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Assembly

## Research and Information Service Research Paper

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# SEN mediation, tribunals and the transfer of rights to children with SEN

**NIAR 179-15**

This Research Paper considers appeals and mediation in relation to special educational needs (SEN), and explores the transfer of rights from parents to children, including issues around mental capacity.

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## Key Points

- The Dispute Avoidance and Resolution Service (DARS) aims to provide an informal forum for resolving disputes between Boards of Governors and parents in relation to SEN across the Education Authority (EA) regions;
- It dealt with 914 cases between 2006 and 2015, with a quarter of these relating to issues around statutory assessment;
- Mediation is generally well-regarded by users, although concerns include the time taken, perceptions of a lack of independence, a lack of enforcement and that it is more difficult to reach a resolution where parents are forced into participation;
- The Special Educational Needs and Disability Tribunal (SENDIST) considers appeals where parents cannot reach agreement informally;
- There has been a general increase in demand for both DARS and SENDIST over the past nine years;
- Over half (55%) of SENDIST appeals were against a refusal to initiate an assessment; no appeals over this period related to disability discrimination;
- There are issues around the ability of parents and guardians to appeal to SENDIST, with limitations in the availability of free representation and many users having little awareness of their rights and the legislation;
- There are perceptions of inequality between the EA and parents at SENDIST hearings, with the Authority having access to legal expertise, professional witnesses and being experienced in SENDIST cases;
- Involving young people with SEN in decisions that affect them can provide valuable insights and promote ownership of decisions; however, such participation is often limited, symbolic or tokenistic;
- No single organisation in NI is responsible for coordinating advocacy services, and the availability of such services for children with SEN varies;
- Mental capacity - the capacity to make decisions - can vary according to the complexity of the decision and may be temporary or permanent;
- Mental capacity is a complex concept in relation to children as they develop capacity at different stages; evidence suggests that people with learning disabilities are often assumed to lack capacity;
- The Mental Capacity Bill applies to decisions involving the care, treatment or personal welfare of those aged 16 and over; and
- There are mixed views in relation to whether children under 16 should be included, with some suggesting that older children should have a presumption of capacity.



## Executive Summary

The Special Educational Needs and Disability (SEND) Bill makes a number of changes in relation to special educational needs (SEN) appeals, and transfers some rights from parents to children over compulsory school age. This paper considers appeals and mediation in relation to SEN, and explores the transfer of rights from parents to children, including issues around mental capacity.

### **The Dispute Avoidance and Resolution Service (DARS)**

DARS aims to provide an informal forum for resolving disputes between Boards of Governors and parents in relation to SEN, and operates across the Education Authority (EA) regions (formerly the Education and Library Boards - ELBs). It dealt with 914 cases between 2006 and 2015, with a quarter of these relating to issues around statutory assessment.

An evaluation of DARS in 2008 found it to be a credible service, although it highlighted concerns around a perceived lack of independence from the ELBs. Indeed, four of the five DARS services are situated at EA regional headquarters. Between 2008 and 2013 57% of cases were resolved, although in almost a quarter of cases contact with DARS ceased without resolution.

### **Mediation**

While mediation is generally well-regarded by users, there are concerns about its use in education including protecting the child's interests, the time taken, perceptions around a lack of independence and a perceived reluctance among authorities to act on findings. A key factor in the success of mediation is a willingness among parties to engage. Indeed, where parents are forced into mediation it is more difficult to reach a resolution.

### **Special Educational Needs and Disability Tribunal (SENDIST)**

The independent SENDIST considers appeals where parents have not been able to reach agreement informally. Since 2006 there has been a general upward trend in the number of cases dealt with by both DARS and SENDIST, with the Tribunal hearing 121 cases in 2014/15 (DARS dealt with 136).

Over the past ten years over half of all SENDIST appeals (55% or 385 cases) were against an ELB refusal to initiate a statutory assessment, with a further 30% (210 cases) against the contents of a statement. Over this period SENDIST did not hear any appeals in relation to disability discrimination.

### **Capacity of SENDIST users, support and representation**

Research suggests that some users of SENDIST have limited awareness of their legal rights or of the relevant legislation, and that those who receive advice are more likely to

understand the relevant issues. Many SENDIST appellants were unaware that advice existed, did not know where to go for it or felt that it was too expensive.

There is often a sense of inequality between parents appealing to SENDIST and the Authority, with many users perceiving the Authority to be a “*well-oiled machine*”: versed in the Tribunal’s procedures and with access to legal expertise and professional witnesses.

While limited legal aid is available to those appealing SEN decisions, this does not cover representation. Where those under 16 request legal aid their parent or guardian must consult a solicitor on their behalf, and their parents’ income is taken into account.

Stakeholders have called for tribunal users to have access to independent advice and representation, suggesting that those with little confidence in their literacy and oral skills would not be able to pursue an appeal without it. Indeed, the literature suggests that SENDIST users tend to be articulate and from more advantaged backgrounds.

### **Transfer of rights to children and young people**

The SEND Bill gives children with SEN who are over compulsory school age rights previously held by parents, including the right to request an assessment and to appeal to the Tribunal.

The evidence suggests that involving young people can promote ownership of decisions and provide valuable insights. This right could be particularly important for children whose parents do not wish to pursue an appeal, or for looked after children who have to rely on foster carers or key workers to do so.

### **Supporting participation**

There can be challenges relating to a child’s capacity to engage in decision-making, and the evidence suggests that involving children with SEN in decisions is often limited, symbolic or tokenistic. The Department’s Code of Practice states that schools should consider how best to involve pupils with SEN in decision-making.

Advocacy broadly describes making arrangements to support people to express their views. In Northern Ireland no single organisation has a duty to coordinate and provide advocacy services regionally, and there is variation in the availability of such services for children with complex needs and disabilities.

### **Mental capacity**

Mental capacity relates to a person’s capacity to make decisions. Such capacity can be affected on a temporary or permanent basis, and can change according to the complexity of the decision to be made. This concept is very complex in relation to children as they develop capacity at different stages.

Evidence indicates that there are people with a range of disabilities who may be assessed as incapable of making certain decisions if the appropriate support is not

provided. It suggests people with learning disabilities are frequently assumed to lack capacity, and that professionals can lack confidence in making such assessments.

### **The Mental Capacity Bill**

The DHSSPS and the DoJ published the civil provisions of the draft Mental Capacity Bill in May 2014. The Bill applies to decisions involving the care, treatment or personal welfare of those aged 16 and over who do not have the capacity to make decisions. It presumes that a person has capacity, emphasising the importance of providing support and help before deciding that this is not the case.

In the consultation there were mixed views in regard to whether the Bill should apply to children under 16. Some believed that older children should have a presumption of capacity and that the Bill could afford greater protections to them, while others thought that the provisions within the Bill were not appropriate for children.

### **Conclusion**

This research paper has highlighted a number of issues around the accessibility of SENDIST and in terms of the complexity surrounding issues of mental capacity in relation to children with SEN. It has highlighted a range of areas that could be given further consideration, including:

- The proportion of DARS cases where contact ceased and the reasons for this;
- Whether the mediation service proposed by the Bill will include enforcement;
- The volume of appeals at both DARS and SENDIST relating to statutory assessment and how, if at all, the new SEN proposals will impact on this;
- The proposed duty for parents to speak to a mediation adviser, particularly whether the element of compulsion is likely to influence mediation outcomes;
- The perceived inequality between parents and the EA in SENDIST appeals, and how, if at all, the new proposals will mitigate against this;
- The perception that users of SENDIST tend to be more advantaged;
- The limited availability of legal support and representation for SENDIST, including the implications for children in exercising their new rights;
- The adequacy of advocacy provision, particularly in light of the rise in appeals;
- The key importance of the support provided to enable children to exercise their new rights and when the regulations regarding this will be available for scrutiny;
- Whether the SEND Bill regulations will include a presumption of capacity; and
- Whether the proposed DHSSPS code of practice for assessing whether a person aged 16 and over has capacity will link to the SEND Bill regulations.





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## 1 Introduction

The Special Educational Needs and Disability Bill aims to give effect to legislative changes for the revised special educational needs (SEN) and inclusion framework: further information can be found in [Paper 38/15: Special Educational Needs and Disability \(SEND\) Bill](#). This research paper considers appeals and mediation in relation to SEN, and explores the transfer of rights from parents to children, including issues around mental capacity.

## 2 Appeals and mediation in the SEND Bill

The Special Educational Needs and Disability (SEND) Bill makes a number of changes in relation to SEN appeals. The Bill:

- Introduces a new right of appeal to the Tribunal where the Authority decides not to make any changes to a statement following annual review;
- Provides a new right of appeal to the Tribunal for parents of children with SEN under the age of two in relation to a) a decision not to make a statement or b) the assessment or provision detailed in the statement;
- Requires the Authority to make arrangements for an independent mediation service for those appealing to the Tribunal;
- Places a new duty on those seeking an appeal to first seek and obtain independent advice and information about pursuing mediation;
- Provides the Department with powers to make subordinate legislation on a range of matters relating to the mediation service;
- Gives children with SEN who are over compulsory school age rights previously exercisable by parents, including the right to appeal and to request a statutory assessment; and
- Allows the Department to make regulations for a pilot scheme to enable children within the compulsory school age to appeal to the Tribunal.

## 3 The Dispute Avoidance and Resolution Service (DARS)

Existing legislation<sup>1</sup> provides for the appointment of “independent persons” by the Education Authority (EA) to facilitate the avoidance or resolution of disagreements. The DARS is an independent and confidential service operating across the EA regions (formerly the Education and Library Boards – ELBs) aiming to provide an informal

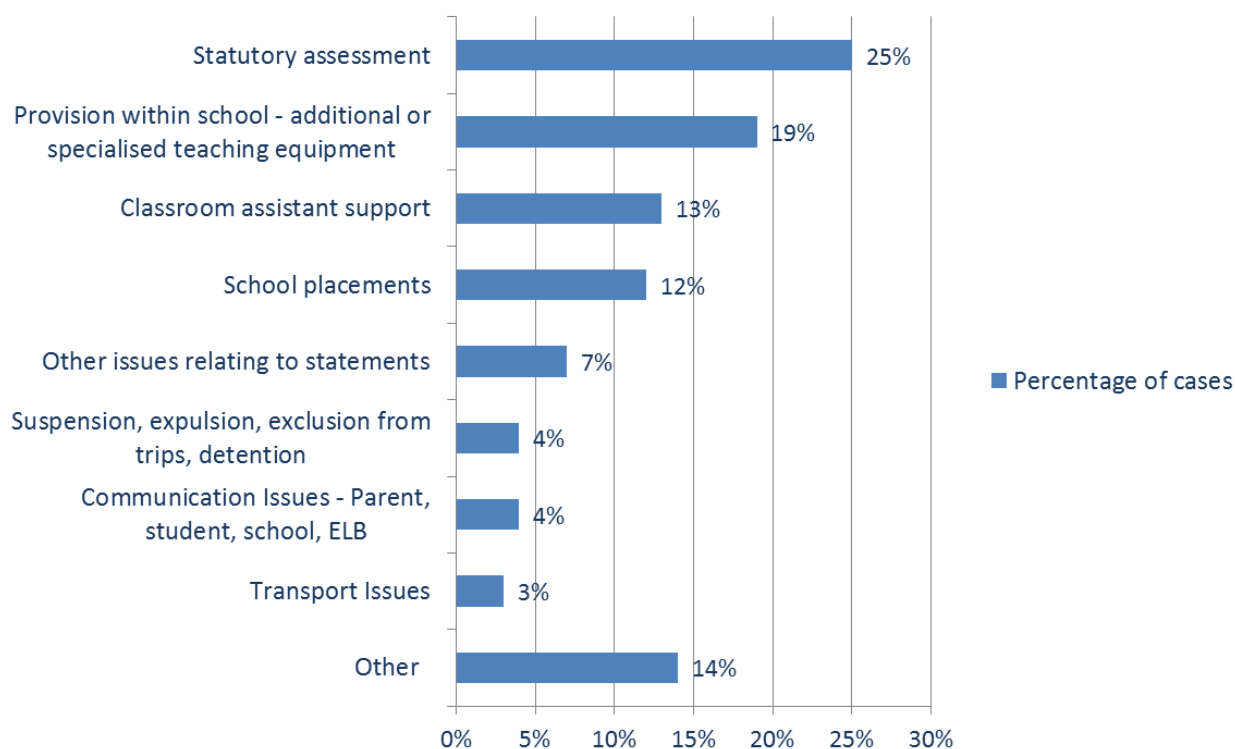
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<sup>1</sup> Article 21B of the Education (Northern Ireland) Order 1996, as amended by the Special Educational Needs and Disability (Northern Ireland) Order 2005

forum for resolving disputes between Boards of Governors or the EA and parents in relation to SEN.<sup>2</sup>

In the period between September 2006 and February 2015 the DARS dealt with 914 cases. Figure 1 illustrates the types of cases dealt with over this nine year period, showing that cases relating to statutory assessment were the most common.<sup>3</sup>

**Figure 1: DARS cases by type between September 2006 and February 2015**



Other cases heard by the DARS include those relating to educational psychology issues, the management of challenging behaviour, bullying issues and adaptations to the physical environment.<sup>4</sup>

Departmental guidance notes that there may be instances where recourse to the DARS would not be appropriate, for example where:<sup>5</sup>

- Either side does not wish to engage;
- Matters of policy are at stake;
- The key issue is one that would set a precedent on which the Authority is not willing to concede without direction from the Special Educational Needs and Disability Tribunal (SENDIST); and

<sup>2</sup> Lundy, L., McKeever, G., Treacy, V. (2015) "Education Rights" *Human Rights in Northern Ireland: The CAJ Handbook* pp. 483-516 Oxford: Hart Publishing

