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## **SPECIAL EDUCATIONAL NEEDS IN NORTHERN IRELAND**

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### **LEGAL FRAMEWORK**

This paper provides an overview of the law relating to special educational needs (SEN) in Northern Ireland. Education law in general is a complex area with a wide range of statutory provision. It is therefore important to be aware of a variety of sources of the main rules and procedures in order to gain an overview of how these govern special educational provision.

I will set out the law relating to identification and assessment of children with special educational needs (including the five-stage approach used to provide for those needs and the process of drafting a Statement of SEN. The appeals process to the Special Educational Needs and Disability Tribunal (SENDIST) will then be explained.

From a children's rights perspective, it is necessary to have regard to the international legal framework as well as domestic law.

### **International Law**

The **United Nations Convention on the Rights of the Child** (UNCRC) is an international treaty granting all children and young people aged under the age of 18 a comprehensive set of rights affecting all aspects of their lives. It has been ratified by the UK. An international treaty it is not directly enforceable in our court system, however the UK government has a duty to implement the provisions of the UNCRC and must report progress to the United Nations Committee on the Rights of the Child every five years.

An example of a provision flowing from the UNCRC is the "best interests principle" embedded within the **Children (Northern Ireland) Order 1995**. That is, the best interests of the child are the priority for the decision makers. **Article 3** of the **UNCRC** provides that "In all actions concerning children...the best interests of the child shall be a primary consideration".

Arguments grounded on the UNCRC are increasingly heard in our domestic courts and this serves to weave children rights into the fabric of our legal system. For example, the UNCRC can be used to enhance children's rights arguments under the ECHR. It is

good practice to consider the UNCRC when formulating a children's rights argument, given the ongoing process of implementation by the government.

Some of the relevant articles of the UNCRC are set out in summary below:

- Article 2 All children are entitled to access the rights within the UNCRC without discrimination.
- Article 3 In all actions concerning children, whether undertaken by social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- Article 12 A child who is capable of forming his or her own views has the right to be heard in all matters that affect him or her.
- Article 23 A mentally or physically disabled child should enjoy a full and decent life including active participation within the community and effective access to education, training, healthcare, rehabilitation services, employment and recreation. The disabled child has the right to special care, free of charge wherever possible.
- Article 28 The child has a right to education on the basis of equal opportunity.
- Article 29 The education of the child should be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential; the development of respect for human rights; respect for parents, culture and the natural world.

The **United Nations Convention on the Rights of Persons with Disabilities** (UNCRPD) is an internationally binding agreement protecting the human rights of disabled people. The Convention and its Optional Protocol came into force in May 2008 (after ratification by 20 countries) and were ratified by the UK government on 8<sup>th</sup> June 2009. The benefit of the Optional Protocol is that it strengthens implementation and monitoring of the Convention in the UK. Individuals can bring petitions to the UN Committee, which has been established to monitor the implementation of the Convention, if there has been a breach of rights. Furthermore, the Committee has a power to undertake enquiries into allegations of grave or systematic violations of Convention rights.

**Article 24** of the UNCRPD provides that people with disabilities have a right to education without discrimination, along with the right to access an inclusive education

system. They should not be excluded from the general education system on the basis of disability.

It should be noted that the UK government has entered an interpretive declaration and a reservation to Article 24 which may have the effect of diluting the right to an inclusive education (i.e. the right of a child with special educational needs or a disability to be educated in a mainstream school).

#### Interpretative Declaration:

“The General Education System in the UK includes mainstream and special schools, which the UK Government understands is allowed under the Convention.”

The interpretive declaration would also seem to go against the recommendation made by the UN Committee on the Rights of the Child in the Concluding Observations from October 2008 that there should be more investment to ensure the right of all children to a truly inclusive education.

#### Reservation:

“The United Kingdom reserves the right for disabled children to be educated outside of their local community where more appropriate education is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.”

The difficulty with the reservation is that children in Northern Ireland may have to travel away from their families in order to access specialist services, which impacts on the right to family life. The desired aim would therefore be to increase provision of local services for children with special needs so that they may stay near familiar surroundings and their families.

### **Domestic Law**

The **Human Rights Act 1998** incorporates provisions from the European Convention on Human Rights (ECHR) into our domestic legal system. This means that these rights can be enforced within our local court system. In theory many of the rights could be applied to the special educational setting but in practice the legal thresholds can be difficult to meet as will be explained below.

**Article 2 Protocol 1** of the Human Rights Act provides that “no person shall be denied the right to education”. In effect this means that all children have a right to access the education system provided by the state. The right granted is fairly weak in that it is a right to a minimum standard of education and is dependent on what is available within

the existing education system. There is a further provision that parents have the right to educate their children “in conformity with their own religious and philosophical convictions”. However, this does not give a child the right to a particular type of education as the UK government has reserved the right to interpret the law in line with current education law, so that “unreasonable public expenditure” can be avoided.

A useful example of how the Human Rights Act can be applied to education is the case of **Orsus and Others –v- Croatia** [2008] ELR 619. Fourteen Croatian nationals of Roma origin brought an application under Article 2 Protocol 1, Article 3 (prohibition against torture), Article 6 (right to a fair hearing), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) due to the fact that children had been placed in Roma-only classes in primary school. The questions centred around whether this segregation violated the right to education and whether it amounted to racial discrimination. The European Court of Human Rights held that the placement of the children in separate classes had been a positive step to assist the children in accessing the curriculum as they needed extra tuition in the Croatian language and the claim was dismissed.

Although the applicants were unsuccessful on the facts of this particular case, a number of useful principles flow from the decision. It was established that treatment based on prejudice against an ethnic minority is capable of falling within the ambit of **Article 3** where there are feelings of inferiority or humiliation triggered by discriminatory segregation. **Article 6** can apply to cases of discrimination on the grounds of religion, political opinion and race. Arguably it could therefore also be applied to disability discrimination arising from a special educational need or disability. However in relation to **Article 2 Protocol 1**, where there is access to education and the education received is “adequate and sufficient” a claim that a child has been denied education will not be successful.

For a comprehensive analysis of European jurisprudence on Article 2 Protocol 1, see the decision of the House of Lords in **Ali –v- Head Teacher and Governors of Lord Grey School** [2006] ELR 223.

