

Children's Law Centre

BRIEFING PAPER

SPECIAL EDUCATIONAL NEEDS AND DISABILITY

**INVESTMENT AND
TRANSFORMATION**



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This briefing document has been prepared by Rachel Hogan BL, SEND Specialist Legal Advisor and Fergal McFerran, Policy and Public Affairs Manager on behalf of the Children's Law Centre. It has been prepared for Members of the Northern Ireland Assembly in advance of the debate scheduled to take place on Monday 26 February 2024 on the following motion:

Special Educational Needs and Disability – Investment and Transformation

That this Assembly commits to prioritising the needs of our most vulnerable children with Special Educational Needs and Disabilities (SEND); notes that the current system for supporting children with SEND has failed to deliver appropriate and timely support for parents, pupils and schools; and calls on the Minister of Education to prioritise and invest in SEND transformation, to ensure that the End to End Review of Special Educational Needs produces an action plan that will be implemented urgently, and to make a commitment that all children with SEND in key transition years are notified of a school placement which meets their needs no later than children without special educational needs.

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Children's Rights
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INTRODUCTION AND BACKGROUND

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

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we provide a free legal advice, information and representation service. We have a dedicated free phone legal advice line for children and young people and their parents as well as a Live Chat service for young people.

Since its establishment in 1997, CLC has provided free legal advice and information as well as strategic legal representation on a growing and increasingly complex range of issues affecting children and young people under the age of 18.

CLC has developed considerable specialist expertise in Special Educational Needs and Disability (SEND) law across our advice and legal team and through employment of a dedicated SEND Specialist Legal Advisor. SEND casework has become a core part of CLC's work, due to an ever-increasing level of demand for support for children to unable to access their right to education.

Our advice service data shows that in 2011, 35% of the total advice queries we received related to education and 51% of those education queries (377) related to SEN. In 2023, over a decade later, 63% of total advice queries received related to education and 71% of those education queries (1,240) related to SEN.

Importantly, CLC was founded upon the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC) and leads for the NI NGO sector in co-ordinating the submission of evidence to the United Nations Committee on the Rights of the Child to inform their monitoring and reporting work on the UK's compliance with children's rights standards.

OUR ANALYSIS OF THE PROBLEM A SYSTEM BUILT ON FAILURE

CLC has continuously challenged the systemic failings of public authorities responsible for delivering SEND services to children – in particular the Education Authority (EA), and the 5 Education and Library Boards (ELBs) that came before it.

CLC has always taken the view that the SEND legal framework is a robust rights-based framework and that the issues experienced by children and their parents, 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, driven in part by chronic under-resourcing and poverty of service provision, relative to growing need.

Notably, the Department of Education's long-running SEN and Inclusion Review which produced the SEND Act (NI) 2016 and draft revised regulations and a draft code of practice which have not been implemented, did not draw out the systemic operational failings of the ELBs or the EA.

Rather, evidence about 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 relevant public authorities, 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)¹, two reports on SEN from the NI Audit Office (June 2017² and September 2020³), a Public Accounts Committee report on SEN (February 2021)⁴, IPSOS (May 2023)⁵, and the Independent Review of Education: Investing in a Better Future report (December 2023)⁶.

Early intervention has taken a back seat to bureaucracy whilst public authorities, in a futile effort to control spending, have constructed ever higher barriers to access for those children who need support to access learning and development.

The SEND system has been allowed to degenerate into critical failure, with even basic legal entitlements, such as a school place, being unavailable to children most in need of a rich and nurturing educational environment. Crisis management has taken the place of proper operation of statutory functions.

The EA has a "Plan of Arrangements" set out on its website to describe all the pupil support services available to children with SEND. Despite CLC's active participation in the EA SEND transformation Reference Group and ongoing DE End to End Review, there is a complete lack of clarity about what transformation processes are taking place "on the ground" within EA

pupil support services. The DE End-to-End Review of SEND must produce positive outcomes urgently and in the long term, underpinned by sustainable funding. The outcomes framework by which success is to be measured, should be ambitious and not limited to a “tick box” statistics exercise based on “easy wins”.