<sup>3</sup> Information provided by the Department of Education, May 2015

<sup>4</sup> Information provided by the Department of Education, May 2015

<sup>5</sup> Department of Education (2005) *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

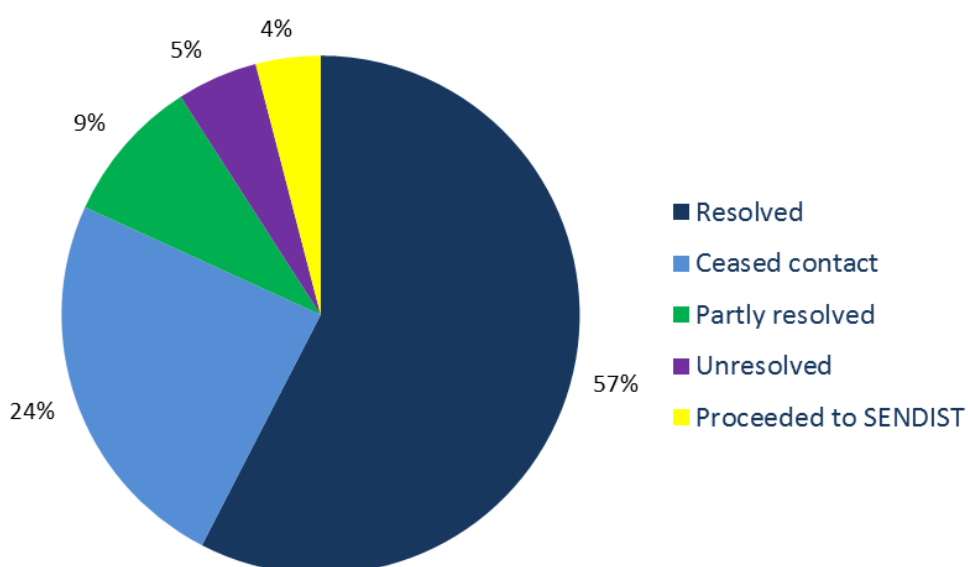
- There is a substantial change in the relationship between parents and the Authority or school.

### Outcomes

An evaluation of the DARS in 2008 found that it provided a functional and credible resolution service, resolving the majority of cases. It noted that a minority of cases are unresolved, often due to an inability or lack of willingness to compromise.<sup>6</sup>

An analysis conducted for this paper of the available data (from 2008 to 2013) shows that 57% of cases at the DARS over this period were resolved. However, in almost a quarter of cases (24%), contact with the DARS ceased without resolution. Only a small proportion of cases (4%) proceeded to the SENDIST, as outlined in Figure 2.<sup>7</sup>

**Figure 2: Outcome of DARS cases between September 2008 and August 2013**



### Concerns

The ETI report recommended that the DARS needed to further develop its sense of independence and objectivity, highlighting a perception that it is an ELB service.<sup>8</sup>

Indeed, of the five DARS services, four are located at the respective EA regional headquarters, while the Western Region's service is operated at the North West Teachers' Centre (a Curriculum Advisory Support Services – CASS centre). The Department advises that the new mediation service proposed by the SEND Bill should not be hosted on EA premises.<sup>9</sup>

<sup>6</sup> Education and Training Inspectorate (2008) *Report of a survey on the Dispute and Resolution Service (DARS)* Bangor: ETI

<sup>7</sup> Information provided by the Department of Education, May 2015

<sup>8</sup> Education and Training Inspectorate (2008) *Report of a survey on the Dispute and Resolution Service (DARS)* Bangor: ETI

<sup>9</sup> Information provided by the Department of Education 2015

Research suggests that those appealing to the SENDIST frequently did not use the DARS, even though they “*would have done anything*” to avoid a tribunal hearing. The reasons identified for this include:<sup>10</sup>

- A perceived lack of independence from the ELBs;
- A perception that DARS would not be able to obtain rights or provision;
- ELBs were viewed as inflexible; and
- A perception that ELBs may compel parents to SENDIST in the hope the case is dropped.

## 4 Mediation

Wider research suggests that mediation tends to be well regarded by users, although there is limited evidence about its use in the public law sphere. Concerns about its use in education include adequately protecting the child’s interests and whether it is likely to increase or decrease the inequalities between those involved in disputes.<sup>11</sup>

Research in England and Scotland in 2009 found that mediation was being used less than had been expected in relation to SEN, and that it had lower levels of satisfaction in comparison to tribunals. Indeed, parents were more likely to appeal to a tribunal than to use mediation, believing that it offered a better chance of achieving their desired outcome.<sup>12</sup> Issues identified included reluctance on the part of local authorities to act on findings.<sup>13</sup>

### Perceptions

Respondents to the Department of Justice’s 2013 consultation on the future administration and structure of tribunals in Northern Ireland supported the use of alternative dispute resolution procedures in relation to tribunals, suggesting that:<sup>14</sup>

- Such procedures could reduce the number of tribunal appeals;
- A less formal arena is best for users; and
- Alternative procedures could reduce processing time and costs.

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<sup>10</sup> McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

<sup>11</sup> Harris, N., Smith, E. (2009) “Resolving disputes about special educational needs and provision in England” *Education Law Journal* Vol. 10 No. 2 pp. 113-132

<sup>12</sup> Riddell, R., Stead, J., Weedon, E., Wright, K. (2010) *Dispute Resolution and Avoidance in Special and Additional Support Needs in England and Scotland* Edinburgh: Centre for Research in Education Inclusion and Diversity

<sup>13</sup> Weedon, E., Riddell, S. (2009) “Additional support needs and approaches to dispute resolution: the perspectives of Scottish parents” *Scottish Educational Review* Vol. 41, No. 2 pp. 62-80

<sup>14</sup> Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

However, some respondents highlighted potential challenges, particularly that alternative dispute resolution could be time-consuming and costly and that it may not be suitable for all cases. This is likely to be particularly pertinent in children's cases, due to the potential consequences where timely intervention is not provided.<sup>15</sup>

The literature also indicates that mediation can be daunting for parents who may perceive that the service is not wholly independent. Other potential issues include a perceived lack of expertise and legal knowledge among mediators.<sup>16</sup>

### **Influence on outcomes**

Many agree that a key factor in successful mediation relates to the willingness of parties to engage, and the evidence suggests that it is more difficult to reach a resolution where parents are forced into mediation.<sup>1718</sup> This was found to be the case with DARS where a key factor in the resolution of cases was the willingness of all parties to engage with the DARS.<sup>19</sup>

The literature indicates that it is difficult to predict the other factors that influence settlement in mediation, although they may include personalities, depth of grievance, degree of conflict and willingness to compromise or negotiate.<sup>20</sup>

## **5 Special Educational Needs and Disability Tribunal (SENDIST)**

Where parents cannot reach agreement informally the independent SENDIST considers parents' appeals against decisions. It also deals with claims of disability discrimination in relation to children at school.<sup>21</sup> It has dealt with 695 cases over the past ten years.<sup>22</sup>

Figure 3 provides an overview of the number of cases heard by the DARS and the SENDIST since 2006. It shows that there has been a general upward trend (with some troughs) in the number of cases dealt with by each body.<sup>23</sup>

<sup>15</sup> Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

<sup>16</sup> Harris, N., Smith, E. (2009) "Resolving disputes about special educational needs and provision in England" *Education Law Journal* Vol. 10 No. 2 pp. 113-132

<sup>17</sup> Harris, N. (2007) *Education, Law and Diversity* Portland: Hart Publishing

<sup>18</sup> Genn, H. (2012) "What is Civil Justice For? Reform, ADR, and Access to Justice" *Yale Journal of Law and the Humanities* Vol. 24, Iss. 1, Art. 18, pp. 397-417 Yale Law School Legal Scholarship Repository

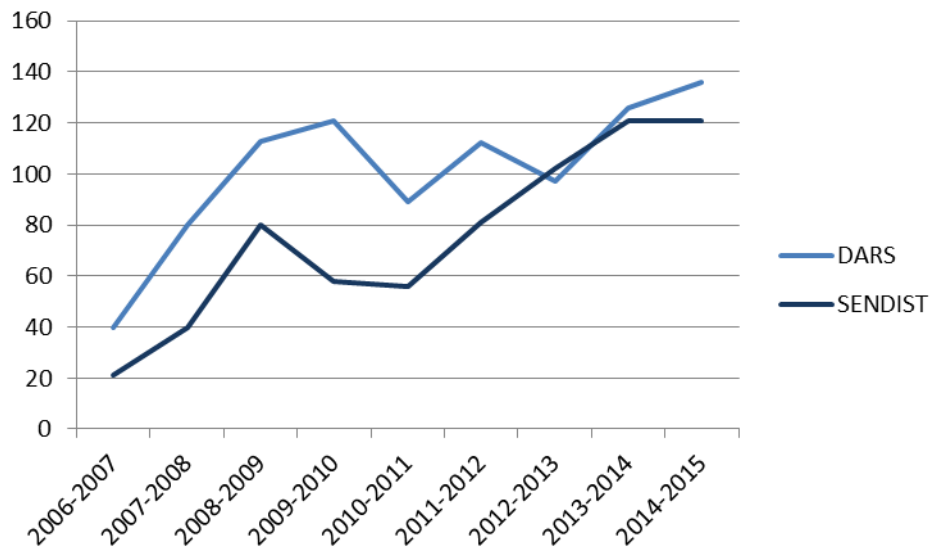
<sup>19</sup> Education and Training Inspectorate (2008) *Report of a survey on the Dispute and Resolution Service (DARS)* Bangor: ETI

<sup>20</sup> Genn, H. (2012) "What is Civil Justice For? Reform, ADR, and Access to Justice" *Yale Journal of Law and the Humanities* Vol. 24, Iss. 1, Art. 18, pp. 397-417 Yale Law School Legal Scholarship Repository

<sup>21</sup> Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

<sup>22</sup> Information provided by the Department of Education, May 2015

<sup>23</sup> Information provided by the Department of Education, May 2015

**Figure 3: Number of cases at DARS and SENDIST since 2006**

### Role of the SENDIST

The SENDIST is an independent tribunal that deals with appeal cases where a parent or guardian disagrees with the EA. Appeals can be made on the following matters:<sup>24</sup>

- Where the EA has decided not to assess a child's special educational needs;
- Where the EA has carried out an assessment but did not make a statement;
- Where applicants wish to appeal the educational contents of the statement;
- Where an EA repeals a statement or decides not to amend it following reassessment; or
- In certain circumstances where the EA decides not to reassess a child, or turns down a request to have a child placed in a different school.

Appeals cannot be made against the manner in which an assessment is carried out; the length of time taken to complete an assessment; against the way a school or the EA arranges provision; the level of funding provided or against the non-educational aspects of a statement (e.g. transport). An appeal must be made within two months of receiving the decision from the EA.<sup>25</sup>

<sup>24</sup> Northern Ireland Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

<sup>25</sup> Northern Ireland Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>



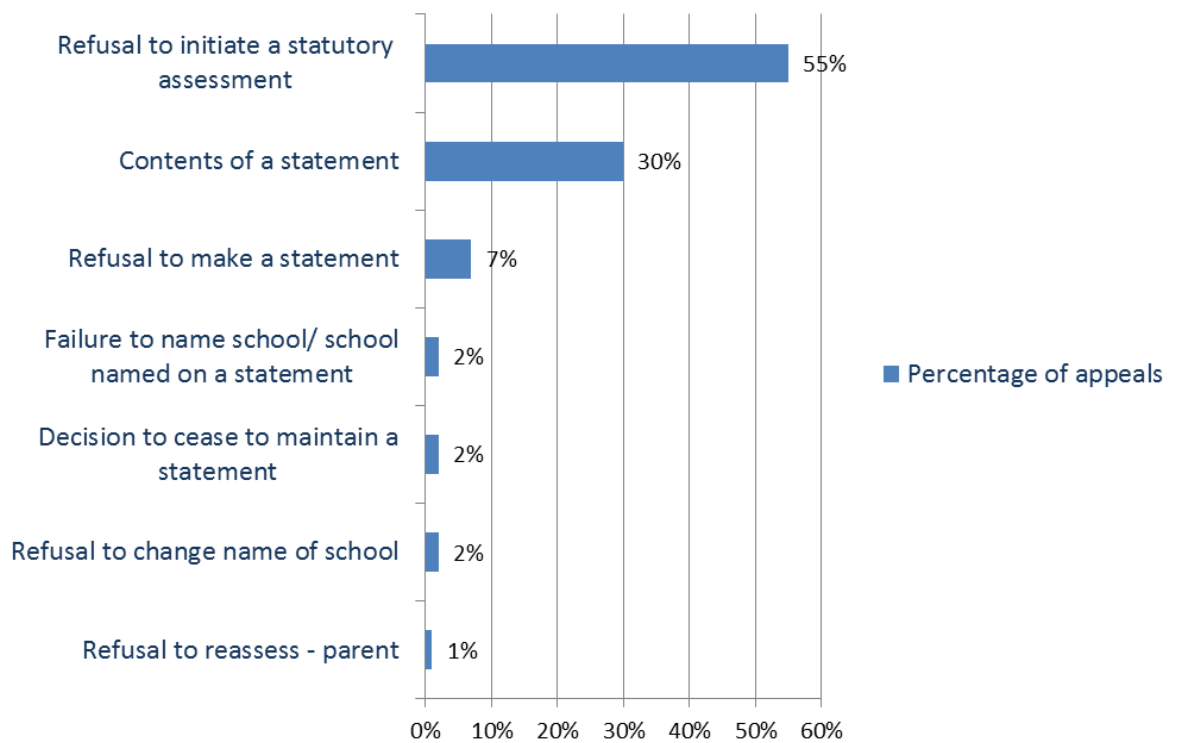
**Figure 4: Types of appeals to the SENDIST between 2005/06 and 2014/15<sup>26</sup>**

