending with the date on which the request is made, and

(c) it is necessary for the board to make an assessment under that Article,

the board shall comply with that request.

(2) Paragraph (1) applies whether or not the board is maintaining a statement under Article 16 for the child.

(3) If in any case where paragraph (1)(a) and (b) applies the board decides not to comply with the request-

(a) it shall notice in writing of that decision and of the reasons for making it to the parent of the child, and

(b) the parent may appeal to the Tribunal against the decision.

(3A) A notice under paragraph (3)(a) shall inform the parent of the right of appeal under paragraph (3)(b) and contain such other information as may be prescribed.

(4) On an appeal under paragraph (3) the Tribunal may-

(a) dismiss the appeal, or

(b) order the board to arrange for an assessment to be made in respect of the child under Article 15." [*Emphasis added*]

[19] Those are the statutory provisions which affect this judicial review. The Code of Practice emphasises the importance of the parents and the need for them to be involved in the process. Paragraph 2.21 states:

> "The relationship between the parents of a child with special educational needs and their child's school has a crucial bearing on the child's educational progress and the effectiveness of any school-based action."

Paragraph 3.14 goes on to say:

> "In some instances, a parental request for assessment may reflect dissatisfaction with action taken in the school-based stages. The Board must follow the same procedure, regardless of the background to the request, investigating evidence provided by the school and parents as to the child's learning difficulties and evidence about action taken by the school to meet those difficulties."

[20] The Code stresses the importance of the school seeking at all times to foster the active participation and involvement with parents. At paragraph 3.20 he states:

> "In considering whether a statutory assessment should be made, Boards should pay particular attention to evidence provided by school and parents about the child's learning difficulties, taking into account the action already taken by the school to overcome these. Decisions must be made in light of all the circumstances of each individual case, in consultation with parents, schools and where appropriate the child concerned."
>
> "3.21 The central question for Boards is 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. Boards will always wish to see evidence of the school's assessment of the child's learning difficulties; to obtain evidence of the child's academic attainment in the school; and to examine that evidence to understand why the child has achieved the levels shown. Beyond that, the evidence Boards should seek

> and the questions they should ask will vary according to the child's age and the nature of the learning difficulty."

Finally it is important to note that paragraph 3.13 requires the Board to "comply with a request from a parent to conduct a statutory assessment, unless one has already been made in the previous 6 months **or the Board concludes, having examined the available evidence, that one is not necessary**". [*Emphasis added*]

D. DISCUSSION

Issue 1

[21] The applicant through his Senior Counsel abandoned any claim that the Board had a policy of refusing outright to carry out any assessment of children with special educational needs and then giving in when the parents appealed to SENDIST. However, the applicant does say that the Board acted unlawfully, and even though this issue is past history so far as the applicant is concerned, there is a point of general public importance, namely how the Board should approach such applications from parents for statutory assessments.

[22] The Board in the first affidavit from Ms Dorrity set out in detail the approach the Board adopted towards such applications. She says at paragraph 31:

> "In the light of the short timescale within which the decision on a statutory assessment must be made, if the necessary evidence is not available, the Board will normally refuse to carry out statutory assessment. Where this occurs, the decision does not necessarily mean that the Board has made a considered and informed judgment about the child's needs, rather it is a reflection of the lack of evidence available at the time the decision must be made to suggest that a statement is necessary or probably necessary. Like this case, the evidence may indicate to the Board that the child's needs are capable of being addressed within the school, with specialist help from the Board, in accordance with stage 3 of the Code of Practice. In other cases, very little evidence is available at all. In many cases, these decisions by the Board are appealed to the SENDIST. The Tribunal's procedures require the Board to prepare a case statement setting out the basis for its decision. However, the absence of available evidence will inevitably impact upon the Board's ability to provide a substantive response to the appeal. The Board frequently finds itself left in the

> somewhat invidious position of having to choose either to defend its position without clear supporting evidence or agree to carry out the statutory assessment. It is the experience of the Board over many years that where it has chosen to defend the appeal in the absence of clear evidence, the outcome was that SENDIST simply directed the Board to carry out the assessment. Consequently, in recent years, the Board frequently takes a pragmatic approach and elects not to defend the appeal and agree to an assessment. It has been the experience of the Board that with the increasing number of appeals it was not an efficient use of resources to offer a substantive defence. When faced with this situation, the Board has simply opted in many cases to carry out assessments. This is not a blanket policy on the part of the Board to fail to assess unless a SENDIST appeal is lodged, rather it reflects the pragmatic response to the circumstances in which the Board finds itself."

[23] If SENDIST was acting unlawfully in its approach to cases where the parents had appealed the Board's refusal to make a statutory assessment, then the Board should have sought judicial review of SENDIST's unlawful approach rather than make itself a complicit party to such unlawfulness. The Board was unable to offer any explanation as to why it did not seek a judicial review of SENDIST if it concluded that SENDIST was not acting in accordance with its statutory duty.