We are aware that local integrated teams are proposed to be rolled out in September 2024 which involve transforming single EA services into localised multi-service teams. The original plan to have multi-disciplinary teams including health input has been shelved after the transformation programme funding had its budget cut. It is imperative that we know what the service delivery changes are, how entry/exit criteria are affected and how outcomes will be measured and evaluated against the single service model that is being dismantled.

Recommendation

CLC recommends that this aspect of the transformation of EA services requires close and careful scrutiny as it is the foundation upon which early intervention will be built.

THE IMPACT OF FAILURE REFLECTIONS FROM CLC CASEWORK

CLC's legal team report that over the past number of years cases regarding SEND have become more complex, more entrenched and more difficult to resolve. Despite very positive working relationships, communication with the EA has become more difficult as staff appear to be extremely overstretched. Parents and young people report that they feel they are being ignored.

CLC has recently secured High Court Declarations in two judicial review leave applications in relation to the denial of the human right to education for reasons connected to disability. One of these children, who had complex needs and was registered to a special school, was unable to access all but one day of nursery and did not enter full time education in a school until Primary 3 due to lack of suitable transport during the covid pandemic and whilst restrictions eased for non-disabled peers.

Ongoing legal work within our team has exposed an extremely concerning trend regarding vulnerable children who are unable to attend school due to unmet needs. The majority of these clients have SEND and there are a high proportion with anxiety and mental health difficulties which are not being addressed, as well as children with no suitable school placement, children inappropriately placed and children with complex family support and respite needs. Schools are ill equipped to make reasonable adjustments both in terms of "knowhow" and due to overcrowding and lack of time and money. Unacceptable attitudes towards children with disabilities which inhibit true inclusion are also a concern alongside poor planning, which hinders access to educational facilities.

We have recently assisted a Year 8 pupil who was unable to start Year 8 for the first four months of term as the necessary equipment and toilet facilities were unavailable and were only sourced after the start of term.

We are witnessing family breakdown and entry of children into care when education placements fail and there is little or no short break provision available from Health and Social Care Trusts.

CLC are having to step in to drive and coordinate multi-disciplinary responses in cases where children have SEND but have been left at home, with professionals believing the problem is for another agency to resolve. The system is simply not responding and these vulnerable children are becoming invisible.

INSTITUTIONALISED DISABILITY DISCRIMINATION

It is important to make the connection between the operation of the SEND framework for special educational provision and access to disability equality protections. In many cases that CLC deals 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 experienced by a child. CLC has previously obtained a declaration of disability discrimination from the Special Educational Needs and Disability Tribunal (SENDIST) on the basis of failure to carry out a statutory assessment which left a young child unsupported and suffering significant school exclusion, both formal and informal. In other cases, schools are failing to recognise their legal duties and the need to proactively plan to educate pupils with disabilities and to make reasonable adjustments to enable full participation in education.

Delays in access to early intervention and in access to appropriately specialist placements, caused by lack of investment and 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.

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 through the Special Educational Needs and Disability (NI) Order 2005 (SENDO).

We see this discrimination 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; and when they are subject to unregulated restraint. It manifests in a myriad of ways; when children with SEND are not allowed to be in the school playground 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.

WHAT NEEDS TO HAPPEN A SYSTEM BUILT ON SUCCESS

All are broadly agreed on what the problems are. This in itself is a form of progress and presents an opportunity for positive change. 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. It will be important to identify for all stages of the SEND framework how progress is to be actioned and measured from the child's standpoint and how the DE and the EA will be able to demonstrate both legal compliance and an ability to measure and report upon the timeliness, quality, efficiency, effectiveness and ultimately the outcomes of SEND operations and SEND 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.

Significant investment in specialist multi-disciplinary early intervention at the point of need is urgently required. This is a cross-departmental issue. Current plans for "Local Integrated Teams" included EA services only, following cuts to the EA Transformation budget. Children with SEND must have their needs identified early, access appropriate assessments quickly and receive suitable and timely intervention/reasonable adjustments, whether at school level or with support from the EA and/or HSCTs and other children's services providers.