Figure 4 shows that over the past ten years appeals against the Authority's refusal to initiate a statutory assessment made up over half of all cases (55% or 385 cases). Parents or guardians made 210 appeals (30%) against the contents of a statement.<sup>27</sup>

Over this period there have been no appeals in relation to disability discrimination. In the past five years a total of six SENDIST appeals proceeded to judicial review at the High Court.<sup>28</sup>

### **SENDIST panel**

SENDIST panels consist of three members. The chair is a lawyer and the other two members will have experience of special education needs and/ or public administration. All members are required to be impartial and decide the case on the basis of the legislation, the documents before them and any oral evidence given at the hearing.<sup>29</sup>

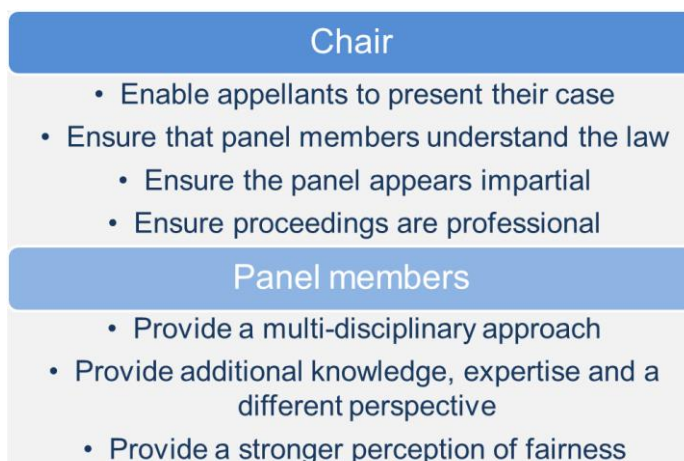
<sup>26</sup> Information provided by the Department of Education, May 2015

<sup>27</sup> Information provided by the Department of Education, May 2015

<sup>28</sup> Information provided by the Department of Education, May 2015

<sup>29</sup> Northern Ireland Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

**Figure 5: Perceived role of the Chair and panel members at tribunal hearings<sup>30</sup>**



**Experiences of the SENDIST**

Research published in 2010 explored the experiences of tribunal users in Belfast, including those appealing to the SENDIST. Figure 6 provides an overview of the findings.<sup>31</sup>

**Figure 6: Experiences of SENDIST users**

Stage	Experiences
Pre-hearing	<ul style="list-style-type: none"> <li>• Preparing a submission for the tribunal was challenging</li> <li>• Most were anxious and stressed, mainly due to a lack of familiarity with tribunal procedure;</li> <li>• Parties do not typically meet prior to the tribunal hearing (although they have the opportunity to do so) - this may contribute to a perception that the hearing is a “fight” between users and the Authority</li> </ul>
Hearing	<ul style="list-style-type: none"> <li>• Mixed views, with many finding it more formal than anticipated</li> <li>• Representatives believed that users were more likely to accept the outcome where they understood and felt part of the process</li> </ul>
Delays in obtaining a hearing	<ul style="list-style-type: none"> <li>• Problematic and distressing to families</li> <li>• Can prove costly where users must obtain new reports where evidence gathered prior to the hearing is out of date</li> </ul>

<sup>30</sup> Adapted from McKeever, G., Thompson, B. (2010) Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland Belfast: Law Centre NI

<sup>31</sup> McKeever, G., Thompson, B. (2010) Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland Belfast: Law Centre NI

## Proposed reforms to the SENDIST

The Department of Justice has proposed a number of changes to the existing tribunal system which it describes as “complex and fragmented.” These include merging more than ten tribunals, including the SENDIST, into a new “Appeal Tribunal” - an integrated structure with common practices and procedures.<sup>32</sup>

The proposals include deploying the Tribunal’s legal staff as mediators in order to deliver enhanced earlier dispute resolution.<sup>33</sup> Respondents to the consultation highlighted mixed views on this proposal, with some suggesting that it could have a negative impact on the perceived independence of the tribunal.<sup>34</sup>

## 6 Capacity of tribunal users and support

Research has highlighted a lack of awareness among some SENDIST users of their legal rights or of the relevant legislation. Compounding these issues is a perceived lack of communication between schools, the EA and parents, and the provision of inaccurate information to parents in some cases.<sup>35</sup>

Indeed, tribunal users often do not understand the legal element of the issues they are contesting, which can have implications for their understanding of the evidence they need to present. Users who had access to advice and support were more likely to understand the relevant legal issues.<sup>36</sup>

Many SENDIST appellants were unaware that advice existed, did not know where to go to receive advice or felt that legal advice was too expensive. Of those that sought advice, the quality was variable, particularly where advisers were inexperienced or unfamiliar with the legal issues or did not understand what had to be established at the tribunal.<sup>37</sup>

A report published by the Law Centre (NI) in 2010 recommended that tribunal users should have access to “*independent, good quality advice, support and representation.*”<sup>38</sup> Respondents to the recent Department of Justice consultation

<sup>32</sup> Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document* Belfast: Department of Justice

<sup>33</sup> Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document* Belfast: Department of Justice

<sup>34</sup> Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

<sup>35</sup> McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

<sup>36</sup> McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

<sup>37</sup> McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

<sup>38</sup> McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

supported this view, highlighting the importance of pre-hearing advice and representation for appellants to tribunals in enabling them to access the system.<sup>39</sup>

### Legal advice and assistance

The Green Form legal aid scheme is available to those appealing decisions regarding SEN assessment and provision.<sup>40</sup> This scheme provides limited legal assistance (typically covering two hours of a solicitor's work) to those on a low income; this is means tested and may be provided for free or for a small contribution.<sup>41</sup>

It covers matters such as writing letters, negotiating, information on evidence that might assist the case (such as a medical report) and preparing a written case for a tribunal. It does not include representation at the tribunal. It may cover the costs of mediation.<sup>42</sup>

Research has considered whether providing advice in advance of tribunal hearings would avoid the need for tribunal representation. In general, the perception was that pre-hearing advice would be "better than nothing," with the main difficulties with relying only on such advice including:<sup>43</sup>

- Cases may be more complex than anticipated;
- Advice given may not be accepted by tribunal which may proceed with a hearing in cases where a representative would have sought an adjournment; and
- Advice is not a substitute for representation.

### Perceptions of inequality

The research identifies a perception among tribunal users that the opposing party tends to be much more knowledgeable of the legislation and experienced in the tribunal processes, perceiving the Authority in SENDIST proceedings as a "*well-oiled machine*." This led to a feeling of inequality between appellants and the Authority.<sup>44</sup>

The Children's Law Centre has suggested that the lack of free legal representation for applicants to the SENDIST is problematic, highlighting the legal expertise and access to senior professional witnesses available to the EA during SENDIST hearings. It refers

<sup>39</sup> Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

<sup>40</sup> Department of Justice (2014) *Consultation Document: Scope of Legal Aid* Belfast: DoJ

<sup>41</sup> Citizens Advice *Help with legal costs* [online] Available at:

[http://www.adviceguide.org.uk/nireland/law\\_ni/law\\_legal\\_system\\_ni/law\\_taking\\_legal\\_action\\_e/help\\_with\\_legal\\_costs\\_nireland.htm#h\\_legal\\_advice\\_and\\_assistance\\_the\\_green\\_form\\_scheme](http://www.adviceguide.org.uk/nireland/law_ni/law_legal_system_ni/law_taking_legal_action_e/help_with_legal_costs_nireland.htm#h_legal_advice_and_assistance_the_green_form_scheme)

<sup>42</sup> Citizens Advice *Help with legal costs* [online] Available at:

[http://www.adviceguide.org.uk/nireland/law\\_ni/law\\_legal\\_system\\_ni/law\\_taking\\_legal\\_action\\_e/help\\_with\\_legal\\_costs\\_nireland.htm#h\\_legal\\_advice\\_and\\_assistance\\_the\\_green\\_form\\_scheme](http://www.adviceguide.org.uk/nireland/law_ni/law_legal_system_ni/law_taking_legal_action_e/help_with_legal_costs_nireland.htm#h_legal_advice_and_assistance_the_green_form_scheme)

<sup>43</sup> McKeever, G., Thompson, B. (2010) *Redressing Users' Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

<sup>44</sup> McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

to an “inherent” inequality in relation to the Tribunal that it asserts cannot be mitigated by the Chair facilitating appellants in making their case.<sup>45</sup>

The literature highlights a perception that applicants to the SENDIST in Northern Ireland tend to be from more advantaged backgrounds and are often very articulate.<sup>46</sup> Similarly, there is a view that the corresponding tribunal in England is a “*weapon of the middle classes*.”<sup>47</sup>

### **Representation to reduce inequality**

There was consensus among interviewees in research conducted in 2010 that good representation was beneficial to appellants, particularly in providing equality between parties to the hearing. Participants highlighted a concern that those with little confidence in their literacy and oral skills would be unable to pursue a SENDIST case without advice and representation.<sup>48</sup>

However, tribunal members stated that the quality of representation varied greatly. Members and users of tribunals noted that legal representatives with expertise in the area considered by the tribunal were particularly useful.<sup>49</sup>

## **7 Transfer of rights to children and young people**

Clauses 9 and 10 of the SEND Bill give children with SEN who are over compulsory school age rights within the SEN framework which were previously exercisable by the parent, including the right to request a statutory assessment and to appeal to the Tribunal against certain decisions of the Authority. Clause 11 provides for a pilot scheme to enable children within compulsory school age to appeal to the Tribunal.

### **Potential benefits**

Including the views of young people with SEN in decisions can provide valuable insights on provision and can help to improve quality of life for marginalised students.<sup>50</sup> The literature suggests that involving children in SEN dispute resolution can also promote ownership of decisions and support outcomes.<sup>51</sup>

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<sup>45</sup> Children’s Law Centre (2013) *Response to the Department of Justice Consultation on Future Administration and Structure of Tribunals in Northern Ireland* Belfast: Children’s Law Centre

<sup>46</sup> McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI); Children’s Law Centre (2013) *Response to the Department of Justice Consultation on Future Administration and Structure of Tribunals in Northern Ireland* Belfast: Children’s Law Centre

<sup>47</sup> Riddell, S., Harris, N., Smith, E., Weedon, E. (2010) “Dispute resolution in additional and special educational needs: local authority perspectives” *Journal of Education Policy* Vol. 25, No. 1, pp.55-71

<sup>48</sup> McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

<sup>49</sup> McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

<sup>50</sup> Prunty, A., Dupont, M., McDaid, R. (2012) “Voices of students with special educational needs (SEN): views on schooling” *Support for Learning* Vol. 27, No. 1, pp. 29-36

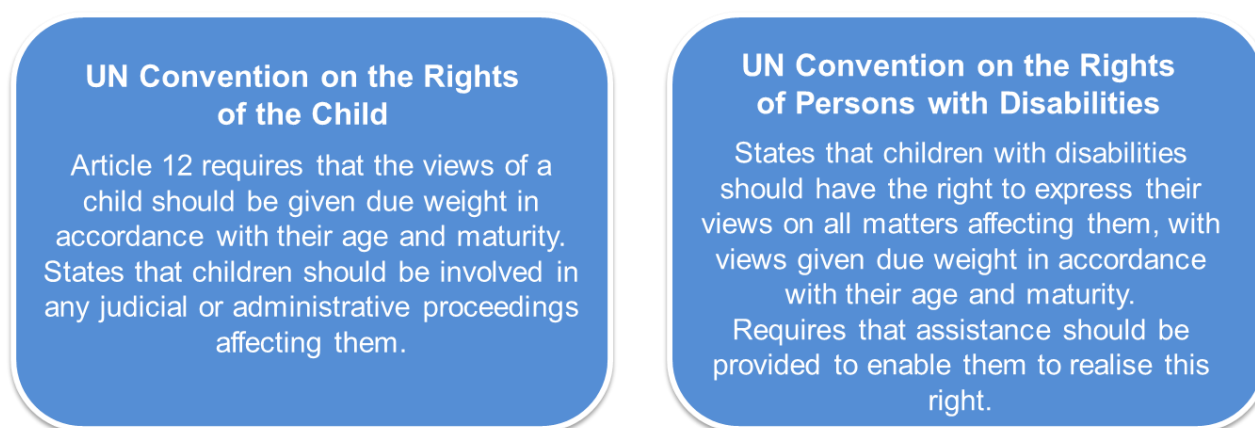
<sup>51</sup> Harris, N., Smith, E. (2009) “Resolving disputes about special educational needs and provision in England” *Education Law Journal* 10 (2) pp.113-132

Having the right to appeal can be particularly important for those whose parents are anxious or disinterested about pursuing an appeal, and for looked after children who have to rely on foster carers or key workers to initiate an appeal (which may present a conflict of interest).<sup>52</sup> A quarter (25%) of looked after children in Northern Ireland have a statement of SEN, compared to 5% of the overall school population.<sup>53</sup>

### Human rights perspective

The UN Convention on the Rights of the Child, ratified by the UK in 1991, and the UN Convention on the Rights of Persons with Disabilities, ratified in 2009, require States Parties to ensure that a number of rights are provided.

