



Briefing to the Education Committee

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Introduction

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 every child can achieve their full potential.

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

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

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a legal advice/information/representation service. We have a dedicated free phone legal advice line for children and young people called CHALKY and provide legal information through an online platform known as 'REE' and legal advice through 'REE Live Chat'. We also undertake strategic litigation to vindicate children's rights.

From its perspective as an organisation which works with and on behalf of children, both directly and indirectly, the Children's Law Centre is grateful for the opportunity to engage with the Education Committee on the issue of special educational needs.

Special Educational Needs - EA Improvement Process

1. CLC have long been challenging systemic failings of the EA, and previously the five ELBs, in terms of operation of the legal framework which serves children with special educational needs and disabilities (SEND). CLC have always taken the view that the SEND legal framework is robust and that the issues experienced by children and their parents and carers and schools have been caused by unlawful operation of that framework and process failings which were essentially allowed to continue and to escalate unchecked, probably driven at least in some part by chronic under-resourcing, relative to growing need.
2. CLC's legal advice service, which deals with any legal matter at all concerning children, has been dealing with continuously increasing numbers of queries about SEND statutory operations for many years to the point where SEND queries now form the largest proportion of our total workload. A flavour of the increasing nature of the issues before and after the EA became operational can be seen below from our CHALKY advice service database:

Year to 31 st March	Total No. of Issues	SEN Issues
2013	1909	384
2015	2362	590
2019	3395	1634
2020	3350	1574

3. The challenge mechanisms that CLC uses to vindicate the educational rights of children with SEND include working with the EA to seek resolution, supporting parents to exercise their legal rights to appeal to the Special Educational Needs and Disability Tribunal (SENDIST) and issue of pre-action correspondence and if necessary Judicial Review proceedings if matters are not resolved (see: <https://www.judiciaryni.uk/judicial-decisions/2015-niqb-15>).
4. In relation to the primary mode of legal challenge, the EA has an incredibly high fail rate at SENDIST appeals. The number of appeals has been rising

exponentially in recent years. In 2015/16 there were 145 SEN Appeals (of which only 4 were dismissed), compared to 378 in 2018/19 (of which only 11 were dismissed). 184 cases were recorded as conceded by the EA in 2018/19. This means that in **over 97% of cases, parents obtained a successful outcome for their child** by either winning or settling and withdrawing their appeals. This indicates poor first instance decision-making which is not evidence-based.

5. It has always been in our experience a regular occurrence that the EA will concede a case at the point where it may be required to defend its decision with evidence (notably in appeals against refusals of statutory assessments). Unlawful failure to specify provision in statements (e.g. adult assistance; specialist teaching hours; therapies) is another common ground of appeal. This type of appeal generally results in a redraft of the statement in a legally compliant form which a parent will accept and then withdraw the appeal. Appeals take approximately 14 weeks to get from registration to hearing, followed by about 3 weeks for a written decision and then there are then a series of timescales allowed for compliance with Tribunal Orders. This delay in provision for the child will be on top of potentially years of delay in accessing EA services, contributed to significantly by the time-allocation model of Educational Psychology which has become a form of “gate-keeping” of service access. Some families will have had to file two appeals to get to the point of a satisfactory statement of SEN. Some families will have had to do this for several children with SEN in their household. Only those with the knowledge, support and resources to avail of appeal rights will have been able to carry out a challenge. The EA is aware of and has acknowledged that the facts around SEN appeals raise questions about the validity of the EA’s decision-making processes. The question now is, what steps has the EA taken to address the issue, what improvements are under way, how will these be measured and which external parties have been consulted or will be consulted to identify the solutions?

6. Notably, the Department of Education's long-running SEN and Inclusion Review did not draw out the systemic operational failings of the ELBs or the EA, although CLC and others did point out that the failings in the SEN system were largely operational rather than being caused by deficiencies in the SEN legal framework itself. CLC has made clear in a series of consultation responses that systemic failures in the operation of the EA and deficits in the working capacity of the SEND framework (notably the capacity of schools and EA specialist pupil support services) require to be addressed as a prerequisite to the rolling out of a further suite of policies which rely upon an efficient and effective SEND system which is able to identify the special educational needs of all children and is properly resourced to meet those needs promptly through early intervention.

7. Many of our ongoing concerns can be seen in CLC's responses to the EA's consultation on a Draft Framework for Specialist Provision in Mainstream Schools and a Draft Framework for Special School Provision (April 2021), the Department of Education's proposed Revised Draft SEN Regulations (March 2021), the Department of Education's Draft Revised SEN Code of Practice (March 2021), the Expert Panel's call for evidence on Educational Underachievement caused by Socio-Economic Disadvantage (October 2020), the Department of Education's Disability Action Plan 2019-2024 (December 2019) and the EA's Equality Action Plan and Disability Action Plan 2018-2022 (July 2018). All of these responses can be accessed here:
<https://childrenslawcentre.org.uk/consultation-responses/>

8. CLC strongly believes that an end to end process review is required in relation to the way the EA operates the current Stages 3-5 of the Code of Practice before the new SEND framework is allowed to become operational, otherwise the new system will be infected by the ills of the current system. We therefore question whether the EA is ready and able to implement and effectively operationalise a revised SEND framework, in light of ongoing operational problems and in the context of the disruption which has been caused by the pandemic?