In the Northern Ireland context, a move towards a Bill of Rights provides opportunities to further secure and safeguard children’s rights, including the right to education and personal development for children who have special educational needs.

The main legal provisions which typically apply in practice are now set out below and these will form the backdrop for the majority of the forthcoming discussion.

**The Education (Northern Ireland) Order 1996** (“the 1996 Order”), as amended by the **Special Educational Needs and Disability (Northern Ireland) Order 2005** (“SENDO”) is the main piece of legislation governing special educational needs.

SENDO amends parts of the 1996 Order relating to SEN and extends protection against disability discrimination to certain areas of the education system i.e. the provision of education and associated services, admissions and expulsions. I will be focusing upon the SEN aspects of the legislation throughout this paper.

The 1996 Order is underpinned by several earlier Education Orders. For the purposes of this discussion, the most important is the **Education and Libraries (Northern Ireland) Order 1986** (the “1986 Order”).

The **Education and Libraries (NI) Order 1986** provides a range of definitions and provisions on the powers of the Department of Education, which impact upon practical application of the law relating to SEN (e.g. board policy issues/inter board disputes to be referred to the Department of Education).

**The Education Reform (Northern Ireland) Order 1989** contains provisions relating to the nature of the Northern Ireland curriculum and duties regarding the management of schools. The **Education (Northern Ireland) Order 2006** (the “2006 Order”) revises the framework for the Northern Ireland curriculum and is being introduced on a phased basis.

Flowing from the more recent statutory provisions are two sets of regulations which are **The Special Educational Needs and Disability Tribunal (Northern Ireland) Regulations 2005** which govern procedural steps necessary to take an appeal to the Special Educational Needs and Disability Tribunal and **The Education (Special Educational Needs) Regulations (Northern Ireland) 2005** which govern statutory assessments, production of statements of SEN and compliance with Tribunal Orders.

Guidance on the legislation, produced by the Department of Education (DENI), is contained in the **Code of Practice on the Identification and Assessment of Special Educational Needs** and a **supplement** which accounts for the changes to special educational needs provision introduced by SENDO in 2005.

Under **Article 4** of the 1996 Order there is an obligation upon schools, boards and other relevant persons (which include the Tribunal), to have regard to the Code of Practice. Failure to have regard to the provisions of the Code may be raised during any legal proceedings.

## **INCLUSIVE EDUCATION – The Northern Ireland Curriculum**

A central principle flowing from **SENDO** and the Code of Practice is that the Department of Education, via Education and Library Boards and/or Boards of Governors should provide **inclusive education** for children with SEN. That is, children with SEN should be educated in a mainstream school where possible and should have equality of access to a **balanced and broadly based education, to include the Northern Ireland curriculum** (SEN Code of Practice, paragraph 1.6 – fundamental principles). In practical terms, the vast majority of children with special educational needs will be educated in mainstream schools.

**Article 4** of the **2006 Order** requires that the Board of Governors and the Principal of every grant-aided school secures a curriculum that is “**balanced and broadly based**”. This requirement will be satisfied if the curriculum:

4(2)(a) “promotes the spiritual, moral, cultural, intellectual and physical development of pupils at the school and thereby of society; and

4(2)(b) “prepares such pupils for the opportunities, responsibilities and experiences of life by equipping them with appropriate knowledge, understanding and skills”.

The current requirements relating to the detail of the Northern Ireland Curriculum are found in Part 1 of the **Education (Minimum Curriculum Content) Order (Northern Ireland) 2007** (the “2007 Order”).

In Schedule 2 of the 2007 Order, schools are provided with fairly detailed definition of the areas in which learning opportunities must be provided in order to deliver the minimum content of the statutory Northern Ireland curriculum from foundation stage to Key Stage four (i.e. for the duration of compulsory education).

**Article 16** of the 2006 Order provides that for pupils with a statement of SEN, core elements of the curriculum may be modified or excluded by the statement.

## **APPLICATION OF THE 1996 ORDER, as amended by SENDO**

### **SPECIAL EDUCATIONAL NEEDS**

The 1996 Order governs special educational provision for school-registered children with special educational needs up to and including the age of 18 years. If a person reaches the age of 19 during a school term, he/she is deemed to be 18 until the day after the end of that term. Children under compulsory school age are also entitled to special educational provision. Assessment of children under the age of 2 generally does not follow the statutory procedures but these do apply to children aged 2 or over.

Nursery schools and classes should follow the same procedures as are in place for children of compulsory school age.

**Article 3** of the Order sets out the definitions of “special educational needs” and “special educational provision”.

A **special educational need** is “a learning difficulty which calls for special educational provision”.

A **learning difficulty** can arise in 3 situations:

- (a) Where a child has a “significantly greater difficulty in learning than the majority of children his age”.
- (b) The child has “a disability which either prevents or hinders him from making use of educational facilities”.
- (c) The child has not yet attained the lower limit of compulsory school age but may fall within (a) or (b) when this age limit is reached.

**Special educational provision** is educational provision which is additional to or otherwise different from that generally offered in ordinary schools. For children aged less than 2 years, it includes any type of educational provision.

## **Article 7      Education in Ordinary Schools**

**Article 7** of the 1996 Order, as amended by article 3 of SENDO, imposes the duty to educate children with special educational needs in ordinary (i.e. mainstream) schools. The main exceptions to the principle that children with SEN should be educated in mainstream schools are that mainstream education is against the **wishes of the parents** or that mainstream education is incompatible with the **provision of efficient education for other children**.

The “provision of efficient education” exception can only be relied upon by a Board (or Board of Governors) to place a child outside mainstream education if it shows that there are “**no reasonable steps** that it could take to prevent the incompatibility” with the provision of efficient education for other children (see Article 7A re education otherwise than in ordinary schools).

## **Article 8 Duties in relation to pupils with SEN in Ordinary Schools**

The Board of Governors must “use its best endeavours” to secure that special educational provision is made for children who need it as well as ensuring that “all who

are likely to teach” the child are made aware of the child’s needs and know “the importance of identifying and providing for those needs”.