**Figure 7: Relevant UN Conventions**



Despite the international conventions, the evidence suggests that children's views are not consistently or reliably taken account of in educational decision making.<sup>54</sup> Indeed, the UN Committee on the Rights of the Child concluded in 2008 that there had been little progress in implementing Article 12 in education legislation and policy in Northern Ireland, particularly in relation to children with disabilities.<sup>55</sup>

## 8 Supporting the participation of children with SEN

There can be challenges relating to a child's capacity to participate in decisions that affect them, particularly where their SEN affect communication.<sup>56</sup> The participation of children with significant learning difficulties is often dismissed, limited or tokenistic.<sup>57</sup>

<sup>52</sup> Anderson, K. (2011) "The right for children to appeal SEN decisions" *Children and Young People Now* 14-27 June 2011, pp. 30-31

<sup>53</sup> Department of Health, Social Services and Public Safety (2014) *Children in Care in Northern Ireland 2012-13, Statistical Bulletin* Belfast: DHSSPS

<sup>54</sup> Prunty, A., Dupont, M., McDaid, R. (2012) "Voices of students with special educational needs (SEN): views on schooling" *Support for Learning* Vol. 27, No. 1, pp. 29-36

<sup>55</sup> United Nations Committee on the Rights of the Child (2008) *Concluding Observations: United Kingdom of Great Britain and Northern Ireland UN*

<sup>56</sup> Harris, N., Smith, E. (2009) "Resolving disputes about special educational needs and provision in England" *Education Law Journal* 10 (2) pp.113-132

<sup>57</sup> Lawson (2010) *Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties* Confronting obstacles to inclusion Oxon: Routledge

Indeed, the literature warns against engaging children in decisions that affect them simply as a “symbolic gesture” that does not lead to changes in practice.<sup>58</sup>

An international review has found that inconsistencies arise where support for decision making is not explicitly required by law. The review asserts that the legal framework should refer to independent advocacy and commit to taking all practical steps to support a person to make a decision prior to considering substitute decision-making powers.<sup>59</sup>

### Departmental guidance

The Department’s Code of Practice encourages the involvement of young people with SEN in decisions that affect them, where possible. It states that schools should consider how best to involve pupils in decision-making, taking into account approaches suitable for their age and ability.<sup>60</sup>

*“As far as the child’s levels of maturity and understanding will allow; all reasonable efforts should be made to ascertain the views of the child or young person about his or her own learning difficulties and education, offering encouragement where necessary.*

*Young people are more likely to respond positively to intervention programmes if they understand the rationale for them and are given some personal responsibility for their own progress.”*

Code of Practice (1998)

The Department’s Code of Practice notes that schools and the Authority should consider the best way to ascertain a child’s views. It suggests that report forms could be provided for pupils to submit their views, and that if necessary, an adult close to the child could help them to complete these.<sup>61</sup>

It also discusses involving young people in assessment and review during transition periods and in the annual review process, providing examples including:<sup>62</sup>

- Expressing views through a trusted professional, family member, independent advocate or an officer of the EA;

<sup>58</sup> Lawson (2010) *“Beyond tokenism? Participation and ‘voice’ for pupils with significant learning difficulties”* Confronting obstacles to inclusion Oxon: Routledge

<sup>59</sup> Davidson, G., Kelly, B, Macdonald, G. et al (2015) “Supported decision making: A review of the international literature” *International Journal of Law and Psychiatry* Vol. 38 pp. 61-67

<sup>60</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

<sup>61</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

<sup>62</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

- Incorporating their views using student counsellors, advocates or advisers, social workers or peer support;
- Focusing curriculum planning on activities that encourage young people to review their experiences and formulate their own views; and
- Supporting involvement with information, career guidance, counselling and work experience.

The 2005 Supplement to the Code of Practice states that schools and the Authority should seek participation of young people in all decision-making processes, including choice of school, assessment of needs and the annual review. It notes that their views should be given due weight in accordance with their age, maturity and capability.<sup>63</sup>

### **Approaches to supporting the involvement of children with SEN**

The literature highlights three broad types of supporting decision making: support in making a decision, support in engaging with others to give effect to the decision, and support to act on the decisions. Such supports may include.<sup>64</sup>

- Advocacy;
- Communication and interpretive supports;
- Representational supports;
- Relationship building supports; and
- Administrative supports.

### **Advocacy**

Advocacy can be defined in a number of ways; however it broadly describes making arrangements to support people in expressing their views.<sup>65</sup> Obtaining the views of children with limited communication may involve actively building a relationship in order to advocate for them.<sup>66</sup>

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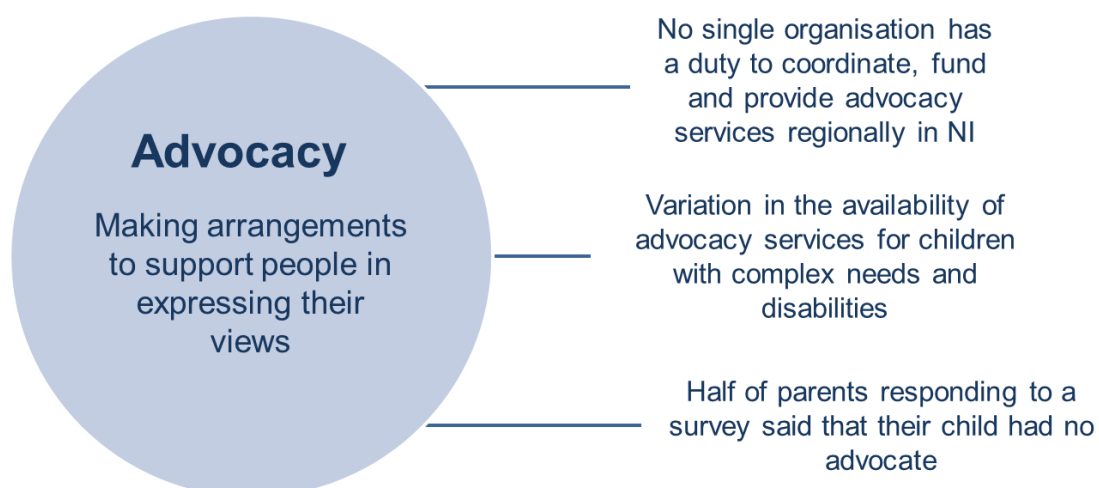
<sup>63</sup> Department of Education (2005) *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

<sup>64</sup> Davidson, G., Kelly, B, Macdonald, G. et al (2015) "Supported decision making: A review of the international literature" *International Journal of Law and Psychiatry* Vol. 38 pp. 61-67

<sup>65</sup> Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

<sup>66</sup> Lawson (2010) *"Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties"* Confronting obstacles to inclusion Oxon: Routledge



**Figure 8: Overview of advocacy support in Northern Ireland<sup>67</sup>**

A 2008 survey found that many parents view their Social Worker as playing an advocacy role. However, this can present a conflict of interest as they are employed by organisations responsible for providing services. Some voluntary organisations provide advocacy services in particular areas.<sup>68</sup>

The Department advises that some young people with SEN express their views through a trusted professional, independent advocate or through an officer of the EA. Voluntary organisations such as the Children's Law Centre (CLC), the Special Educational Needs Advice Centre (SENAC) and Barnardos provide independent advocacy.<sup>69</sup>

In addition, for a period of two years from April 2015, the Department is providing funding to the CLC for its SENDIST Project. A key objective of this is to provide free legal advice, information and representation to children and their parents and carers.<sup>70</sup>

### ***Communication and interpretive supports***

Some children with significant learning difficulties communicate in a range of non-verbal ways, using symbols, signs, eye contact, vocalising, facial expression and changes in behaviour.<sup>71</sup> In research by NICCY in 2008, 5% of parents surveyed said that their children had little or no communication and would always require someone to advocate on their behalf.<sup>72</sup>

<sup>67</sup> Adapted from Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

<sup>68</sup> Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

<sup>69</sup> Information provided by the Department of Education, May 2015

<sup>70</sup> Information provided by the Children's Law Centre, May 2015

<sup>71</sup> Lawson (2010) *"Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties"* Confronting obstacles to inclusion Oxon: Routledge

<sup>72</sup> Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

The literature emphasises the importance of using a personalised approach to involving young people with SEN.<sup>73</sup> It highlights examples of approaches that may be used, including by:<sup>74</sup>

- Group or individual discussions;
- Drawing and writing;
- Using symbols (for example, faces);
- Taking photographs or making videos (either by young people themselves or to prompt them in expressing their views);
- Being observed for non-verbal signals; and
- Moving to different corners of a room according to the view held.

In addition, some children with severe speech, language and communication needs can use assistive communication technology to support their speaking and writing, for example computers and voice output devices.<sup>75</sup>

### **Representation**

While the SEND Bill provides for regulations around the provision of assistance and support to enable children to exercise their rights, it does not state whether these will include legal representation.

Research suggests that access to legal advice and representation will be crucial in supporting children in exercising their right to appeal, particularly in light of their age, vulnerability and lack of income.<sup>76</sup>

As outlined previously in this paper, legal aid is available to those appealing decisions regarding SEN covering limited legal support, but excluding representation at a tribunal. Where children under 16 request legal aid their parent or guardian must consult the solicitor on their behalf. The income of their parent or guardian is taken into account when assessing eligibility.<sup>77</sup>

## **9 Mental capacity**

Mental capacity relates to a person's ability to make decisions. Capacity to make decisions can be affected temporarily or permanently, and can change according to the

<sup>73</sup> Lawson (2010) *"Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties"* Confronting obstacles to inclusion Oxon: Routledge

<sup>74</sup> Macbeath, J., Demetriou, H., Ruddock, J., Myers, K. (2003) *Consulting pupils: a toolkit for teachers* Cambridge: Pearson

<sup>75</sup> Griffiths, T., Price, K. (2011) "A proposed framework for decision-making for assistive communication technology support: many perspectives, but one common goal" *Journal of Assistive Technologies* Vol. 5, No. 4, pp. 242-248

<sup>76</sup> Anderson, K. (2011) "The right for children to appeal SEN decisions" *Children and Young People Now* 14-27 June 2011, pp. 30-31

<sup>77</sup> Northern Ireland Legal Services Commission (2014) *A guide to Legal Aid* Belfast: Northern Ireland Legal Services Commission

complexity of the decision made. Someone lacking capacity is unable to do one of the following:<sup>78</sup>

- Understand information about a particular decision;
- Retain the information long enough to make a decision;
- Weigh up the information to make a decision; or
- Communicate their decision.

The concept of mental capacity is very complex in relation to children, in that they develop capacity to make decisions at different stages. They are not assumed to have capacity in the same way as adults.<sup>79</sup>

### **Current legislation**

Mental capacity is governed by common law (case law); this presumes that everyone has capacity to make decisions, including decisions thought to be unwise. Under common law, a decision may be taken on behalf of someone who lacks capacity provided that there is a reasonable belief that they lack capacity and that the decision is in their best interests. However, this approach can be problematic.<sup>80</sup>

The Children (Northern Ireland) Order 1995 sets out a number of principles, including the involvement of children in decision making. Its general philosophy is that those with parental responsibility have primary responsibility for raising children. This includes parental entitlement to make all major decisions about a child's welfare and education, regardless of whether the child has capacity.<sup>81</sup>

### **SEND Bill**

Clauses 9, 10 and 11 of the SEND Bill provide for regulations about assistance and support to enable children to exercise their rights under the legislation. They also contain a series of powers to make regulations where a child over compulsory school age lacks, or may lack, capacity to exercise these rights, including making provision for:

- Determining whether a child lacks capacity in relation to the exercise of any such right (including the criteria to be applied in making the determination);
- The parent of the child to exercise the rights where it is determined that the child lacks the capacity to do so;

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<sup>78</sup> Mental health foundation *Mental capacity* [online] Available at: <http://www.mentalhealth.org.uk/help-information/mental-health-a-z/M/mental-capacity/>

<sup>79</sup> Black, L. (2012) *The Mental Capacity Bill and children under 16* Belfast: Northern Ireland Assembly Research and Information Service

<sup>80</sup> Black, L. (2012) *The Mental Capacity Bill and children under 16* Belfast: Northern Ireland Assembly Research and Information Service

<sup>81</sup> Black, L. (2012) *The Mental Capacity Bill and children under 16* Belfast: Northern Ireland Assembly Research and Information Service

- Part 2 of the 1996 Order (the main legislation governing SEN) to have effect in such a case with any modifications prescribed by the regulations.

### **Mental capacity in relation to people with learning disabilities**

Evidence indicates that there are people with a range of disabilities who may be assessed as incapable of making particular decisions if appropriate support is not provided.<sup>82</sup>

In a research study a number of people with learning disabilities stated that it was often assumed that they did not have capacity, simply due to their learning disabilities. They had to prove their capacity (without formal assessment) in order to make decisions for themselves. The study found that:<sup>83</sup>

- People with learning disabilities are often considered incapable of making decisions, or are shielded from them;
- Such judgements are made routinely without a formal assessment of capacity;
- A judgement of incapacity was often not noticed or accepted; instead it was considered to be part of being treated like “*someone with a learning disability*”; and
- People were rarely given clear information about the options available.