9. The evidence about the issues with the EA's operation of the SEND framework, which ultimately led to the current SEND improvement processes, came into the public domain, not through the EA itself but through whistleblowing and external investigation and reporting in a series of highly critical reports including the NICCY "Too Little, Too Late" report (March 2020), two reports on SEN from the NI Audit Office (June 2017 and September 2020) and the recent Public Accounts Committee report on SEN (February 2021).
10. These reports have recorded formally what parents, children and external organisations have been reporting for many years. Public confidence in the EA as a public authority, which was already extremely fragile, has now has been totally shattered.
11. The EA, through its relatively new Chief Executive, Sara Long, has stated to the Education Committee its firm commitment to improvement processes within the operation of SEND systems. CLC has joined an EA SEND Project Reference Group which will help inform improvement processes and we very much welcome the opportunity to do so. The EA has in CLC's view acknowledged the deficiencies in its operations, has expressed a will to make meaningful change and is putting forward ambitious improvement plans and projects. These are incredibly hard-won positive developments and mark an opportunity to make substantial change which will benefit the entire school population. It is imperative that the EA receives sufficient financial input to bring forward the necessary improvements and that there is robust ongoing external scrutiny and oversight of the EA to determine ultimately whether it is capable of operating in a manner that is both lawful and fit for purpose. CLC would like to see published a clear explanation of all of the recommendations of the various reports (including EA internal review findings) mapped against EA improvement projects as they develop and to have openness and transparency in information sharing about how success is being measured in the short and long term.
12. CLC, whilst expressing hope and optimism for a significantly improved EA, must sound a note of caution. The public will not and should not tolerate mere

headline “wins” or bare statistics in terms of progress. For example, there has been very significant focus publicly upon the 26-week statutory time limit for production of a statement. CLC is aware that the EA has been making a considerable effort to bring all statements within timeframe. This has been a priority for the EA throughout the pandemic. Whilst CLC welcomes all improvement in EA systems and processes, statutory timescale compliance is a very basic mandatory legal requirement which tells us nothing about the timing or quality of special educational provision a child has received before issue of a statement or indeed after that statement becomes operational.

13. For example, CLC is dealing with a case where a child has experienced very significant delay in accessing a statutory assessment (a very common issue). CLC supported the parents with exercising their parental rights and a statutory assessment was carried out. There were further delays at the early part of the statutory assessment. A draft/proposed statement was then issued to parents and they made representations seeking greater specificity as is their legal right (having 15 days to be consulted). A meeting was held with EA to discuss. This entitles the parents to a further statutory 15 days to enter any representations before the statement is finalised. It later emerged on working back through the paper trail, that the statement had been finalised and ratified before the first 15-day consultation period had expired “to make up” for the earlier delays. Whilst on paper, this statement may appear to have been successfully issued within 26 weeks, the EA may in fact have unlawfully truncated the parents’ statutory right of consultation, replacing one legal flaw with another in a bid to hit a compliance target, so that the process has not been lawful and the parents will now require to file an appeal against the content of the final statement in order to have their views incorporated. The EA, and parents, and the Courts Service will have to expend time and resources dealing with an unnecessary appeal. The question therefore remains, how will the EA gain public confidence in any progress that is reported and what support will the EA receive to enable genuine change in organisational ethos and culture, including respect for parental rights and children’s rights.

14. Another issue which we believe will draw scrutiny due to the cost implications, will be the provision of adult assistance as a support to children with SEND. This is an important human resource which many children with statements currently rely upon. CLC wishes to have reassurance that any decisions about adult assistance as a type of provision will be evidence-based and will rely upon evidence commissioned in Northern Ireland to capture the costs, benefits and outcomes of using adult assistance amongst the SEND population here as well as the equality impacts of removing or diluting such provision in any way at any given juncture in the EA's improvement journey. Consultation with children and young people who are affected and their parents and carers and with schools who rely upon the support of non-teaching staff is critical in relation to this issue of adult assistance which is (or ought to be) specifically provided for in Part 3 of a child's statement of special educational needs in accordance with Article 16 of the Education (NI) Order 1996.

15. Although the EA has a series of mountains to climb to get to the point of legal compliance with various aspects of the SEND framework, such as statutory timescales, specification in Part 3 of statements, and sufficiency of primary and secondary school places suitable to the needs of children with SEND, it will not be enough for the EA to demonstrate basic legal compliance. Lawful operation is not optional and is (or should be) a default position for a public authority. It will be the lived experiences and the outcomes for service users, namely children with SEND and their parents and carers, which will be the proof of the sufficiency of improved systems and processes. These experiences happen from Stage 1 to Stage 5 of the current Code of Practice. CLC wishes to see evidence of progress by the EA at all stages of the Code of Practice where it may be involved. We wish to ensure that the EA does not focus only on compliance with strict mandatory statutory duties at the expense of children who have not yet made it through to the statutory stages because of excessive gate-keeping or other process failures. CLC seeks reassurance that the EA is looking at end to end process reform in consultation with affected parties, including children and their Parents and carers.