[24] The Board is bound to take into account the representations of the parents: see Articles 15(1) and 16(1). In this case the Board maintains that the critical evidence which tipped the balance in favour of carrying out an assessment was the report from Dr Macleod. This is dated 7 December 2012. No explanation has been provided as to why the Board was unable to obtain this information before it refused to carry out an assessment. But in any event Dr Macleod in his report did not tell the Board anything that the applicant's mother had not set out in detail in her submissions of 30 October 2012. The paragraph of the submission of the mother entitled "Investigations into Epilepsy" is a rather fuller account than that given by Dr Macleod. The Board was duty bound to take into account those representations, unless the Board had some good reason to ignore them. No good reason has been advanced. This was not a case in which a statutory assessment (or even a request) had been made within the previous 6 months. Consequently the Board on the basis of its own Code was duty bound to examine the available evidence in order to determine whether an assessment was necessary. The Code emphasises the importance of the parents' input and of the parents' involvement in the process. It seems to this court that in this case the Board paid lip service to the parental involvement and that the information provided by the applicant's mother was ignored. It is important to stress that the Board has to take into account all of the

information available to it in deciding whether or not to make a statutory assessment. The Board is not entitled to reject or ignore the representations made by parents unless there is good reason to do so. It may be that SENDIST does order the Board to carry out statutory assessments in this type of case because the Board has failed to pay adequate attention to the representations of the parents and thus to the all the available evidence. Indeed, very often it is the parents who are best placed to make representations on behalf of their offspring as they are the ones who will spend most time with the child and they are the ones who will observe the child most closely. To ignore their contribution as not worthy of consideration or to attach a little importance to it, is to do them a grave disservice. In this case the Board, by ignoring the representations of the applicant's parents, failed to carry out their statutory duty and thus acted unlawfully. It is important to stress that the Board, to comply with its statutory duty in the future, must act on all the evidence it has available to it at the time and this should include any representations made by the parents.

Issue 2

[25] This issue relates to the Board's failure to offer a personal classroom assistant for the applicant's personal use for a minimum number of hours. This has now been resolved by agreement as is set out earlier in this judgment. When leave was granted, the court made it clear that the court was not in a position to make any assessment in respect of this child's special educational needs. Having now had the benefit of detailed argument, the court declines to make any finding on this issue. It became clear during the course of argument, that there was no point of general public importance involved. There was nothing to suggest the approach of the Board to this assessment was unlawful except insofar as it was suggested that the Board had acted wholly unreasonably in the light of all the evidence. In any event the application in respect of this issue is now academic and any decision of this court can have no practical effect or serve no useful purpose between the parties. In R v Secretary of State for the Home Department, ex parte Salem (1999) 2 All ER 42 Lord Slynn said:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or anticipated so that the issue will most likely need to be resolved in the near future."

[26] In A Matter of an Application by Daniel Hughes (A Minor) (2006) NIQB 27 Deeny J was asked to carry out a judicial review which attacked the final statement of special educational needs made on 7 June 2005 on the grounds that the statement did not set out sufficiently specific detailed and quantified occupational therapy, an application which it might be thought is similar to the present one. He said:

> "I am not persuaded in any way that this is a matter in which I should grant leave to bring judicial review proceedings. Firstly it seems to me very much a matter that can be considered by the Special Educational Needs Tribunal. It has the necessary expertise, information and opportunities for examination to reach a conclusion about that. It seems to me that it would be quite wrong of the court to intervene in that matter where an alternative remedy is available. See Regina (Pepushi) v Crown Prosecution Service 2004 EWHC 798 (Admin) and also Regina v Special Educational Needs Tribunal ex parte F 1996 ELR 213 where Popplewell J held that it was only in exceptional circumstances that judicial review would be granted where a statutory right of appeal existed. I respectfully agree with that view which finds repeated echoes in the decisions of the court."

[27] I also note the comments of Kerr J in Re Nicholson's Application (2003) NIQB 30 where he said:

> "Generally, it will be necessary to demonstrate that such a ruling (on an academic issue) would not require a detailed consideration of facts; it should also be shown that a large number of cases are likely to arise (or already exist) on which guidance can be given; that there is at least a substantial possibility that the decision-maker had acted unlawfully and that such guidance as the court can give is likely to prevent the decision maker from acting in an unlawful manner."

[28] Having heard arguments from both sides I conclude that:

(i) There is no point of statutory construction arising in this issue.

(ii) A decision on this issue will not provide any help to other children with special educational needs whose cases will be based on their own particular circumstances.

(iii) Insofar as this case gives rise to public interest, it does so only on the particular facts which relate to LC, a minor.

(iv) Any dispute is academic, the parents and the Board having reached an agreement about the level of personal support to be provided to the applicant by a classroom assistant.

E. CONCLUSION

[29] On Issue 1, I grant the necessary declaration. On Issue 2 the court declines any relief given that the issue is academic and the circumstances of the application are such that it will not assist in the resolution of any other cases, which will fall to be considered on their own particular facts.