Research also suggests that many professionals lack confidence in assessing mental capacity in those with learning disabilities, and that many clinical practitioners do not understand the rules around making accurate assessments.<sup>84</sup> In many cases where a person lacked capacity, those making the decision were not able to accurately predict their wishes.<sup>85</sup>

### **Mental Capacity Bill**

The Department of Health, Social Services and Public Safety (DHSSPS) and the Department of Justice (DoJ) published the civil provisions of the draft Mental Capacity Bill in May 2014, applying to those aged 16 and over.<sup>86</sup>

The Bill proposes introducing a single legislative framework governing situations where a decision needs to be made in relation to the care, treatment or personal welfare of

<sup>82</sup> Davidson, G., Kelly, B, Macdonald, G. et al (2015) “Supported decision making: A review of the international literature” *International Journal of Law and Psychiatry* Vol. 38 pp. 61-67

<sup>83</sup> Williams, V., Jepson, M., Tarleton, B., Marriott, A., Ponting, L. (2008) *‘Listen to what I want’ The potential impact of the Mental Capacity Act (2005) on major life decisions by people with learning disabilities* Bristol: Social Care Institute for Excellence

<sup>84</sup> Willner, P., Jenkins, R., Rees, P, Griffiths, V.J., John, E. (2010) “Knowledge of Mental Capacity Issues in Community Teams for Adults with Learning Disabilities” *Journal of Applied Research in Intellectual Disabilities* Online Early View

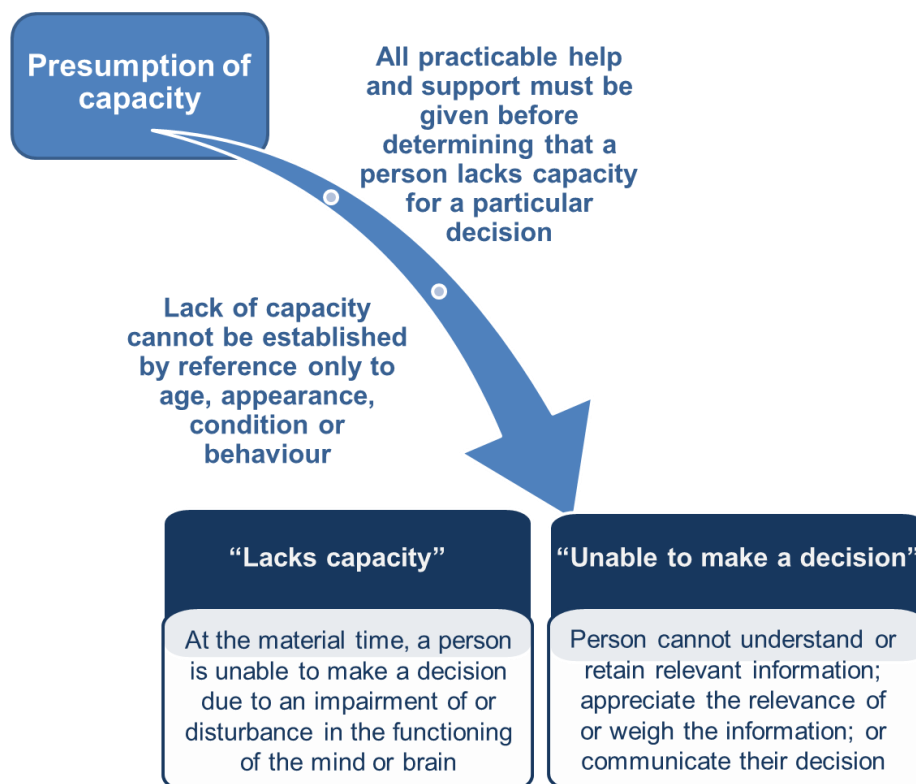
<sup>85</sup> Mental Health Foundation (2012) *Mental Capacity and the Mental Capacity Act 2005: A literature review* London: Mental Health Foundation

<sup>86</sup> DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>

those aged 16 and over who do not have the capacity to make decisions for themselves – the first of its kind anywhere.<sup>87</sup>

Part 1 of the draft Bill sets out its key principles. The Bill presumes that a person has capacity, and emphasises the provision of support and help prior to deciding that a person does not have capacity or is unable to make decisions. In such cases, the Bill requires that any decision must be made in the best interests of the person who lacks capacity. The principles are illustrated in Figure 9.<sup>88</sup>

**Figure 9: Key principles of the draft Mental Capacity Bill<sup>89</sup>**



The draft Bill requires DHSSPS to issue a code of practice for assessing whether a person aged 16 and over has capacity. It also places a duty on health trusts to ensure that independent advocates are available where a compulsory serious intervention is proposed regarding a person who lacks capacity.<sup>90</sup>

Many respondents to the consultation on the draft Bill suggested that it should apply to children under 16. They gave two broad reasons for this: a concern that children under 16 would not be able to avail of the protections afforded by the Bill, and a perception that older children should have a presumption of capacity. However, a number of

<sup>87</sup> DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>

<sup>88</sup> Mental Capacity Bill [online] Available at: [http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex\\_a\\_-\\_draft\\_mental\\_capacity\\_bill\\_civil\\_provisions\\_.pdf](http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex_a_-_draft_mental_capacity_bill_civil_provisions_.pdf)

<sup>89</sup> Mental Capacity Bill [online] Available at: [http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex\\_a\\_-\\_draft\\_mental\\_capacity\\_bill\\_civil\\_provisions\\_.pdf](http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex_a_-_draft_mental_capacity_bill_civil_provisions_.pdf)

<sup>90</sup> Mental Capacity Bill [online] Available at: [http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex\\_a\\_-\\_draft\\_mental\\_capacity\\_bill\\_civil\\_provisions\\_.pdf](http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex_a_-_draft_mental_capacity_bill_civil_provisions_.pdf)

respondents believed that the Bill should not apply to children under the age of 16.<sup>91</sup> The DHSSPS position is that the Bill is a decision-making framework for adults and is not suitable for children as it stands.<sup>92</sup>

## 10 Conclusion

This research paper has highlighted a number of issues around the accessibility of SENDIST and in terms of the complexity surrounding issues of mental capacity in relation to children with SEN. It has highlighted a range of areas, many of which are cross-departmental, that could be given further consideration, including:

- The proportion of DARS cases where contact ceased and the reasons for this;
- Whether the mediation service proposed by the Bill will include enforcement;
- The volume of appeals at both DARS and SENDIST relating to statutory assessment and how, if at all, the new SEN proposals will impact on this;
- The proposed duty for parents to speak to a mediation adviser before pursuing an appeal with SENDIST, in particular whether this element of compulsion is likely to have an influence on the outcome of mediation;
- The perceived inequality between parents and the EA in SENDIST appeals, and how, if at all, the new proposals will mitigate against this;
- The perception that users of SENDIST tend to be more advantaged;
- The limited availability of legal support and representation for SENDIST, including the implications for children to exercise their new rights;
- The adequacy of advocacy provision, particularly in light of the rise in SENDIST and DARS cases;
- The key importance of the support provided to enable children to exercise their new rights and when the regulations regarding this will be available for scrutiny;
- Whether the regulations provided for by the SEND Bill regarding capacity will include a presumption of capacity; and
- Whether the proposed DHSSPS code of practice for assessing whether a person aged 16 and over has capacity will link to the SEND Bill regulations.

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<sup>91</sup> DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>

<sup>92</sup> DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>



Northern Ireland  
Assembly

## Research and Information Service Research Paper

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13<sup>th</sup> May 2015

**Caroline Perry**

# SEN legislation and policy in Northern Ireland

**NIAR 178-15**

This paper provides an overview of special educational needs (SEN) legislation and policy in Northern Ireland, including regulations and Codes of Practice. It details timescales in relation to SEN assessment and summarises arrangements for those with SEN over the age of 16. It also compares the SEND Bill with proposals published by the Department in 2012.





## Key Points

- The SEN framework in Northern Ireland comprises primary legislation supported by three Codes of Practice and a range of regulations;
- The Education (NI) Order 1996 provides a framework for assessment and provision for SEN, and the Special Educational Needs and Disability (NI) Order 2005 enhances the rights of children with SEN to attend mainstream schools;
- The 1998 Code of Practice outlines a five stage process for SEN assessment; time limits apply only to stages four and five of the process;
- The Education Authority has 26 weeks to issue a final statement: in 2013/14 a majority (59%) of statements were issued after the statutory period of 26 weeks;
- The regulations state that annual reviews of statements from the age of 14 must include transition plans: however there is no duty to prepare a plan for children with SEN who do not have a statement;
- A recent review found that while transition works well for most people, there are serious concerns around provision for those with complex needs; it called for greater coordination between health and education and a review of transitions;
- The SEND Bill takes forward some of the actions agreed by the Executive in 2012, although many actions will be implemented through amendments to regulations, new regulations and a revised Code of Conduct – these are yet to be developed;
- In this regard, further consideration could be given to:
  - The extent of the planned amendments to existing regulations, in addition to the significant powers for subordinate legislation provided for in the Bill;
  - When the revised regulations and Code of Practice will be available for scrutiny;
  - The lack of time limits for the completion of stages 1-3 in the current SEN framework and what time limits for each of the three stages are proposed for the new framework;
  - The proportion of statements issued beyond the statutory time limit of 26 weeks and the proposed reduction in the time limit to 20 weeks;
  - The lack of a statutory duty to prepare transition plans for pupils with SEN who do not have a statement; and
  - The need identified for greater cooperation between health and education in regard to transitions.



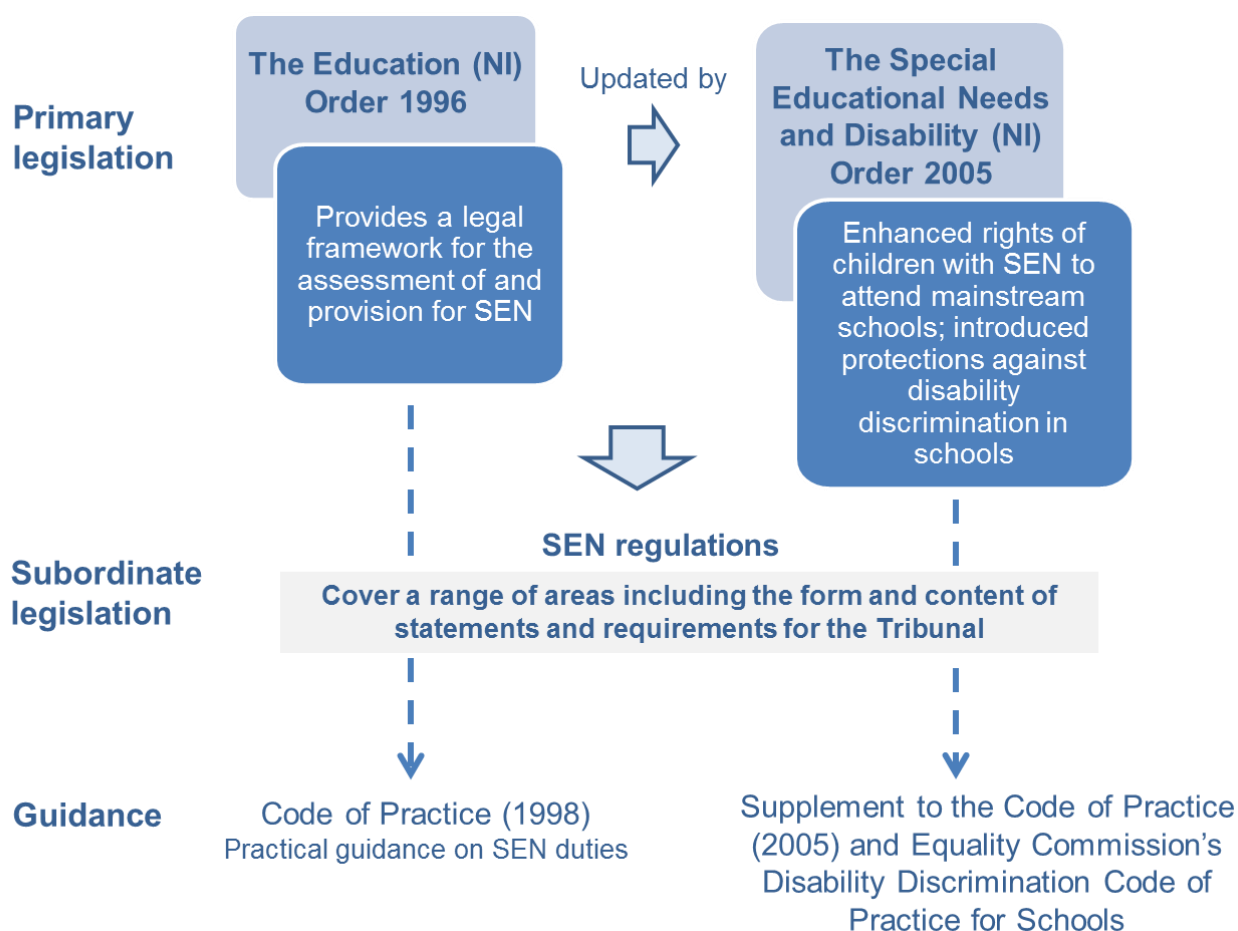
## Executive Summary

This paper outlines the key legislation governing Special Educational Needs (SEN) in Northern Ireland. It also sets out timelines for SEN assessment, considers post-16 SEN arrangements and compares the Special Educational Needs and Disability (SEND) Bill currently before the Assembly to proposals agreed by the Executive in 2012.

### SEN legislation and policy

The SEN framework in Northern Ireland comprises primary legislation supported by Codes of Practice, and a range of regulations, as illustrated in Figure 1.

**Figure 1: Overview of SEN legislation and policy**



The Code of Practice sets out five stages for assessing SEN. The first three stages are based within the school, and it is anticipated that most children's needs will be identified and provided during these stages. Indeed, 76% of pupils within the SEN framework were at Stages 1-3 in 2014/15. The school shares responsibility with the Education Authority (EA), formerly the Education and Library Boards (ELBs) during the final two stages.

### **Time limits**

The Code states that assessments and statements should be made as quickly as possible. However, time limits only apply to completion of stages four and five. Broadly, the EA has 26 weeks to issue a final statement, although exceptions apply. The Department of Education (the Department) proposes reducing this period to 20 weeks.

In 2013/14 59% of statements (1,317) were issued outside the statutory 26 week limit, although the Department notes that nearly all cases were subject to valid exceptions. There were variations by ELB, with 71% of statements (347) issued by the BELB subject to delays compared to 51% at the NEELB (194). The Department states that *“nearly all cases that were issued outside the 26 weeks are subject to valid exceptions”*.

