

Rachel Hogan BL - SENDIST Representative, Children's Law Centre**Children's Law Centre**

The Children's Law Centre is an independent charitable organisation established in September 1997 which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve his/her full potential.

Our aim is to protect, promote and realise children's rights using the framework of international children's rights law alongside the law of Northern Ireland.

CLC is founded on the principles enshrined in the United Nations Convention on the Rights of the Child, in particular:

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

CLC undertakes education, training and research on children's rights, produces leaflets and papers on a wide range of children's rights topics and makes submissions on law, policy and practice affecting children and young people. We have a youth advisory group called youth@clc which is active in many aspects of our work.

We offer free legal advice and information on a wide range of children's rights issues. For example, education, discrimination, mental health issues, human rights and criminal justice. In certain cases, in line with our casework policy, we are able to provide legal representation.

My role with CLC is Special Educational Needs and Disability Tribunal ("SENDIST") Representative. This Tribunal deals with appeals and complaints about the education of children, where they have a special educational need or a disability. My role mainly involves giving advice and information about the law with the aim of resolving any disputes or issues at an early stage. In some cases CLC provide representation in legal proceedings. This is an important service for parents and children, as cases taken to the SENDIST do not qualify for legal aid for representation. In certain cases we refer matters out to private Solicitors. In strategic cases or interventions involving particular children's rights issues, we may instruct Counsel to represent CLC.

Approximately 20% of children in Northern Ireland may have a learning difficulty at some time during their education and may need special help at school or from external specialists in order to access their education effectively. This may include for example children with autism, dyslexia, dyspraxia, ADHD, Down's syndrome, cerebral palsy and many other conditions.

In 2008/2009 4.1% of pupils (excluding independent and hospital schools) had a statement of special educational needs from the Education and Library Board (*DENI Statistical Press Release, 26/2/09*). A statement sets out the help that a child is entitled to receive in order to access their education. I advise and assist parents, children and organisations about the procedures involved when a child is identified as having special educational needs.

In 2005 Education Law was updated by the Special Educational Needs and Disability (NI) Order 2005 to strengthen protection for school children who have a disability. These children have a right to be educated in mainstream schools. They are protected from disability discrimination at school and schools have a duty to make reasonable adjustments to enable children with a disability to have equality of access to education. This is the principle of inclusive education.

Special Educational Needs and Disability – The Legal Framework

The main domestic provisions relevant to special educational needs and disability are:

- (a) The Education (NI) Order 1996, as amended by
- (b) The Special Educational Needs and Disability (NI) Order 2005 (SENDO)
- (c) The SENDIST (NI) Regulations 2005
- (d) The Education (Special Educational Needs) Regulations (NI) 2005
- (e) Code of Practice on the Identification and Assessment of Special Educational Needs (and supplement)

International standards which apply include:

- (a) United Nations Convention on the Rights of the Child (UNCRC)
- (b) United Nations Convention in the Rights of Persons with Disabilities (UNCRPD)
- (c) European Convention on Human Rights – Article 2 Protocol 1

See Appendix 1 for more detail on international provisions.

RECENT DEVELOPMENTS: SPECIAL EDUCATIONAL NEEDS

It will be useful at this point to briefly outline what is meant by “special educational needs”.

What is a “Special Educational Need”?

Article 3 of the 1996 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.

Appeals about special educational provision can be brought to the SENDIST. It is the parent who holds the right to appeal, rather than the child.

Recent developments affecting the area of special educational needs (SEN) include:

(1) SEN & INCLUSION REVIEW

This long-awaited review, which aims to modernise the manner in which special educational provision is made, was carried out by the Department of Education at the end of 2008 but the proposals have not yet been made available for public consultation. The review document was drawn up by experts on SEN with input from parents and teachers. The Education Minister has stated that there is some £25 million additional funding available for SEN but due to disagreements about the scope of special educational needs, this process had been significantly delayed. This is particularly worrying given ongoing pressure on the resources available to a growing population of children with SEN within mainstream schools. On 19th May 2009, the Assembly

passed a motion calling on the Executive to publish the review proposals for public consultation. At the date of writing the review has not been published.

(2) REVIEW OF PUBLIC ADMINISTRATION - ESA 2010

Due to the Review of Public Administration (RPA), Northern Ireland's education system is going through a significant process of structural change which will culminate in the establishment of the Education Skills Authority (ESA) in January 2010. ESA will replace the current system of five education and library boards which was designed thirty years ago. One of the aims is to provide a more consistent approach to educational policies and provision throughout Northern Ireland, rather than provision dependent upon the board area in which a child lives. The goals stated by the Department of Education include ensuring greater equality of access to education for vulnerable children, including those with a special educational need or a disability, as well as increasing attainment levels for children who are disadvantaged or are from poorer socio-economic backgrounds.

The new system requires significant legislative provision and will be fully implemented over the course of several years.