Implementation of cooperation across all children's services involved with a child, including pooling of expertise, human and financial resources, buildings and equipment – as envisioned under the Children's Services Cooperation Act (NI) 2015 should be a priority. It is unclear what steps have been taken to maximise the opportunities such pooling of resources may present. The Department of Finance does not appear to have exercised any of its regulation-making powers under section 8 of the Act. The DE Children and young People's Strategy has not been implemented.

Active promotion of equality of opportunity and compliance with equality duties in the allocation of resources as per section 75 of the Northern Ireland Act 1998, including through appropriate screening, data gathering and consultation with affected parties is a legal requirement.

Schools and education providers require adequate resourcing, training and professional development to enable them to meet the needs of children with SEND in the classroom, particularly as the direction of travel is increased "inclusion" in mainstream in the absence of specialist places.

Non-attendance at school is becoming normalised, particularly post-covid. For the substantial number of children who are regularly not at school and

are not receiving suitable education or social protection, which we believe is substantially due to unidentified or unmet needs, it is absolutely critical that the DE and the EA with support from schools and HSCTs collect data from the affected children and families about the reasons for disrupted school attendance and identify the factors that would assist return to education. Children who are not at school are much less likely to access early intervention from the education system. Data should be capable of disaggregation by section 75 characteristics.

Children with SEND who are not in education, are legally entitled to alternative arrangements by the EA. This is not happening and it is unclear why the EA is failing to provide article 86 education “otherwise” than at school for children who, for any reason, are not receiving suitable education (Education (NI) Order 1998).

All children have strengths, abilities and aptitudes which should be promoted and celebrated in line with article 29 of the UNCRC. Success and outcomes should not be measured by academic achievement alone. All children should be valued, celebrated and enabled to have a sense of belonging within their school community. Outcome measures should capture a wide range of attainments including social, emotional and developmental progress for all children as well as measures for inclusion in all aspects of an effective education.

Recommendation

It is clear that any meaningful improvement in outcomes for children with SEND will require effective co-operation and ongoing cross-departmental and multi-agency planning, funding and implementation (as reflected in the findings of both the Independent Review of Education and 'A Fair Start'⁷). CLC therefore recommends that MLAs examine the current ability, both in structural and resource terms to enable this to effectively take place, including through regulation-making powers, to ensure that sufficient resource is invested to deliver meaningful joined-up working to enhance the delivery of children's services.

Recommendation

CLC further recommends that relevant Ministers are asked to outline the extent to which the Children's Services Cooperation Act (NI) 2015 has been implemented and utilised since its introduction in this context.

COMPLIANCE WITH CHILDREN'S RIGHTS STANDARDS

Ratified by the UK in 1991, the United Nations Convention on the Rights of the Child (UNCRC) is an international human rights treaty; celebrated as the most complete statement on children's rights ever produced, containing civil, political, socio-economic and cultural rights and is the most widely-ratified international human rights treaty in history. The UNCRC should be seen as minimum standards rather than the ceiling of our ambitions for children's rights.

While the UNCRC has not yet been incorporated into domestic law it provides a blueprint for the treatment of children which the UK government has already ratified. There are also a number of other policy and legislative vehicles through which it is envisioned children's rights will be realised in NI including the Children's Services Co-operation Act (NI) 2015, and the Children and Young People's strategy 2020-2030.

The Department of Education is the lead, co-ordinating department for monitoring the implementation of the UNCRC in Northern Ireland but all departments and public authorities have a responsibility to fulfil the rights of children and young people.