Of the delayed statements, 73% (969) were issued within six to nine months, 22% (290) were issued in nine to 12 months and 2% were issued in 12-18 months, with the remainder taking more than 18 months.

### **Post-16 SEN arrangements**

Children with a statement of SEN who continue to attend school remain the responsibility of the EA until they reach the age of 19 – this is deemed to occur after the end of the same school term in which they celebrate their Birthday. The SEND Bill alters the definition of a child to allow a young person reaching 19 to remain in school until the end of that year.

After reaching the age of 16 options for children with SEN may include staying on at school or studying at a college of further education. The Code notes that the EA should, where necessary, provide assistance for young people with SEN who do not have a statement, including link courses and work placements.

### **Transitions**

The regulations require annual reviews of statements from the age of 14 to include transition plans. However, there is no statutory duty to prepare a transition plan for children with SEN who do not have a statement.

A recent review by the Education and Training Inspectorate (ETI) found that the process of transitioning to post-school provision was working well in the majority of cases. However, it highlighted serious concerns around transition for a small number of pupils at post-19. The Department of Health, Social Services and Public Safety (DHSSPS) is responsible for this group.

The report recommended a comprehensive review of transition for these young people, who often have complex needs and may live in areas with limited health provision. It also called for greater cooperation between health and education and more dedicated support.

## **The SEND Bill and proposals for SEN in 2012**

In 2012 the Executive agreed a series of actions for SEN following a consultation process. The SEND Bill does not include a number of the proposals, and the Department advises that it will introduce many of these through a revised Code of Practice and amendments to regulations. However, these have not yet been developed.

An analysis of the 2012 proposals suggests that a broad range of amendments to existing regulations will be required. These include regulations in relation to pre-school; changing statements to Coordinated Support Plans; reducing timescales for statements and altering requirements for the review of statements.

In addition, the SEND Bill itself provides for a significant amount of subordinate legislation, including providing powers for the Department to make any transitional, transitory or consequential provisions it feels are appropriate.

## **Conclusion**

This paper has provided an overview of SEN legislation and policy in Northern Ireland. It has shown that the Department plans to introduce wide-ranging amendments to existing regulations and guidance (that have yet to be developed) in order to support a revised SEN framework. Further consideration could be given to:

- The extent of the planned amendments to existing regulations, in addition to the significant powers for subordinate legislation provided for within the SEND Bill;
- When the revised regulations and Code of Practice will be available for scrutiny;
- The lack of time limits for the completion of stages 1-3 in the current SEN framework and what time limits for each of the three stages are proposed for the new framework;
- The proportion of statements issued beyond the statutory time limit of 26 weeks, and how the proposed reduction in the time limit to 20 weeks will work in practice;
- The lack of a statutory duty to prepare transition plans for pupils with SEN who do not have a statement; and
- The need for greater cooperation between health and education in regard to transitions.



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## 1 Introduction

This paper provides an overview of the special educational needs (SEN) legislation, the Department of Education's (the Department's) Code of Practice and the Equality Commission's Code of Practice. It also details timescales in relation to SEN, summarises arrangements for those with SEN over the age of 16 and compares the SEND Bill with proposals published by the Department in 2012.

## 2 Overview

Legislation for children with special educational needs (SEN) is contained within the Education (Northern Ireland) Order 1996 (the 1996 Order) and the Special Educational Needs and Disability (Northern Ireland) Order 2005 (the 2005 Order), supported by a Code of Practice for the identification and provision for pupils with SEN and a number of Statutory Rules.

Policy and legislation has enhanced educational provision for those with SEN in mainstream schools, although the extent to which they are accorded their educational rights varies. SEN policy in Northern Ireland has been described as “*overly bureaucratic*.”<sup>1</sup> Despite the extensive regulation and guidance, other concerns include:<sup>2</sup>

- Perceived inadequacy of resources for SEN;
- A perception that parents from more affluent and educated backgrounds are in a better position to negotiate and challenge decisions than those from disadvantaged backgrounds; and
- A pressing need for early intervention, with ‘unacceptable’ delays in the statementing process.

## 3 The Education (Northern Ireland) Order 1996

The current system for the identification, assessment and statementing of children with SEN was introduced in 1986, in line with legislation in England and Wales.<sup>3</sup> It was updated by Part II and Schedules 1 and 2 of the 1996 Order.

The 1996 Order provides a legal framework for the assessment of, and provision for, SEN. It requires the Education Authority (EA), formerly the Education and Library Boards (ELBs) to identify, assess and make provision for children with SEN within their area. It also provides a definition of SEN.

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<sup>1</sup> O'Connor, U., Hansson, U., Keating, S. (2012) *Capacity Building for Inclusion: The role and contribution of special needs assistants and classroom assistants in Ireland and Northern Ireland* Coleraine: UNESCO Centre

<sup>2</sup> Lundy, L., Kilpatrick, R. (2006) “Children’s rights and special educational needs: findings from the research conducted for the Northern Ireland Commissioner for Children and Young People” *Support for Learning* Vol. 21, No. 2, pp. 57-63

<sup>3</sup> O'Connor, U., McConkey, R., Hartop, B. (2005) “Parental views on the statutory assessment and educational planning for children with special educational needs” *European Journal of Special Needs Education* Vol. 20, No. 3, pp. 251-269

*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.*

The Education (Northern Ireland) Order 1996 (Part II)

The 1996 Order contains a large number of provisions, including:

- Providing for a Code of Practice that the EA and schools must have regard to;
- Setting out the duties of health authorities in relation to children with SEN;
- Detailing requirements for the EA to inform parents in relation to SEN assessment and provision;
- Outlining the requirements for statements of SEN;
- Setting out the grounds for appeal in relation to statementing;
- Requiring the EA to keep statements under review;
- Giving parents a right to request an assessment; and
- Providing for a Special Educational Needs Tribunal.

## 4 The 2005 Order

The 2005 Order enhanced the rights of children with SEN to attend mainstream schools and introduced protections against disability discrimination to the education system for the first time.<sup>4</sup> Discrimination is defined as the failure to make reasonable adjustments or providing less favourable treatment for a reason related to a child’s disability.

### **SEN provisions**

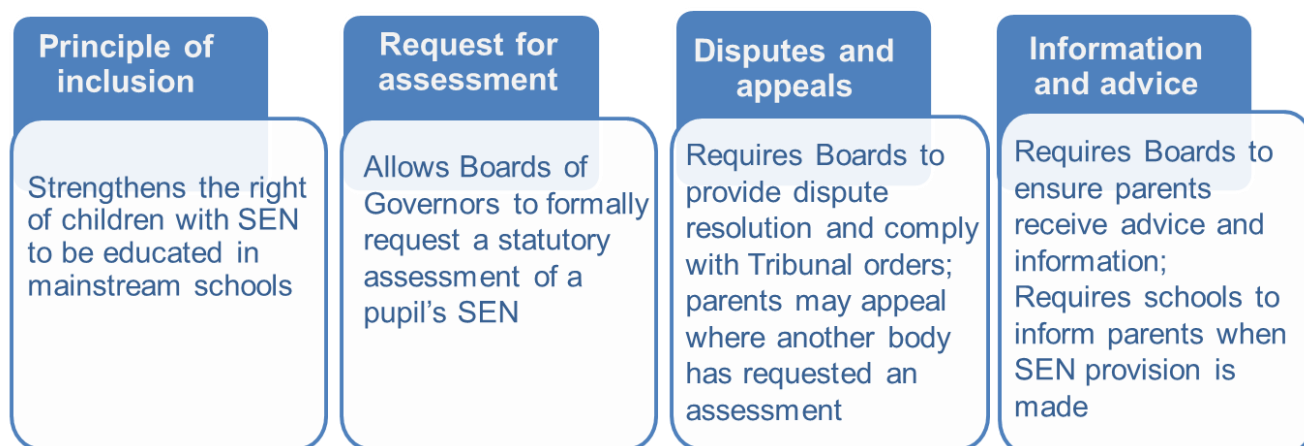
Figure 2 outlines the main provisions of the Order in relation to SEN. The Order contains a presumption in favour of inclusion; however some authors argue that this can be compromised where access to resources is not met.<sup>5</sup>

The literature also suggests that the principle of inclusion could present challenges for mainstream schools in coping with increased numbers of children with SEN, particularly in terms of dealing with issues such as bullying and child protection.<sup>6</sup>

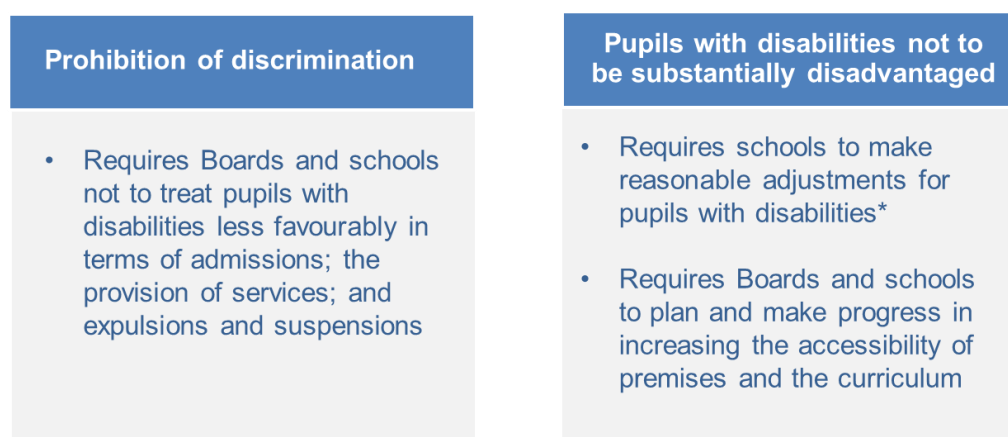
<sup>4</sup> O’Connor, U., Hansson, U., Keating, S. (2012) *Capacity Building for Inclusion: The role and contribution of special needs assistants and classroom assistants in Ireland and Northern Ireland* Coleraine: UNESCO Centre

<sup>5</sup> O’Connor, U., Hansson, U., Keating, S. (2012) *Capacity Building for Inclusion: The role and contribution of special needs assistants and classroom assistants in Ireland and Northern Ireland* Coleraine: UNESCO Centre

<sup>6</sup> Lundy, L., Kilpatrick, R. (2006) “Children’s rights and special educational needs: findings from the research conducted for the Northern Ireland Commissioner for Children and Young People” *Support for Learning* Vol. 21, No. 2, pp. 57-63

**Figure 2: Key provisions of the 2005 Order in relation to SEN****Disability discrimination provisions**

Part III, Chapter I of the 2005 Order extended similar provisions to those within the Disability Discrimination Act 2005 to schools in Northern Ireland for the first time. Within this Act a person is defined as having a disability if they have a physical or mental impairment which has a *“substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”*<sup>7</sup>

**Figure 3: Key provisions of the 2005 Order in relation to disability discrimination**

\* Does not require the provision of auxiliary aids and services or the removal or alteration of physical features

## 5 SEN Statutory Rules

The primary legislation outlined previously is supported by a range of subordinate legislation, illustrated by Table 1.

<sup>7</sup> Department of Education (2005) *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

**Table 1: Statutory Rules for SEN**

Statutory Rule	Key provisions
Education (Special Educational Needs) Regulations (Northern Ireland) 1997	<ul style="list-style-type: none"> <li>Require Boards making an assessment to seek advice from a range of sources</li> <li>Prescribe the form and content of statements</li> <li>Detail how reviews of statements should be carried out</li> </ul>
Education (Special Educational Needs) (Amendment) Regulations (Northern Ireland) 1998	<ul style="list-style-type: none"> <li>Amend the 1997 Regulations</li> <li>Set a time limit of 18 weeks for Boards to provide parents with a proposed statement</li> </ul>
Education (Special Educational Needs Code of Practice) (Appointed Day) (Northern Ireland) Order 1998	<ul style="list-style-type: none"> <li>Appoint 1st September 1998 as the day on which the Code of Practice comes into operation</li> </ul>
Special Educational Needs Tribunal Regulations (Northern Ireland) 1997	<ul style="list-style-type: none"> <li>Detail requirements for the Special Educational Needs Tribunal including for sittings, membership, notices, representation, witnesses, determination of appeals and reviews</li> </ul>
The Education (Special Educational Needs) Regulations (Northern Ireland) 2005	<ul style="list-style-type: none"> <li>Revoke and replace with modifications the 1997 Regulations</li> <li>Provide for a child without a statement to be admitted to a special school for assessment</li> <li>Set time limits for assessments, statements and compliance with Tribunal orders</li> </ul>
Special Educational Needs and Disability Tribunal Regulations (Northern Ireland) 2005	<ul style="list-style-type: none"> <li>Revoke the 1998 SENT Regulations</li> <li>Procedures broadly follow, with modifications, the procedures for SEN appeals under Part II and Schedule 2 of the 1996 Order</li> </ul>

## 6 The Code of Practice

Article 4 of the Education (Northern Ireland) Order 1996 requires the Department to issue a code of practice giving practical guidance on SEN duties. The 1996 Order states that the EA, Boards of Governors and the Tribunal must “have regard” to the code of practice.<sup>8</sup>

The Department’s SEN Code of Practice, in operation since 1998, addresses the identification, assessment and provision for children who may have SEN. It is based on a number of principles, including:<sup>9</sup>

- The needs of all pupils with learning difficulties must be addressed;