(3) CONCLUDING OBSERVATIONS – COMMITTEE ON THE RIGHTS OF THE CHILD

Every five years the UK government must report to the UN Committee on the Rights of the Child on its progress with the implementation of the UNCRC. The most recent examination of the government took place in 2008. Some of the resultant recommendations, which were made in October 2008, impact upon special education/disability including:

- Reduce the effect of social background on children's achievement at school
- More investment to ensure the right of all children to a truly inclusive education
- Ensure that children out of school get quality alternative education
- Use suspensions and expulsions as a last resort only
- Active representation of children in care to ensure educational best interests
- Tackle bullying and violence in schools, including through teaching human rights
- Strengthen children's participation in all matters of schooling
- **Ensure the child's right to appeal against exclusion and to the SENDIST**
- Address segregation of education in NI
- Abolish the 11+ and include all children in admissions arrangements

A further recommendation is that the State Party takes the opportunity to incorporate the provisions of the UNCRC in the development of the Bill of Rights for Northern Ireland e.g. as a children's rights section.

For full details on the concluding observations and recommendations please see www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf

(4) BILL OF RIGHTS FOR NORTHERN IRELAND

The Good Friday Agreement 1998 made provision for a Bill of Rights for Northern Ireland. The Human Rights Commission has under s69 (7) of the Northern Ireland Act 1998 a statutory duty to advise the government on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience which taken together with the ECHR will constitute a Bill of Rights for Northern Ireland.

This advice was given by the Commission to the government in December 2008. Education rights and children's rights are two of the areas about which the Commission has given advice. In relation to education it has been recommended that Article 2 of the First Protocol of the ECHR is incorporated within the Bill of Rights along with additional provisions to ensure that:

- (a) Education in all its forms must be directed towards the promotion of human rights, equality, dignity of the person, respect for diversity and tolerance.
- (b) No child shall be denied the right to access the full Northern Ireland education curriculum.

The government is considering the advice and the next step will be a public consultation. This will possibly take place over the summer months, although the dates have not been officially announced at the time of writing.

(5) SPECIAL EDUCATIONAL NEEDS - RECENT CASES

Some of the issues which have arisen in the Northern Irish court system recently are outlined below in the following case summaries:

Re C, McD and McG (Minors) 2008 NIQB 16

The main issue in this judicial review was a challenge against the refusal of a Board to quantify on the statement of special educational needs the number of hours of speech

and language therapy to be provided to three children attending a special school. The question was, whether the Board had employed an unlawful blanket policy (rather than assessing the needs of individual children). The Speech and Language Therapist who had advised the Board stated that the provision needed to be flexible for these children and that this was not a blanket policy, but a professional opinion. The applicants did not provide an independent report to contradict the assertion that flexible provision was needed for these particular children due to their complex needs. In the absence of contrary evidence, the Court accepted the evidence of the Speech and Language Therapist that there was no unlawful blanket policy and the application was refused.

This type of issue arises very frequently due to the fact that if therapies are not specified and quantified on the statement, it is very difficult for a parent to enforce provision. Parents therefore often appeal the contents of statements to the SENDIST in order to have therapies specified and quantified. Where the evidence shows that the needs of the child require specificity, the SENDIST can make an Order to provide this for the child.

JR 17's Application NICA 26/2/09

This application involved the issue of “precautionary” suspension from school and whether this is justifiable in order to protect the interests of others. A further issue was whether precautionary suspension is subject to the rules of procedural fairness.

The applicant was the subject of allegations of indecent assault, threatening behaviour and aggravated assault on females outside of school and criminal proceedings were ongoing. The suspension was a precautionary measure while a risk assessment in relation to other pupils took place. The Applicant argued that the suspension was unlawful as he had not been given details of the reasons for the suspension and his parents had not been invited to the school to discuss the suspension.

The Court held that a Principal has a power to order a precautionary suspension in limited circumstances, for example, during a police investigation, a social services assessment or a suspected infectious disease outbreak. The regulations on suspensions apply to all suspensions. However procedural fairness was not compromised in this case due to a need for confidentiality and a risk of harm to the child who had complained (and who was suicidal).

This decision may be relevant to children with special educational needs who present with challenging behaviour in school, which has the potential to cause harm to other pupils or staff. For example, children with ADHD are vulnerable to suspension due to behavioural problems that can flow from this condition.

RECENT DEVELOPMENTS - DISCRIMINATION IN EDUCATION

I will focus upon disability discrimination as this can overlap with issues connected to special educational needs i.e. depending upon the facts of a particular case, some learning difficulties are capable of meeting the definition of disability (as set out in the Disability Discrimination Act 1995).

What is a “Disability”?

A disability is a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities. Complaints about disability discrimination in education can be made by a parent to the SENDIST and can be made against the responsible body for a school (which in the case of a grant-aided school is the Board of Governors) or against an education and library board. Relevant areas are provision of education and associated services, admissions and expulsions.

Disability discrimination in education falls under three headings - less favourable treatment, failure to make reasonable adjustments and/or victimisation.