An important element of Article 8 is the requirement that, “so far as is **reasonably practicable... the child engages in the activities of the school together with children who do not have special educational needs**”. This is subject to compatibility with:

- (a) The child receiving the special educational provision which his learning difficulty calls for,
- (b) The provision of efficient education for the children with whom he will be educated; and
- (c) The efficient use of resources

This provision goes to the heart of the legislation in that children with SEN should be included in all aspects of ordinary school life. Failure to treat children with SEN equally to children without SEN, without justification, may amount to discrimination and this is true whether or not the child has a statement.

## **Article 9 SEN Policy**

The Board of Governors of grant-aided schools have a duty to determine a policy in relation to the provision of education for children with SEN. The policy must be kept under review. In its annual report, the school must describe the steps that have been taken to secure implementation of the SEN policy. Education and Library Boards have similar duties under Article 6.

## **APPLICATION OF THE 1996 ORDER, as amended by SENDO**

### **IDENTIFICATION AND ASSESSMENT OF CHILDREN WITH SEN Articles 13-21 & Schedule 2 1996 Order, Code of Practice and Supplement**

The main provisions and procedures relating to identification and assessment of children with SEN are contained in **Articles 13-21** and **Schedule 2** of the **1996 Order** (as amended) read along with the Codes of Practice and the **Education (SEN) Regulations (NI) 2005**.

Before exploring the statutory provisions relating to identification and assessment of children with SEN it would be useful to look at the fundamental principals upon which the Code of Practice is founded. I will then outline the three school based stages of

assessment before moving on to the statutory assessment at stages four and five of the Code of Practice.

### **The Code of Practice – Fundamental Principles and Essential Practices**

The Code and supplement provide practical guidance for those who exercise any function related to the statutory system of special educational provision in grant-aided schools. Under **Article 4** of the 1996 Order there is an obligation upon schools, boards and other relevant persons (including the SENDIST), to have regard to the Code. Further examples of relevant persons would be the health and social services.

The code is based upon **5 fundamental principles** set out in paragraph 1.6 which are in summary:

1. The needs of pupils with SEN must be met.
2. Children with SEN should have the greatest possible access to a broad and balanced education, including the Northern Ireland curriculum.
3. Children with SEN should be educated in mainstream schools where possible.
4. Children below school age may have SEN which require intervention.
5. Working in partnership with parents is vital.

Paragraph 1.7 identifies **essential practices and procedures** which include, in summary:

1. Early identification and assessment of children with SEN.
2. In most cases the child's mainstream school, in partnership with parents, will be able to provide for the child with SEN.
3. Assessments and statements should be completed as quickly as possible.
4. Boards must complete clear and thorough statements which are monitored and reviewed.
5. The ascertainable wishes of the child should be considered.
6. There must be a multi-disciplinary approach to resolution of issues.

The Boards of Governors of grant-aided schools have a statutory duty under **Article 9** of the 1996 Order to determine a SEN policy and to keep this under review.

The school Principal has responsibility for managing SEN provision in the school. The SEN Co-ordinator (SENCO) at the school has responsibility for co-ordinating any special educational provision in consultation with teaching staff, the Principal, the

parents and the child. Teaching staff should be familiar with the school's SEN policy and procedures and it is desirable that they are involved in the development of the policy.

**Article 8** of the 1996 Order places reporting requirements upon mainstream schools so that parents are informed about special arrangements which are in place for admission of pupils with SEN who do not have a statement and informed about the steps taken to ensure there is no discrimination against pupils with SEN.

The Code of Practice sets out specific guidance (at paragraph 2.8) on the types of information that should be shared by schools via the school prospectus, the annual report and other methods. It includes information about school policies on all aspects of SEN provision and the arrangements for involving parents in the various processes.

Partnership with parents is a fundamental principle and this is of particular relevance when considering the sharing of information. In practical terms a failure of communication between the school, parents, boards and/or other agencies can cause significant damage to the process of supporting a child with SEN. The active participation of parents should therefore be encouraged. Paragraphs 2.21 – 2.17 of the Code give further detail on the concept of partnership with parents.

Board's have a general statutory duty to provide advice and information about available services to the parents of any children in their area with SEN as well as to schools and any other relevant persons (see Article 21A 1996 Order, as amended).

The child's individual legal rights in both domestic and international law must be taken into account. The child's right to have a say in decisions affecting him or her is enshrined within **Article 12** of the **United Nations Convention on the Rights of the Child** (UNCRC).

Considering the wishes of the child, taking into account age and level of understanding, is an essential practice under the code of practice. Paragraph 2.28 of the code expands on this requirement and states that "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."

## **STAGES 1, 2 & 3 of the CODE of PRACTICE – The “School-Based Stages”**

For children of compulsory school age, there are five stages of identification and assessment of special educational needs, set out in the Code of Practice at paragraph 1.8 and outlined below. The five stages are designed to account for developments in a child’s needs as the child progresses through the education system.

The level of intervention or support increases at each stage of the process. The first three stages are managed within the school and funded from the school budget. At stage three there will be close involvement with the Board. Stages four and five are the responsibility of the relevant Board.

A child will not necessarily encounter all 5 stages. Rather there is a continuous process of identification and assessment with provision depending upon the needs of the individual child. The child may need minimal provision or temporary provision to overcome a mild or temporary difficulty. Procedures are in place for systematic review of the child’s progress.

On the other hand, according to the Code, the stages should not be regarded as hurdles to be crossed before a statutory assessment can be made (paragraph 2.18). An example is given that a child can start at stage 3 of the process if this is necessary to meet the child’s needs i.e. the child should move to the stage that is appropriate to meet his or her individual needs. In exceptional cases a child might start the process at stage 4 (paragraph 3.5).

Parents should be encouraged to participate as appropriate in all aspects of the assessment process and should be kept up to date about any steps to be taken.

Paragraph 2.43 of the Code sets out 5 key principles which should be considered during the school-based stages of identification, assessment and provision which are, in summary:

- Provision should match needs
- Needs, actions taken and outcomes should be recorded
- Have regard to the ascertainable wishes and feelings of the child
- Consult closely with parents
- Involve outside specialists where appropriate, particularly before referring to the Board for a statutory assessment

The first three stages can be summarised as follows: (see paragraphs 2.45 to 2.76 of the Code for full detail)

### **STAGE 1**

At Stage 1, the class teacher identifies that a child has special educational needs and consults with the school's SENCO to initiate the process of assessing the child's educational needs. The class teacher manages the Stage 1 process.