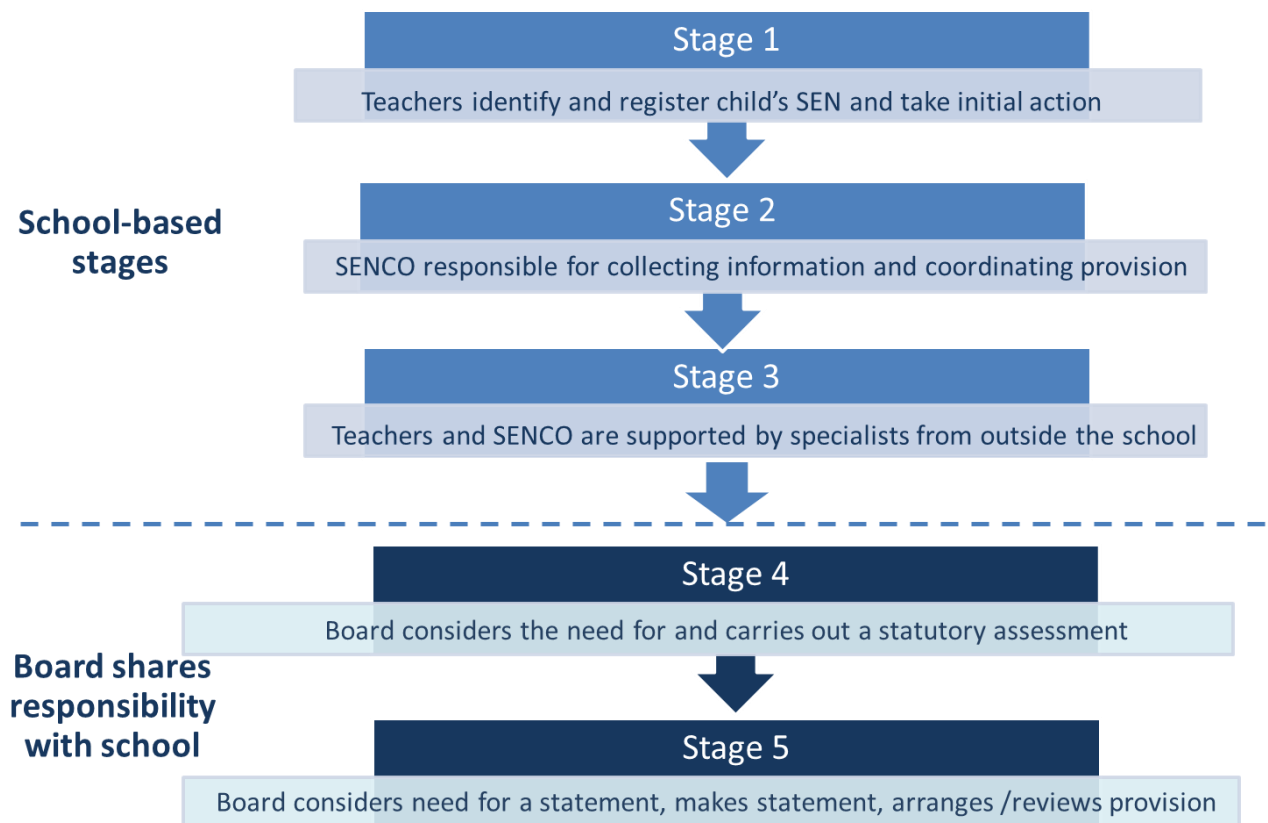
<sup>8</sup> The Education (Northern Ireland) Order 1996 [online] Available at: <http://www.legislation.gov.uk/nisi/1996/274/article/4>

<sup>9</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

- Children with SEN require a broad and balanced education;
- The needs of most children will be met in mainstream schools, and without a statutory assessment or a statement; and
- Parents' knowledge, views and experience are vital.

The Code standardised the procedures and timescales for undertaking an assessment and issuing a statement.<sup>10</sup> It comprises five main stages, although it acknowledges that there is a continuum of SEN and that progress in response to action taken at one of the first three stages may mean that a pupil does not need to move to the next.<sup>11</sup> The proposals to change the current approach to SEN include reducing the number of stages to three.

**Figure 4: Five stages of the SEN Code of Practice**



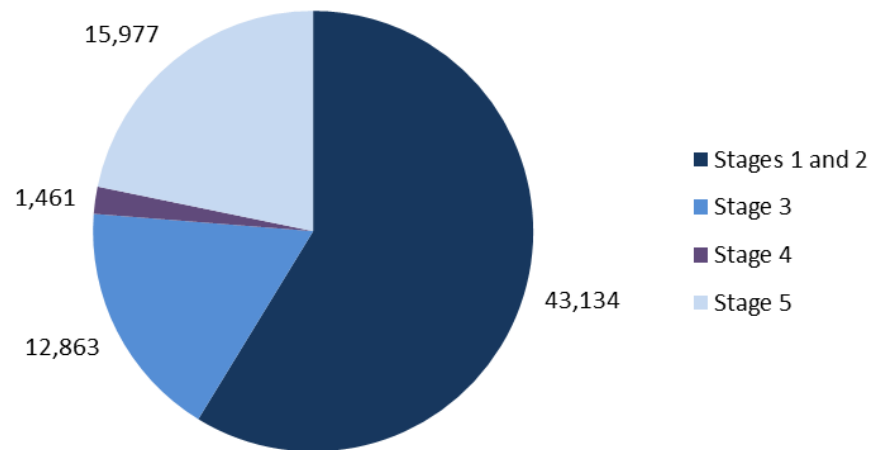
The Code emphasises identifying and responding to children's needs within schools, noting that more formal assessment and statementing processes should only

<sup>10</sup> O'Connor, U., McConkey, R., Hartop, B. (2005) "Parental views on the statutory assessment and educational planning for children with special educational needs" *European Journal of Special Needs Education* Vol. 20, No. 3, pp. 251-269

<sup>11</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

commence when this approach is insufficient.<sup>12</sup> In 2014/15 over three-quarters (76%) of pupils within the SEN framework were at Stages 1-3, with 22% at Stage 5.<sup>13</sup>

**Figure 5: Number of pupils at each stage of the Code of Practice in 2014/15<sup>14</sup>**



### Views on the Code of Practice

The SEN Code of Practice aimed to standardise provision, procedures and timescales in line with practice in England and Wales. Since its introduction, other jurisdictions have taken a more individualised approach to SEN.<sup>15</sup>

The literature suggests that the Code of Practice has limitations including a narrow conception of SEN relating primarily to literacy and numeracy difficulties and undeveloped ideas about how children with a wide range of SEN can be supported throughout the school.<sup>16</sup>

## 7 Supplement to the Code of Practice

The Department brought into operation a Supplement to the Code of Practice in 2005 in light of the 2005 Order and its regulations. It does not affect the status, coverage, principles, essential procedures and guidance contained in the 1998 Code of Practice. It aimed to provide guidance for schools, the EA and others in discharging their duties under the 2005 Order.<sup>17</sup>

<sup>12</sup> O'Connor, U., McConkey, R., Hartop, B. (2005) "Parental views on the statutory assessment and educational planning for children with special educational needs" *European Journal of Special Needs Education* Vol. 20, No. 3, pp. 251-269

<sup>13</sup> Data provided by the Department of Education, March 2015

<sup>14</sup> Data provided by the Department of Education, March 2015

<sup>15</sup> O'Connor, U., Hansson, U., Keating, S. (2012) *Capacity Building for Inclusion: The role and contribution of special needs assistants and classroom assistants in Ireland and Northern Ireland* Coleraine: UNESCO Centre

<sup>16</sup> Smith, R., Florian, L., Rouse, M., Anderson, J. (2014) "Special education today in the United Kingdom" *Advances in Special Education* Vol. 28 pp. 109-146

<sup>17</sup> Department of Education (2005) *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

## 8 Equality Commission Code of Practice

The Equality Commission published a *Disability Discrimination Code of Practice for Schools* in 2006, explaining the provisions of the 2005 Order.<sup>18</sup> The Code is issued under Article 54A of the Disability Discrimination Act 1995 which provides for the Equality Commission to prepare and issue codes of practice. Article 16(4) of the 2005 Order states that responsible bodies should have regard to any code of practice issued under the Disability Discrimination Act.

The Code does not impose legal obligations on schools, although it may be used in legal proceedings and the Special Educational Needs and Disability Tribunal (SENDIST) must take into account any relevant part of the code when dealing with disability discrimination cases.<sup>19</sup>

The Code's concept of disability discrimination is based on the Social Model principle whereby it is not the limitations arising from a person's disability that restrict their ability to participate fully in education. Rather, factors relating to the environment, attitudes, communication or a provider's practices lead to such restrictions. The Code:<sup>20</sup>

- Aims to show that all pupils have a right to the same opportunities in the whole of educational life;
- Seeks to explain the requirements of the 2005 Order for providers;
- May help children with disabilities and their parents to understand the law and assist providers in avoiding complaints and litigation by adopting good practice; and
- Aims to give practical guidance on how to strengthen inclusive practices.

## 9 Time limits

The Department's Code of Practice states that assessments and statements should be made "*as quickly as possible*." It details the time limits that apply to SEN assessment at stages 4 and 5; however no time limits are given for completion of the first three stages.

Broadly, the EA has 18 weeks to issue a proposed statement following a parental request for an assessment or after notifying parents that it is considering making an assessment. It has a further eight weeks to make a final statement.<sup>21</sup> The Department proposes reducing this period from a total of 26 weeks to 20 weeks.

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<sup>18</sup> Equality Commission for Northern Ireland (2006) *Disability Discrimination Code of Practice for Schools* Belfast: ECNI

<sup>19</sup> Equality Commission for Northern Ireland (2006) *Disability Discrimination Code of Practice for Schools* Belfast: ECNI

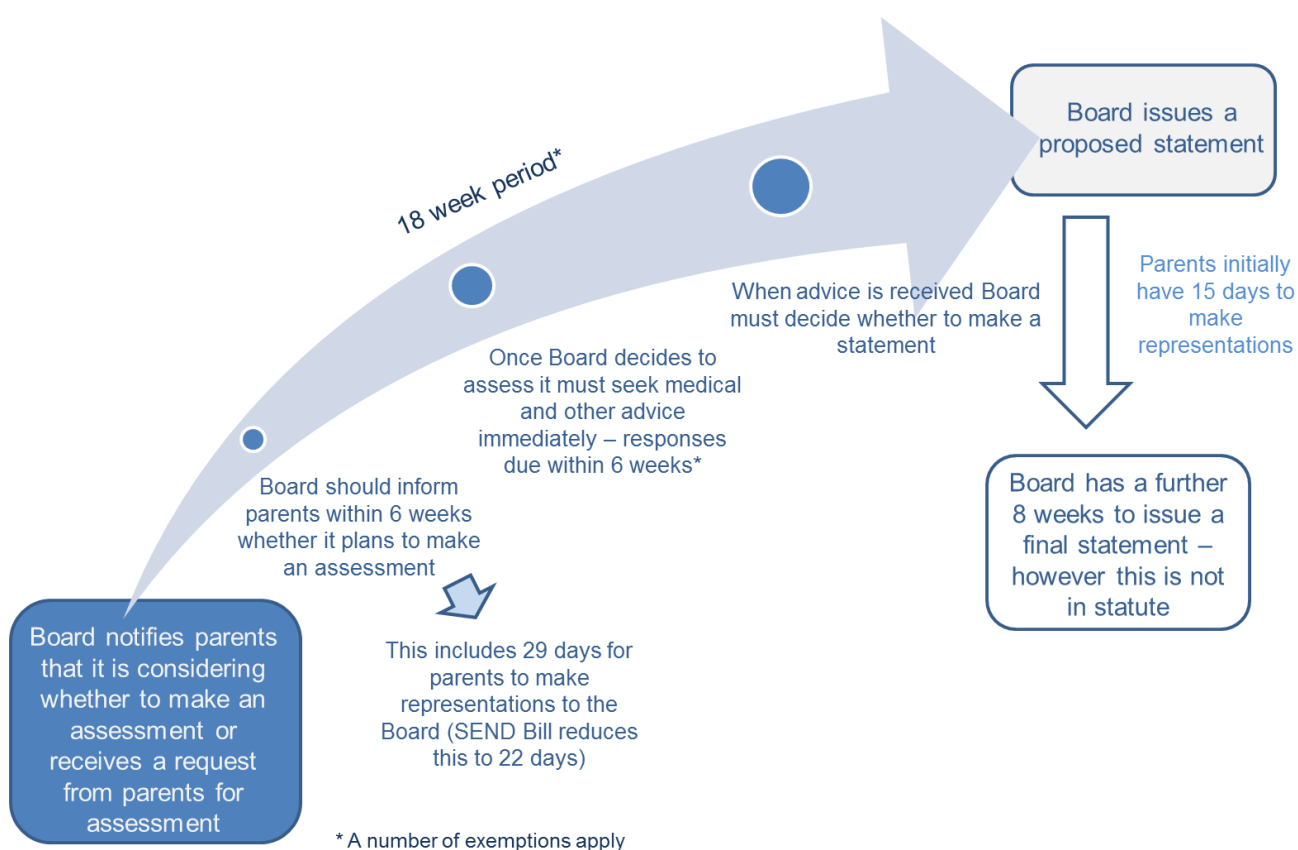
<sup>20</sup> Equality Commission for Northern Ireland (2006) *Disability Discrimination Code of Practice for Schools* Belfast: ECNI

<sup>21</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

The Code of Practice details a number of exceptions to the statutory 18 week time limit for the EA to issue a statement, in cases where:<sup>22</sup>

- Further advice needs to be sought by the EA to complete its assessment;
- Parents wish to provide advice to the EA more than six weeks after they were invited to do so;
- Advice from a principal is delayed because of school closure;
- Advice sought from a health trust has not been provided within six weeks;
- Exceptional personal circumstances affect the child or parent;
- The child or parent is away for at least four weeks during the 18 week period; or
- An appointment for examination or test is not kept.

**Figure 6: Timescales for making and issuing a statement<sup>23</sup>**



Once the EA has issued a final statement, further time limits may apply, as outlined in the following paragraphs.