16. Stages 1-3 are “non-statutory” stages, and it is these earlier stages of intervention, including through specialist EA Pupil Support Services (such as Educational Psychology, Literacy Support, Autism Support, Language and Communication Support, Behaviour Support etc) which are fundamental to the success of the entire system. CLC understands that the EA is carrying out service reviews. Transparency is crucial here, as is consultation with affected parties such as children with SEND and their parents and carers as well as representative organisations. Identifying unmet need for early intervention is the starting point in our view to enable appropriate planning for service delivery and we believe that the EA would acknowledge this fact. We would like clarity on how and when unmet need will be identified and monitored and also how this will be reported upon.

17. In relation to Stage 3 Pupil Support Services, CLC would like to see a halt to any moves which dilute provision by removing direct access for children and replacing it with “advisory” support to schools (as has been the pattern that we have seen with literacy support for example). In addition, questions that CLC have include: Which direct services are to be expanded/contracted/changed? What is the evidence base for any changes? What measures have been undertaken or will be undertaken to ensure compliance with the EA’s Equality Scheme and thereby the Section 75 equality duties when reallocating, reducing or increasing resources amongst Pupil Support Services? What steps has the EA taken to consult affected parties, including children, before review and during review of any Stage 3 Pupil Support Services? How is unmet need to be identified, measured, tracked and reported upon? How will progress and success be measured for each service? Which services have been reviewed to date and what are the plans for ongoing reviews? Have the terms of the reviews, outcomes and any monitoring arrangements been published? How is the ongoing efficacy of Stage 3 Pupil Support services to be evaluated and reported upon? How will any necessary expansion of service be funded and will funding be maintained and capable of flexing upwards if demand increases?

18. It is important to make the connection between the EA’s operation of the SEND framework for special educational provision and disability equality protections.

In many cases that CLC deal with, disability discrimination is flowing from unmet need which has caused barriers to educational access and inclusion within school. In a proportion of cases the EA will be aware of or complicit in the informal exclusion or other unfavourable treatment suffered by a child. CLC has previously obtained a declaration of disability discrimination on the basis of failure to carry out statutory assessment which left the child unsupported and suffering significant school exclusion, both formal and informal. CLC would like to know how and when the EA will start to count and monitor informal exclusions from school?

19. In CLC's view, which we have formed through our legal advice and casework, disability discrimination against children has become institutionalised within our education system due to shortcomings in the implementation of the policy of inclusion which became legally regulated via SENDO 2005 and the supplement to the Code of Practice. Further, we have indicated in our response to the DE's revised Code of Practice that we have significant concerns about the Inclusion section of the new Code. Connected to all of this, we have concerns about the EA's SEND Area Planning Frameworks (which propose reduced formality and thereby potentially reduced oversight) and how these will affect inclusion in practice.

20. Delays in access to early intervention and in access to appropriately specialist placements, caused by shortcomings in EA planning and operations (and formerly by ELB operations) are responsible in some cases for blocking access to education for disabled children and young people. We see this when children with SEND are sent home early from school or placed on part-time timetables for prolonged periods; when they are isolated or segregated from peers; when their school-work or physical environment is not adapted appropriately; when they are subject to unregulated restraint; when they are not allowed to be in the school play or go on the school trip and when they are excluded from the class photo; when they are so anxious and unwell that they cannot tolerate the thought of putting on a uniform or getting into or out of the car to go into school; when they are formally suspended or expelled for behaviour arising from disability in the absence of special educational provision. For every

improvement that is proposed and carried out, CLC would like to see the question asked – what will be the impact upon equality, participation and inclusion for children and young people with SEND? It is primarily the affected parties who hold this information and require to be consulted about potential impacts.

21. The pervasive process flaws which have become deep rooted and entangled throughout all stages of the SEND operational system will not be weeded out overnight. The EA will need to prioritise and systematically work through improvements. It will be important to identify for all EA operational areas of the SEND framework how progress is measured from the **child's standpoint** and how the EA will be able to demonstrate both legal compliance and an ability to measure and report upon the timeliness, quality, efficiency and effectiveness and ultimately the **outcomes** of EA operations and EA service provision. It will not be possible to measure success in the absence of significant ongoing input from affected children, young people and their parents and carers. The EA does in our view recognise the importance of parental participation in SEND improvement. We conclude by asking how and when the EA will ensure the voices of those children with SEND and their parents and carers will be heard and how they will participate in driving and monitoring the outcomes from the essential process and service delivery improvements which the EA hopes to bring to fruition.

Conclusion

CLC is grateful to have the opportunity to brief the Education Committee in relation to our experience of EA SEND statutory operations. If any further detail or clarification is required, we would be pleased to assist.