Information is gathered from school records, from parents, from the child and any other relevant source. The child is added to the school's SEN register. A decision is made as to whether any special help is needed within the classroom and which stage of the Code is appropriate, if any. Targets, monitoring arrangements and review dates should be set and recorded. If Stage 1 does not result in satisfactory progress, the class teacher and the SENCO may decide to implement Stage 2

### **STAGE 2**

At Stage 2, the SENCO gathers information to coordinate the child's special educational provision using an individual education plan (IEP) and works alongside the school-teachers. The SENCO manages the Stage 2 process.

The SENCO gathers together information from the Stage 1 process; from the school doctor or GP as to whether there is a medical problem affecting the child's ability to learn; from the HSST and any other agency or organisation linked to the child. A decision is then made as to any further investigation needed and interim arrangements may be put in place while this is carried out.

When all relevant information is available, the IEP is designed for the child. This will include information about the learning difficulties, the needs arising (educational, pastoral or medical) and provision required to meet the needs.

The IEP should be monitored and reviewed against time-limited targets.

At review it is decided which stage of the Code, if any, is appropriate as the child continues through the education system.

### **STAGE 3**

External specialists are brought in to support and assist the school.

The SENCO continues to coordinate the process but responsibility for the child is shared with the external experts. Examples of the types of expert include occupational therapists, speech and language therapists, behaviour support workers, GP, medical consultants, social workers.

In order to comply with its duty to identify children with SEN, the Board is responsible for obtaining information from schools about registered pupils who are at Stage 3 of the Code of Practice. The Board is informed when a child enters Stage 3.

It may be necessary for an interim education plan to operate while external professional advices are awaited. Once all of the advice is available, a revised IEP is drawn up by the SENCO with the assistance of the teachers and external specialists. The information included in the IEP follows a similar format to that at Stage 2 and in addition includes details about the external specialists involved in assisting the child.

Modified or tailored teaching approaches can be considered and the specialists may work with the child directly or give advice to the class teachers. The Code emphasises that the IEP should be implemented within the normal classroom setting where possible. In some cases outreach support may be put in place. Targets should be set as part of the IEP and should be monitored, assessed and reviewed (normally within a term). Where practicable, the child should participate in drawing up the IEP as the plan will affect his/her daily education and motivation to reach targets.

Parents should be invited to attend Stage 3 reviews. Depending upon the child's progress over the first two review periods, the child may stay at Stage 3 or revert to a previous stage or the Principal of the school may consider requesting a statutory assessment i.e. to request that the child is moved to Stage 4.

## **STAGES 4 and 5 of the CODE of PRACTICE**

Before exploring the statutory stages it is useful to refer to some of the provisions which govern them.

Under **Article 13** of the 1996 Order, if a child has SEN and it is necessary for the Board to determine the special educational provision needed (by means of a statement), then the board has a **duty to identify** that child. This duty applies only to children for whom the Board is **responsible**. The Board is responsible for **registered** pupils at **grant-aided** schools. In line with the Code, such children should be identified as early as possible.

A statutory assessment will not always lead to a statement as it may identify provision that will be effective without the need for a statement. Statements will be used in a small minority of cases. At paragraph 2.2 of the code it is stated that only about 2% of cases will require a statement.

The Board is also responsible for children who are at least 2 years old, but have not yet reached compulsory school age, who have been brought to the attention of the Board

as having or probably having SEN. Under **Article 14** duties are placed upon the health and social services authorities in relation to this age-group which may result in bringing the child to the attention of the Board or helping the Board with any identification/assessment of SEN.

## **STAGE 4**

The statutory assessment initiated under **Article 15** of the 1996 Order and the making and maintenance of a Statement under **Article 16** of the 1996 Order are subject to formal procedures and time limits which are set out in **Regulation 11** of **The Education (Special Educational Needs) Regulations 2005**. Guidance on the operation of these rules and procedures is contained in **Parts III and IV** of the **Code of Practice**

The Board becomes directly involved with the child on referral from the school or an agency (e.g. Health Trust) or when a parent makes a formal request for statutory assessment.

The definition of “parent” for the purpose of requesting a statutory assessment includes a person who has parental responsibility and a person or agency who has care of the child. Parental responsibility is interpreted in line with the **Children (Northern Ireland) Order 1995**.

If the child meets the criteria for an assessment (see below), this will be carried out using a multi-disciplinary approach. Advice will be sought from a range of relevant professionals such as an educational psychologist, speech and language therapist, occupational therapist, doctors and social workers etc. Evidence is also gathered from the parents and the school. Since the parents and teachers spend most time with the child they are in a good position to provide direct evidence about the child’s needs. At paragraph 3.2 the Code of Practice states that “Boards should pay particular attention to evidence provided by school and parents”.

### **Criteria**

The Code of Practice sets out three criteria (see appendix A5) to guide the Board when it is deciding whether to carry out a statutory assessment:

“Where the balance of evidence presented to and assessed by the Board suggests that the child’s learning difficulties:-

- are **significant** and/or **complex**
- have not responded to **relevant and purposeful measures** taken by the school and any external specialists involved; and

- may call for special educational provision which cannot reasonably be provided within the **resources normally available to mainstream schools** in the area,

the Board should consider very carefully the case for a statutory assessment of the child's special educational needs. “

In practice, when reviewing evidence, Boards use agreed regional criteria and thresholds to decide how resources are employed. The application of the criteria may vary from one Board to another. Tension between the Boards' obligation to use resources efficiently and the child's right to be assessed as an individual with particular needs is at the heart of many disputes which progress to the SENDIST.