Recent developments in the field of disability which may impact upon educational needs include:

(1) LEWISHAM –V- MALCOLM

The case of London Borough of Lewisham –v- Malcolm (2008) UKHL 43 has overturned long-established case law on disability discrimination on the ground of “less favourable treatment than others for a reason related to disability” with the effect that it is now much more difficult to prove discrimination for a reason related to a disability. Previously, under principles established in Clark –v- Novacold the test was much broader and easier to meet. Although Malcolm was a case about a tenancy agreement, it has impacted on other areas, such as employment and education, where less favourable treatment comes into play. The difficulty presented in Malcolm was the comparator i.e. the “others” who were not treated less favourably.

How might this affect an education case?

Take as an example, a child with Tourette’s Syndrome, who shouts out and swears in class. His school decides to exclude him. Is this less favourable treatment for a reason related to disability? Under Novacold, the child would be compared with others who do

not have Tourette's Syndrome and therefore do not shout out and swear. The behaviour would be seen as being related to the disability. He may therefore have been excluded for a reason related to disability if the exclusion could not have been justified. Under Malcolm, the child would be compared with others who do not have Tourette's Syndrome and who shout out and swear. The school could argue that they would exclude any child who behaves in this manner. The exclusion is related to bad behaviour, not disability. This reasoning means that the court would not get to the stage of considering grounds for justification i.e. reasonable adjustments that may or may not have been made by the school to avoid any discrimination against a pupil. This approach in effect completely discounts the indirect discrimination that occurs when all of the pupils are treated the same way and the disability is not taken into account.

It is widely argued that Lewisham –v- Malcolm has been wrongly decided. However the legal precedent remains. Some creative legal argument will be required pending a change in the law. In England this change will, we hope, take place via the Single Equality Bill (which is at the Parliamentary Committee stage in Westminster) but given the considerable delay in progressing the Equality Bill in this jurisdiction there is no immediate prospect of a change in Northern Ireland at present.

The reasonable adjustment duty is not affected by Malcolm and should be pleaded alongside less favourable treatment.

In the recent case of R (on the application of N) –v- London Borough of Barking and Dagenham – Independent Appeal Panel (2009) EWCA Civ 108 (24.2.09) the Court of Appeal in England confirmed that in education cases, the Malcolm comparator case stands. This was a case of a type which frequently arises locally, where a child with ADHD (which is capable of meeting the definition of disability) is excluded from school for persistent disruptive behaviour.

The argument will often centre on less favourable treatment and a failure to make reasonable adjustments. Clearly, the "less favourable treatment" argument will be limited by Malcolm and in this particular case the court upheld the exclusion due to the persistence and seriousness of the conduct. However, it is important to remember that each case will turn on the particular facts and the quality of the evidence. The "less favourable treatment" argument should not be discounted.

(2) UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) – ARTICLE 24

The 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 8th 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 that has been established to monitor the implementation of the Convention if there has been a breach of their rights. Furthermore, the Committee has a power to undertake enquiries into allegations of grave or systematic violations of Convention rights.

Article 5 of the UNCRPD provides for equal rights for everyone without discrimination.

Article 7 provides that children with disabilities have the same human rights as all other children. The best interests of the child must be a primary consideration in all actions concerning children with disabilities. Children with disabilities have the right to express their views on all matters affecting them.

Article 24 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, against the advice of the Human Rights Commission, 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.

It remains to be seen how the UNCRPD will be implemented and monitored in Northern Ireland and at what rate the human rights of disabled people can be progressively realised.

(3) DISABILITY CONCILIATION SERVICE

The Equality Commission for Northern Ireland has recently launched a disability conciliation service. In education cases, this service is appropriate where there is an allegation of disability discrimination under Part III of SENDO (which governs disability discrimination in education) and both parties wish to attempt settlement by conciliation before proceeding with formal legal action.

(4) SINGLE EQUALITY BILL

A Single Equality Bill is currently progressing in Westminster, having been introduced in the House of Commons on 24th April 2009. The Bill was published in April 2009 and the majority of the proposed changes are due to come into effect in October 2010. The aim is to harmonise and progress equality law and draw together the current protections against discrimination into one piece of legislation so that equality law is easier to access. It will be interesting to monitor this progress of this Bill although it will not apply in Northern Ireland.

In this jurisdiction considerable work has been carried out in preparation for an Equality Bill to harmonise, update and extend anti-discrimination and equality legislation in Northern Ireland. There have been considerable delays in making progress with an Equality Bill for Northern Ireland but it is to be hoped that the work carried out to date will come to fruition in the future.

APPENDIX 1

UNCRC – Articles Relevant to Education

- Article 2: non-discrimination
- Article 3: best interests principle
- Article 12: voice of the child
- Article 23: full & decent life (disability)
- Article 28: right to education
- Article 29: educational development
- Article 42: promoting awareness of CRC

UNCRPD – Articles Relevant to Education

- Article 5: non-discrimination
- Article 7: children with disabilities
- Article 24: right to inclusive education

HRA 1998/ECHR

- A2P1: “no person shall be denied the right to education”
- Article 14: non-discrimination
- Article 6: right to a fair trial