<sup>22</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

<sup>23</sup> Adapted from Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE



### **Change of EA region and annual review**

An additional time limit applies when responsibility for a statemented child changes from one ELB (now EA region) to another. Where the EA chooses to review the statement or carry out a new assessment it is required to notify parents within six weeks.

For the annual review of a statement, the EA must ask the principal to convene a meeting and prepare a report. The principal must request written advice from the child's parents, all those specified by the EA and any others and is required to circulate this advice at least two weeks in advance of the meeting. In total, at least two months' notice must be given for the report to be returned to the EA.

### **Request for a change of school**

Where parents request a change of school and the EA concludes that it cannot name the proposed school in the statement, it is required to inform parents within eight weeks of the initial request.

### **Amending or ceasing to maintain a statement**

Where the EA proposes to amend a statement it must inform parents within 15 days of the proposal; it must then make any amendment within eight weeks of sending the letter of proposal to the parents. If the EA decides not to go ahead with the amendment, it must write to parents within eight weeks of the original letter.

The EA may not cease to maintain a statement until two months after it has written to parents to notify them of their decision. After the period of two months following the letter has passed the EA is required to cease to maintain the statement within a further four weeks.

### **Concerns around timescales**

Research with parents in Northern Ireland in 2005 highlighted concerns around the time taken to complete assessments and issue a statement. Some parents also commented that the process was overly bureaucratic and that assessment procedures were not relevant or tailored to the specific needs of the child.<sup>24</sup>

In 2013/14 across the five ELBs 59% of statements (1,317) were issued beyond the 26 week limit. The Department states that "*nearly all cases that were issued outside the 26 weeks are subject to valid exceptions*".<sup>25</sup>

Of these statements, 73% (969) were issued within six to nine months, 22% (290) were issued in nine to 12 months and 2% were issued in 12-18 months, with the remainder

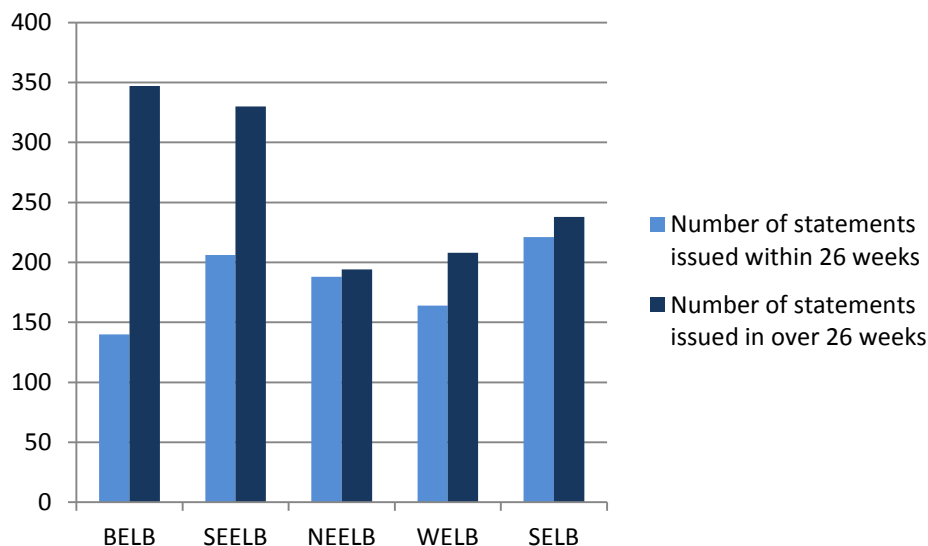
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<sup>24</sup> O'Connor, U., McConkey, R., Hartop, B. (2005) "Parental views on the statutory assessment and educational planning for children with special educational needs" *European Journal of Special Needs Education* Vol. 20, No. 3, pp. 251-269

<sup>25</sup> Information provided by the Department of Education, May 2015

taking more than 18 months. There were variations according to ELB, as illustrated in Figure 7.<sup>26</sup>

**Figure 7: Number of final statements issued beyond the statutory time limit of 26 weeks by ELB**



## 10 Post-16 SEN arrangements

Under Part II of the 1996 Order a child (for the purpose of special education) is deemed to reach 19 after the end of the same school term in which they celebrate their Birthday. Children with a statement of SEN who stay in school remain the responsibility of the EA until this time.<sup>27</sup>

The SEND Bill alters the definition to enable a child reaching age 19 during a school year to remain in school until the end of that school year, subject to the EA maintaining their statement.

Post-16 education for children with SEN may be at school or a further education college. Some children with statements remain at school after reaching the age of 16. The Code recognises that some young people with SEN who do not have a statement will require support for further education, noting that the EA should provide assistance, including link courses and work placements.<sup>28</sup>

### Transitions

The Education (Special Educational Needs) Regulations (Northern Ireland) 1997 require annual reviews of statements from the age of 14 to include the preparation of a

<sup>26</sup> Information provided by the Department of Education, May 2015

<sup>27</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

<sup>28</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

transition plan. However, the regulations do not require transition plans for those without a statement of SEN. The Code of Practice suggests that schools “*may wish to*” prepare their own transition plans for such students.<sup>29</sup>

A 2014 review of transitions from special schools and some mainstream schools to post-school provision found a well-organised process working well for the majority of pupils moving to further education and training. However, it highlighted “*ongoing serious concerns*” regarding transition provision for a small minority of pupils at post-19 (for whom DHSSPS is responsible). In particular, the review notes that:<sup>30</sup>

- Young people with complex needs and those in areas with limited health provision require more dedicated support and greater cooperation between health and education;
- A comprehensive review of what transition should provide for such pupils is urgently required;
- Opportunities for young people offered by voluntary agencies are limited in rural areas, leading to additional disadvantage;
- There is a “glaring” need for improvement for pupils whose choice is confined to transition from special schools to post-19 provision in adult centres provided by DHSSPS.

## 11 The SEND Bill and the 2012 proposals

The Department of Education’s 2009 consultation *Every School a Good School: The Way Forward for Special Educational Needs and Inclusion* proposed extensive changes to provision for SEN, including introducing a new model based on Additional Educational Needs.<sup>31</sup> However, many respondents criticised the proposals.<sup>32</sup>

In 2012 the Minister for Education, John O’Dowd MLA, presented a proposed direction of travel to the Education Committee and in July 2012 the Executive agreed a series of actions within a Policy Memorandum Paper. Just four of the original 26 policy proposals were included within this (Personal Learning Plans, SENCos, a three phase SEN framework and statements to be set out as Coordinated Support Plans).<sup>33</sup>

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<sup>29</sup> Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

<sup>30</sup> Education and Training Inspectorate (2014) *A survey report on transition arrangements from special schools and mainstream learning support centres to post-school provision* Bangor: ETI

<sup>31</sup> Department of Education (2009) *Every School a Good School – The Way Forward for Special Educational Needs and Inclusion* Bangor: DE

<sup>32</sup> Department of Education (2012) *Summary Report of Responses to the Consultation on Every School a Good School – The Way Forward for Special Educational Needs and Inclusion and the associated Equality Impact Assessment* Bangor: DE

<sup>33</sup> Smith, R., Florian, L., Rouse, M., Anderson, J. (2014) “Special education today in the United Kingdom” *Advances in Special Education* Vol. 28, pp. 109-145

A recent article stated that this lengthy policy process had resulted in little in the way of fundamental change. Rather, the changes centred on formalising procedures in order to regulate identification and resource allocation.<sup>34</sup>

### **SEND Bill, regulations and policy framework**

The Bill, as drafted, does not include many of the proposals agreed by the Executive in 2012. Many of these are expected to be introduced through the revised Code of Practice and amendments to regulations.

The SEND Bill provides for a significant amount of subordinate legislation, and allows the Department to make any transitional, transitory or consequential provisions it feels are appropriate. It is also expected to be supported through a revised Code of Practice that has not yet been developed. For further information see [Paper 38/15: Special Educational Needs and Disability \(SEND\) Bill](#).

### ***Revised Code of Practice***

The revised Code of Practice aims to provide guidance to schools and the EA on the provisions of the SEND Bill and associated regulations. The Department advises that the work is underway to begin drafting the revised Code, which will follow similar structures to the existing Code and Supplement, but set out within a single document. It is likely to include a range of areas, including:<sup>35</sup>

- Duties on Boards of Governors and the EA;
- Role of the Learning Support Coordinator;
- Views of the child;
- Three levels of SEN support;
- Personal Learning Plans;
- Statutory assessment, statementing and annual review arrangements;
- Pre-school settings;
- Transition planning;
- Dispute Avoidance and Resolution, appeals and mediation; and
- New rights for children over compulsory school age.

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<sup>34</sup> Smith, R. (2014) "Changing policy and legislation in special and inclusive education: a perspective from Northern Ireland" *British Journal of Special Education* Vol. 41, No. 4. pp. 382-402

<sup>35</sup> Information provided by the Department of Education, May 2015

### ***Extent to which 2012 proposals have been included within the SEND Bill***

The Policy Memorandum in 2012 set out a total of 26 policy proposals, some of which relate to policy only. Table 2 considers the proposals for *legislative* change and whether they have been included in the SEND Bill.

Table 2 shows that some of the proposed legislative changes have been included in the SEND Bill, but that a broad range of amendments to existing legislation are planned by the Department in implementing the proposed SEN framework. On the 10<sup>th</sup> March the Minister for Education stated that there is “*considerable work left to be done on the regulations.*”<sup>36</sup>

**Table 2: Key legislative actions agreed in 2012 and the SEND Bill**

Proposed action(s)	SEND Bill
<b>Boards of Governors:</b> amend the 1996 Order to strengthen duty to identify, assess and make provision for children with SEN; and requiring teachers to take actions to identify and provide for SEN	<ul style="list-style-type: none"> <li>• Includes a duty to make all those involved with a pupil’s education aware of their SEN</li> </ul>
<b>Personal Learning Plans (PLP):</b> require Boards of Governors to ensure they are in place	<ul style="list-style-type: none"> <li>• Requires Boards of Governors to ensure PLPs are in place, monitored and reviewed</li> </ul>
<b>Pre-school:</b> consider mechanisms for placing children; amend the 1998 Order to require appropriate provision and support for children with SEN	<ul style="list-style-type: none"> <li>• Does not refer to pre-school education</li> <li>• Code of Practice expected to include information on pre-school settings</li> </ul>
<b>Statements:</b> amend regulations so statements can be set out as a Coordinated Support Plan (CSP); reduce timescales from 26 to 20 weeks	<ul style="list-style-type: none"> <li>• Does not refer to CSPs or timescales for statements</li> <li>• Expected to be included in regulations and the Code of Practice</li> </ul>
<b>Statement Reviews:</b> amend regulations to simplify process - annual reviews could be carried out in two steps other than at transition points or where provision is not thought to meet needs	<ul style="list-style-type: none"> <li>• Does not detail approach to reviewing statements</li> <li>• Expected to be included in amendments to regulations and the Code of Practice</li> </ul>

<sup>36</sup> Northern Ireland Assembly (2015) *Official Report: Tuesday 10 March 2015* [online] Available at: <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2015/03/10&docID=226893>

Proposed action(s)	SEND Bill
<b>Transitions:</b> full reviews to be required for pupils with CSPs at transition stages	<ul style="list-style-type: none"> <li>• Does not refer to transitions</li> <li>• “Transition planning” to be included in the Code</li> </ul>
<b>Education and health:</b> amend the 1996 Order to require that the EA requests help; guidance to emphasise that health bodies make recommendations for health provision in the CSP	<ul style="list-style-type: none"> <li>• Requires the EA to request help from health bodies</li> </ul>
<b>Partnerships with children:</b> Consider how existing provision can be amended to require that child’s views are sought	<ul style="list-style-type: none"> <li>• Requires the EA to have regard to the views of the child and the Code of Practice is expected to provide guidance on this</li> </ul>
<b>Dispute Avoidance and Resolution Service (DARS):</b> require Boards of Governors to inform parents of a dispute between the parent and school; require parents to avail of the DARS prior to the SENDIST; consider requiring all parties to participate in dispute resolution	<ul style="list-style-type: none"> <li>• Requires parents to seek advice from a mediation advisor about the process and its potential benefits, prior to lodging an appeal with the SENDIST</li> <li>• However, engaging in mediation itself is not compulsory<sup>37</sup></li> </ul>
<b>Transitional arrangements for CSPs:</b> consider whether they should be included in SEND Bill or a statutory code	<ul style="list-style-type: none"> <li>• Permits the Department to make any transitional provisions it feels are appropriate</li> <li>• No specific reference to how pupils currently with a statement will transition to CSPs</li> </ul>

## 12 Conclusion

The SEND Bill, together with a revised Code of Practice and new and amended regulations, aims to support a revised SEN and inclusion framework.

An analysis of the proposals agreed by the Executive in 2012 shows that the Department plans to make wide-ranging amendments to existing legislation and guidance. However, the regulations and the revised Code of Practice have not yet been developed, and the Bill itself gives the Department significant powers to make subordinate legislation. Further consideration could be given to:

<sup>37</sup> Information provided by the Department of Education, May 2015

- The extent of the planned amendments to existing regulations, in addition to the significant powers for subordinate legislation provided for within the SEND Bill;
- When the revised regulations and Code of Practice will be available for scrutiny;
- The lack of time limits for the completion of stages 1-3 in the current SEN framework and what time limits are proposed for each of the three stages proposed by the new framework;
- The proportion of statements issued beyond the statutory time limit of 26 weeks, and how the proposed reduction in the time limit to 20 weeks will work in practice;
- The lack of a statutory duty to prepare transition plans for pupils with SEN who do not have a statement; and
- The need for greater cooperation between health and education in regard to transitions.