It is convenient to look at the Stage 4 procedures as a series of steps as follows:

1. A Board (under **Article 15**), parent (**Article 20**) or responsible body (**Article 20A**) can initiate the process. The responsible body is the school principal or Board of Governors or proprietor of the school. The parent or school can make a **formal request** for statutory assessment. The Board must comply with the request unless an assessment has been carried out within the past 6 months or the Board, on examining the available evidence, decides that an assessment is not necessary.
2. If the Board or the school have initiated the process, the Board will serve on the parents a **Notice of Proposal** to make a statutory assessment. The notice should be copied to the school Principal, the HSST and any relevant agencies. The Notice of Proposal informs the parents of the procedure to be followed; the name of the Board Officer from whom they can obtain further information and informs them of their right to make representations and submit written evidence. (see 3.8 – 3.11 Code of Practice for guidance on the provision of information to parents)
3. Parents then have a period of time of not less than **29 days** in which to make representations and/or provide written evidence.
4. Within **6 weeks** of the date of service of the Notice of Proposal (or date of receipt of the request), the Board serves notice on the child's parents and/or school of its **decision** about whether or not it will assess the child, along with the reasons for that decision and details for parents about the availability of advice and information from the Board.
5. If a Board has given notice to the child's parent of its decision to make an assessment, it must complete that assessment within **10 weeks** beginning with

the date on which that notice was given (see Regulation 11 of the Education (SEN) Regulations (NI) 2005).

### **Right of Appeal to the SENDIST**

6. If the Board decides not to undertake a statutory assessment, parents have a right of appeal to the SENDIST. Along with the notice of decision, the Board must include a notice about the availability of DARS (the Dispute Avoidance and Resolution Service); the right of appeal to the Tribunal and the time limit on the right of appeal (**2 months from date of receipt of the notice of the decision not to make a statutory assessment**). The notice must also make clear the fact that a parent can simultaneously engage with the DARS process and lodge their appeal.

### **Time Limits**

Flexibility is built into the statutory provisions where the time limits are “**impractical**”. **Regulation 11** sets out the circumstances where this may apply.

In relation to the 29 day and 6 week time limits the circumstances include: school closure for at least 4 weeks following the week when the request for information is made to the school; exceptional personal circumstances affecting the child or a parent or absence of the child or parent from the Board’s area for at least 4 weeks during the 6 week time limit.

Similarly, where a Board has requested the help of a Health and Social Services Trust in the assessment process, the Trust has 6 weeks from the date of request to comply, unless this is impractical. Compliance will be “Impractical” when there are exceptional personal circumstances affecting the child or a parent; absence of the child or parent from the Board’s area for at least 4 weeks during the 6 week time limit; the child does not attend an appointment for an examination or test which was made during the 6 week time limit, or the Trust has not previously produced or maintained any records relevant to the statutory assessment.

In relation to the ten week time limit for completion of an assessment, compliance by a Board may be impractical because in exceptional cases, the Board needs further advice; the parent wishes to provide further advice after the first 6 week period and the Board agrees that it should receive the advice; school closure for at least 4 weeks following the week of the request; the health and social services have not complied with a request for advice within 6 weeks of the request; exceptional personal circumstances affect the child or parent; absence of the child or parent from the Board’s area for at

least 4 weeks during the 10 week assessment period or the child fails to attend an appointment for an examination or test during the 10 week assessment period.

**Regulation 16** provides that a proposed statement should be served within **18 weeks** beginning with the date of service of the Board's notice of proposal to assess or the receipt of a request from a parent or school, as the case may be. Again the Board need not comply with this time limit if it is impractical. Reasons for impracticality are defined in the same way as those for delay in the 10- week assessment process (see above).

## **STAGE 5**

On completion of a statutory assessment when all of the professional and other advices are available and taking into account any parental representations, the Board decides whether to make a statement of special educational needs under **Article 16** of the 1996 Order. If it is decided that a statement is necessary, the Board has a duty to determine and arrange the provision set out in the statement. The criteria for deciding whether to make a statement are outlined in **Part IV Code of Practice** and include:

- Can the child's needs be provided from within the resources normally available to mainstream schools?
- Is current provision from within the school appropriate to the child's assessed needs?
- Has the assessment identified areas where new approaches can be taken by the school to provide for the child's needs using its own resources?

The following criteria would suggest that a statement should be made:

- the child requires regular direct teaching from a specialist teacher, daily individual support from a non-teaching assistant or requires a major piece of equipment
- a new placement is appropriate
- the child's parents are in the armed forces and frequent moves may disrupt special educational provision
- a day or residential special school placement may be necessary

Boards should make cost-effective use of resources when arranging provision. However, **provision must be consistent with the child's assessed needs** (as stated at paragraph 4.6 of the Code of Practice). It is clear that the arrangement of special educational provision should be needs driven and not resource driven.

If the Board decides not to make a statement, the parents must be notified and given reasons. There is a right of appeal to the SENDIST which must be exercised **within 2 months** of receipt of the notice of the decision.

The Board does have an option to issue a “**Note in Lieu**” of a statement. This may be used where the information gathered during assessment is informative to parents, schools and professionals who come into contact with the child. The Note in Lieu may follow a similar format to a statement but it does not have the same legal force. Rather it is guidance to assist in meeting the child’s needs in school.

If the Board decides that it is necessary to make a statement, it will make a formal statement and maintain it using annual reviews. The statement will first issue in draft form and this is a critical time for parents to communicate effectively with the Board and the child’s school and to provide their own views on the appropriate wording of the statement.

**Procedure - Schedule 2, 1996 Order** (as amended by Schedule 1 of SENDO)

The procedure relating to the making and maintenance of statements is contained in Schedule 2 of the 1996 Order, as amended by Schedule 1 of SENDO.

Before making a statement, the Board must send a proposed or draft statement out to parents to put them on notice of the provision it is intending to arrange, along with a form on which the parents can state their preferred grant-aided school and their reasons for that preference.

Parents then have **15 days** beginning with the date of receipt of the notice, to express their preference as to choice of school and to make representations about the content of the statement. Alternatively, parents can request a meeting or series of meetings with the Board (within the same time period of 15 days), in which case **a further 15 days** to make representations runs from the date of the last meeting.

This is an important opportunity for parents to provide information, advice and evidence about the child’s needs. In some cases parents may have access to independent medical reports or specific information about their child’s condition. They may have evidence about therapies needed and whether these should be specified and quantified on the statement. All relevant information should be shared with the Board at the earliest opportunity in order that the parental view of the child’s educational needs is adequately represented.

The Board must consider any representations and cannot make the statement until the relevant time period has elapsed. When the statement is made the Board must serve it on the parents along with a written notice of the right to appeal the contents of Part 2, 3

and/or 4 the statement under Article 18(1) of the 1996 Order and notice of the **2 month time limit** for appeal.

## **THE CONTENTS OF A STATEMENT OF SPECIAL EDUCATIONAL NEEDS**

The content of a statement of SEN is governed by Regulation 15 (and Schedule 2) of the Education (SEN) Regulations (NI) 2005. Guidance is provided in Part 4 of the Code of Practice.

A statement of SEN is made up of six parts as follows:

- Part 1 Introduction
- Part 2 Special educational needs
- Part 3 Special educational provision (other than placement)
- Part 4 Placement
- Part 5 Non-educational needs
- Part 6 Non-educational provision

All of the advice gathered during the process of assessment must be attached to the statement as appendices. This may include parental evidence, educational advice, medical advice, psychological advice, social services advice and any other relevant advice, such as the child's views.

**Part 1** of the statement sets out basic details about the child such as name, address, date of birth and details of the parents or carers.

**Part 2** sets out details about the child's special educational needs which have been identified during the statutory assessment. It is important that each need is specifically identified and that the child's functioning is properly described, so that appropriate provision can be made. If a parent is not satisfied with the description of the child's educational needs, an appeal can be made to the SENDIST (within the **2 month time limit**).

**Part 3** sets out the educational and developmental objectives followed by the special educational provision which will meet the child's assessed needs and finally provisions for monitoring and review of the child's progress. The Board is responsible for arranging all elements of the provision on the statement, whether or not the Board itself is the provider. According to the Code of Practice at paragraph 4.21 "the provision set out in this subsection should normally be **specific, detailed and quantified**. If a parent

is not satisfied with the provision set out in Part 3, an appeal can be made to the SENDIST (within the **2 month time limit**). Very often a parent will appeal in order to seek that provision is specified and/or quantified. For example in place of “therapies as required” a parent might request “speech and language therapy once per week for 30 minutes”. Another common reason for appeal is where it is felt that a need placed in part 5 of the statement (non-educational needs) is in fact an educational need e.g. speech and language therapy.

Paragraph 4.21 of the Code states that “there will be cases where flexibility should be retained in order to meet the changing special educational needs of the child concerned”. It is a well established principle that lack of specificity in the statement should be related to a child’s need for a flexible approach and should not be driven by cost considerations.

**Part 4** of the final statement sets out the type of school which the child should attend and where appropriate the name of a specific school. A parent may appeal Part 4 to the SENDIST (within the **2 month time limit**).

The legal provisions surrounding the parental right to choose a child’s school can be summarised as follows:

1. By virtue of paragraph 5, Schedule 2 of the 1996 Order as amended, parents may express their preference for any grant-aided school. When making a statement, a board has a mandatory duty to specify the chosen grant-aided school unless:
  - (a) The school is unsuitable to the child’s age, ability or aptitude or to his special educational needs, or
  - (b) The attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated, or the efficient use of resources.

The same tests apply where a parent requests a change of named school for a child who already has a statement. There is a limit to the Board’s duty relating to compliance with a request to change schools in that the request must be made not less than **12 months** after the later of three possible dates as set out at paragraph 11(b) of Schedule 2 of the 1996 Order:

The date of:

- (a) a previous request to change schools; or
- (b) service of a statement or amended statement on the parent; or
- (c) conclusion of a previous appeal

2. If a child does not have a statement, the Board must place the child in an ordinary school (Article 7(3), 1996 Order, as amended by Article 3 SENDO).
3. Boards have a statutory duty to ensure children with statements of special educational needs are educated in ordinary schools, unless under Article 7 of the 1996 Order (as amended by Article 3 of SENDO), this is incompatible with:
  - (a) The wishes of the child's parent, or
  - (b) The provision of efficient education for other children
4. The Board (or Board of Governors) may only rely on the "provision of efficient education" caveat if only it shows that there are **no reasonable steps** that it could take to prevent the incompatibility (Article 7A 1996 Order). What is reasonable will depend on each particular child's circumstances but will include a consideration of cost implications. Guidance on what is reasonable is contained in the supplement to the Code of Practice at Section 5 and in Appendix 2. For example, to ensure the inclusion of a primary school pupil with hearing loss it would be reasonable to furnish the classroom with a suitable hearing system.
5. Parents may make representations in favour of a school which is not grant-aided (e.g. an independent special school). Under Article 10(2), 1996 Order, the Board shall not arrange education otherwise than in a grant-aided school unless it is satisfied that:
  - (a) the interests of the child require such arrangements to be made; AND
  - (b) it is compatible with the efficient use of resources.
6. Under Articles 12 and 26 of the 1996 Order, in relation to independent schools, there is a requirement for DENI approval that the school is suitable for children with SEN or for DENI consent to a particular child being educated at the school. Without this approval or consent neither the Board nor the SENDIST has the power to place a child in an independent school. Indeed the SENDIST cannot register an appeal regarding an independent school without the Department's approval or consent. A parent can make arrangements to educate a child at their own expense at an independent school without DENI approval or consent. In this situation the Board must be satisfied that the school is able to make the provision specified in the statement. Article 11 of SENDO provides that where parents have made suitable arrangements for the special educational provision specified in the statement to be made for the child, there is no requirement for the Board to name a school on the statement. The Board is still responsible for

maintaining the child's statement but is under no obligation to contribute to the cost of the parent's choice of education.

**Part 5** of the statement sets out non-educational needs which have been identified by the assessment process. For example, transport to and from school or therapies.

**Part 6** of the statement sets out non-educational provision. Therapies may be included in this section if they are deemed to be related to non-educational needs e.g. occupational therapy or speech and language therapy. However if a child needs therapies in order to access the curriculum, then these should be specified in Parts 2 and 3 (educational need/educational provision).

No appeal may be made to the SENDIST regarding the content of parts 5 or 6 of the statement alone. However an appeal against the contents of Parts 2 and 3 can be used to argue that a particular need is educational rather than non-educational and should be included in parts 2 and/or 3 (e.g. therapies).

## **CHALLENGING DECISIONS RELATING TO SEN**

A parent who takes issue with the special educational provision for a child can make a direct approach to the relevant Education and Library Board and/or the school in the first instance to try to resolve matters at an early stage. In practice a well informed parent will be in a good position to negotiate with the Board throughout the process and the earlier the parent makes their views known and provides evidence to support those views, the more likely that any issues can be well aired and resolved.

An additional facility is available as a result of SENDO, whereby a parent can refer the matter to the Dispute Avoidance and Resolution Service (DARS). DARS has been set up to avoid and resolve disputes between the parents and the Board. DARS can be accessed if all parties agree to participate. This service aims to provide independent, impartial advice and to assist the parties to resolve issues by reaching agreement.

**Using DARS does not affect a parent's right to lodge an appeal with the SENDIST** and the two processes can run parallel to each other pending a hearing at the SENDIST. The appeal should be lodged promptly and within the strict two month time limit.

## **THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL - SENDIST Articles 22-24 1996 Order and SENDIST Regulations 2005**

The SENDIST is an independent Tribunal which hears appeals relating to special education and disability. The appeals are heard by a panel of three – a Chairperson and two lay persons. The Chairperson is legally qualified and the lay persons have knowledge and experience of special educational needs.

The following decisions relating to SEN can be appealed by a parent to the SENDIST:

1. Refusal to carry out a statutory assessment (Articles 20 and 20A 1996 Order as amended by Article 10 SENDO )
2. Refusal to make a statement after an assessment has been carried out – Article 17 1996 Order
3. Contents of Part 2 (needs), Part 3 (provision), Part 4 (placement) of a statement or a combination of these issues – Article 18 1996 Order
4. Amendment of a statement – Article 18 1996 Order
5. Decision not to amend a statement after a statutory assessment– Article 18 1996 Order
6. Refusal to change the named school on request from parents (para 11(3)(b) of Schedule 2 1996 Order, as amended)
7. Cessation of a statement (para 13(2)(b) of Schedule 2 of the 1996 Order, as amended)

“**Parent**” for the main purposes of the Education Orders, is defined by Article 2D of the 1986 Order and includes:

1. A person who is not a parent but has “parental responsibility”. Parental responsibility is interpreted in line with **The Children (Northern Ireland) Order 1995**; or
2. A person who has care of the child.

SENDO amends parts of the 1996 Order relating to SEN and extends protection against disability discrimination to the education system. The rights and duties put in place by SENDO in relation to disability discrimination are additional to the rights and duties contained in the **Disability Discrimination Act 2005**, as amended by the Disability Discrimination (NI) Order 2006.

The SENDIST hears disability discrimination claims made against schools and/or Boards. Disability discrimination claims relate to education and associated services, admissions or expulsions. However, if an admission or expulsion claim is made against a grant-aided school, this will be heard by the Boards' Admissions Appeals Tribunal or Expulsions Appeal Tribunal (including any discrimination point). The remainder of claims are heard by the SENDIST (see page 3 of the Booklet "Disability Discrimination in Schools – How to Make a Claim" which is available from the Secretary of the SENDIST).

The time limit for a disability claim is **6 months** from the alleged discrimination. This time limit may be extended for a further two months if the case is referred to the Equality Commission's Conciliation Service. The Equality Commission of Northern Ireland has produced a Disability Discrimination Code of Practice for Schools which should be taken into account along with SENDO.

The main elements of a disability discrimination claim are:

1. Meeting the definition of "disability" in Section 1 of the **Disability Discrimination Act 1995** i.e. a "physical or mental impairment which has a substantial and long term adverse effect on...ability to carry out normal day to day activities". It may not always be clear whether a condition meets this definition e.g. ADHD is capable of being a disability but will not always meet the definition, depending upon the severity of its effects.
2. Proving that the discrimination is connected to the disability or that there has been a failure to make reasonable adjustments or that there has been victimisation.
3. Proving that there was no reasonable justification for the discrimination.

It is not currently possible to obtain legal aid for representation at the SENDIST and this may affect "equality of arms" between parents and Boards. Parents who have the means will often hire a representative and pay for private specialist reports. Otherwise parents self-represent or seek help from charitable or voluntary organisations.

It is possible for a parent to apply to have a SEN appeal heard at the same time as a disability discrimination claim. During 2008, the SENDIST registered approximately 60 cases. The number of cases registered per year is showing an upward trend as parents become more aware of their children's educational rights. The vast majority of cases are SEN appeals on which the remainder of this paper will focus.

## **SEN APPEALS – PROCEDURAL REQUIREMENTS**

The procedural requirements for SEN appeals are found in the **Special Educational Needs and Disability Tribunal Regulations (Northern Ireland) 2005** (“SENDIST Regulations”).

The proceedings tend to be quite informal in nature with oral testimony given in a fairly conversational fashion. The Chairperson will explain the order of proceedings at the outset. The Panel will usually identify and list the main issues for hearing, subject to agreement with the parties. Generally, each issue is dealt with in turn so that all witnesses can contribute their views and respond to issues raised as matters proceed.

However, in terms of preparing for the hearing, the SENDIST regulations are strictly applied and it is therefore vital that all time limits are adhered to, in order to avoid any difficulty at the full hearing.

The basic procedures are as follows:

### **Regulation 7 – Notice of Appeal**

The parent lodges a written, signed **Notice of Appeal** along with a statement of reasons for appealing. The Notice of Appeal form is available from the Secretary of the Tribunal. Relevant copy documents should be attached including copy notice of the disputed decision; copy statement, if any and written confirmation from the named school (if any) that the school is aware of the request to name it. A request to hear a SEN appeal at the same hearing as a disability claim can be made on the Notice of Appeal.

**The Notice of Appeal must be received by the Tribunal no later than the first working day after the expiry of 2 months beginning with the date on which the Board gave notice of the right of appeal.**

### **Regulations 9, 13 & 28 – Case Statements**

The Tribunal will acknowledge receipt of the notice and will in turn give notice of the case statement period. Both the parents and the Board will have exactly the same timeframe of **30 working days** (under Regulation 28) within which to provide a written statement of case, which may include the views of the child. This is an important document which will form the basis of the hearing. Any relevant written evidence (including professional reports, letters etc) which supports the points made should be appended to the case statement. It is very difficult to obtain permission to extend the case statement period or to amend the notice of appeal or case statement as this will only be allowed in “exceptional circumstances”.

If a parent fails to submit a case statement within time, the hearing will go ahead as normal without the statement. If a Board fails to submit a case statement within time, then either the matter will be decided on the papers received, without a hearing, or there

will be a hearing which the Board will not be permitted to attend and the matter will be decided on the parents' evidence alone. The only exception is where "exceptional circumstances" can be proved under Regulation 60(1) on a successful application for an extension of time and this will be very rare.

In advance of the hearing, the parties will be sent copy indexed bundles of papers for hearing so that everyone will be working from the same information.

Normally each party will be allowed to bring a maximum of **two witnesses** but permission can be granted for a greater number to attend (see Regulation 42(9))

### **Regulation 43 – Late Written Evidence**

There are two situations where late written evidence can be submitted:

1. The evidence was not and could not reasonably have been available to that party before the end of the case statement period and a copy was sent or delivered to the Secretary of the Tribunal and the other party to arrive at least **5 working days** before the hearing; or
2. The case is **wholly exceptional** and unless the evidence is admitted, there is a serious risk of prejudice to the interests of the child.

The second of these is very difficult to prove and it is therefore important to be aware at the outset of any potential for late written evidence so that this can be dealt with appropriately.

### **Regulation 46 – Decision**

The decision can be given orally on the day of the hearing but is more usually reserved and given 2-3 weeks after the hearing. The tribunal must provide written reasons for the decision. The decision is treated as having been made on the date on which a copy is sent to the parent.

### **Powers of the SENDIST**

In making a decision the Tribunal has the power to dismiss the appeal, to make an Order against the Board (e.g. to carry out a statutory assessment or to specify and quantify therapies) or to remit the case to the Board for reconsideration in light of the tribunal's findings (see Article 17 1996 Order, re appeal against decision not to make a statement).

### **Compliance with Tribunal Orders**

Article 23 of the Education (Special Educational Needs) Regulations 2005 makes provision for compliance with Tribunal Orders within certain time limits unless it is "impractical" to do so. For example if a Board is ordered to make and maintain a statement it must make the statement within **5 weeks**.

## **Applying for a Review of the SENDIST's Decision**

In certain limited circumstances, it is possible to apply for a review of the Tribunal's decision. The application is made by virtue of **Regulation 47** of the SENDIST Regulations on one or more of the following four grounds:

- (a) the decision was wrongly made as a result of an error on the part of the tribunal staff;
- (b) a party, who was entitled to be heard at the hearing but failed to appear or be represented, had good and sufficient reason for failing to appear;
- (c) there was an obvious error in that decision; or
- (d) the interests of justice require.

The review procedure requires the application to be made not later than **10 working days** after the date on which the decision was sent to the parties. When the application is received by the SENDIST it goes through two stages:

1. It is decided whether a review will be granted. This will be refused if the application has no reasonable prospect of success; and
2. The Tribunal reviews the relevant parts of the decision.

The review process should not be viewed as giving a right of appeal where a parent is unhappy with the decision (appeal rights are dealt with below). Rather it is a mechanism for dealing with a technical flaw in the decision e.g. procedural irregularity or genuine misunderstanding about a fact.

For simple clerical errors the "slip rule" can be used by virtue of **Regulation 58(3)**. Accidental slips or omissions can be corrected at any time by the Chairman or the President. Regulation 58 can also be used to cure procedural irregularities if these are brought to the tribunal's attention before a decision is made.

If a party believes that the decision is wrong due to a material error of law, where the legal argument has been fully aired at the hearing, then review is not appropriate and the only avenue open is an appeal.

## **APPEALING THE DECISION of the SENDIST**

### **Appeals by way of Case Stated**

The right of appeal from the Tribunal is set out in **Article 24** of the 1996 Order. The right of appeal lies with “a person who appeals to the Tribunal” i.e. the parents or the Education and Library Board. This means that there is no right of appeal for the child in person, as it is the parent who appeals to the Tribunal. The parent is therefore the appropriate person to lodge the appeal. If a legal aid application is made, it must be made in the parent’s name.

An appeal from the decision of the SENDIST is made to the High Court on a point of law only. Procedure in the High Court is governed by the **Rules of the Supreme Court (Northern Ireland) 1980** (“RSC”). RSC, **Order 94** states that appeals under Article 24 of the 1996 Order “shall be brought by way of case stated in accordance with the provisions of RSC, **Order 56**”. The case statement process allows the Applicant to set out a question of law to be determined by the High Court. The question is generally drafted by a lawyer.

Order 56 states that a requisition to state a case must be lodged with the Tribunal within **6 weeks** (commencing on the day the Tribunal’s decision was sent to the applicant). The tribunal has **6 weeks** (commencing on the date of receipt of the requisition) to settle the case and send it to the Applicant. The case stated should be signed by the chairperson.

The Applicant has **14 days** from receipt of the case stated to lodge the appeal and serve copies upon the other party or parties. Within **14 days** of lodgement the Applicant must lodge an appeal book containing the requisition to state a case; the case stated; any legal aid certificate and any other documents which may be relevant to the appeal.

### **Judicial Review**

Traditionally the Judicial Review process has been more widely used in Northern Ireland than in England and Wales. The time limit for instituting a judicial review is **promptly and in any event within 3 months** from the date that the grounds to make the application first arose. The applicant must have sufficient interest in the case to succeed in gaining leave to apply. If the child has sufficient interest a legal aid application could be made in the child’s name. Otherwise, the parent is the proper applicant.

Since there is a statutory route of appealing Board decisions to the SENDIST and a route of appeal from the SENDIST to the High Court under Article 24 of the 1996 Order,

Judicial Review will generally not be the appropriate route to take. Independent legal advice would be required in each individual case.

Judicial review may be appropriate in situations where the Tribunal does not have jurisdiction to determine an issue, for example failure to implement a statement of special educational needs or where the Tribunal, Board or Department of Education make an administrative decision which is considered to be irrational under the "Wednesbury principle" i.e. "such that no body properly directing itself on the relevant law and acting reasonably could have reached that decision".