While the rights of children as set out in the Convention are interrelated and interdependent, it is particularly relevant to reflect a number of key standards set out in the Convention. These include, that children should be protected from discrimination; that the primary consideration in all decisions impacting upon children should be their best interests; that they have the right to express their own views freely in all matters affecting them and that those views should be given due weight; that children with disabilities have the right to experience conditions which ensure dignity, promote self-reliance and facilitate active participation in the community. So too, the Convention sets out the right of children of all abilities to access education which realises their potential in an entirely holistic sense, seeking to develop a child's personality, talents, mental and physical abilities.⁸

If it wasn't already clear that we aren't meeting the needs of children with SEND it is demonstrably clear that we too are failing to fulfil their human rights. These standards, as set out in the UNCRC should be read and interpreted alongside the rights contained within the UN Convention on the Rights of Persons with Disabilities (UNCRPD)⁹, most notably article 24 of the UNCRPD which relates specifically to inclusive education.

Every country which has ratified the UNCRC has accepted a duty to report to the treaty body responsible for overseeing its implementation, that is, the United Nations Committee on the Rights of the Child. This reporting process

is a lengthy, deliberative exercise which involves the submission of evidence both from government(s) and a wide range of other stakeholders, including young people themselves. The process results in the Committee producing what is referred to as their Concluding Observations and Recommendations (CObs).

The most recent reporting process for the UK, including devolved jurisdictions concluded in June 2023 when the Committee published their COBs¹⁰. These were wide-ranging and, in our view, pointed to an alarming scale of non-compliance and an ever-increasing gap in children's rights.

The Committee made particular recommendations to the UK and devolved administrations in respect of children with special educational needs and disabilities, including but not limited to the recommendations to:

"40. (b) Reduce waiting times and strengthen the system for early detection and intervention, including for children with autism and developmental disorders, in order to facilitate access for children with all types of disabilities to education, health care, social protection and support services;

40. (c) Strengthen support for the social integration and individual development of children with disabilities, including by providing capacity-building to professionals working with and for children on the rights and specific needs of children with disabilities and ensuring the access of such children to personal assistance, rehabilitation and assistive devices;

40. (d) Ensure the right of children with disabilities to be heard in all decisions that affect them.

47. (a) Strengthen measures to address inequalities in educational attainment and improve educational outcomes for children in disadvantaged situations, including ... children with disabilities..., by, inter alia: (i) providing financial and other support for such children to finish school; (ii) developing guidelines for responding to cases of school absenteeism; and (iii) collecting and analysing data disaggregated ... relevant indicators on completion rates and exclusions to inform policies and programmes;

47. (b) Ensure inclusive education in mainstream schools for all children with disabilities, including by adapting curricula and training and assigning specialized teachers and professionals in integrated classes, so that children with disabilities and learning difficulties receive individual support and due attention;..."¹¹

Recommendation

CLC recommends that renewed focus is given to the meaningful implementation of the UNCRC across government, that the current mechanism for its implementation is scrutinised effectively and that serious consideration is given to placing the standards set out in the Convention on a legislative footing.

CONCLUSION

CLC welcomes the motion debate which we hope provides a meaningful opportunity for the Assembly to speak with a collective voice on the urgent need for investment and reform; close and continued scrutiny; and ultimately maintaining momentum to create a system which finally meets the needs and fulfils the human rights of some of our most vulnerable children and young people.

CLC acknowledge that MLAs will be well aware of the current challenges in SEND provision through their constituency casework, perhaps most acutely in how the outworkings of those challenges impact upon individual children and their families. In this briefing we have sought to highlight, informed by our years of practice in this area, some of the key areas of focus that we would encourage MLAs to bring renewed attention and scrutiny to. We welcome the opportunity to engage further with MLAs on this and other children's rights issues during this Assembly mandate.

REFERENCES

1 NICCY, Review of SEN Provision – 'Too Little, Too Late'. March 2020. Accessible at <https://www.niccy.org/review-of-sen-provision-too-little-too-late/>

2 NIAO, Special Educational Needs Report. June 2017. Accessible <https://www.niauditoffice.gov.uk/publications/special-educational-needs>

3 NIAO, Impact Review of Special Educational Needs. September 2020. Accessible at <https://www.niauditoffice.gov.uk/publications/impact-review-special-educational-needs>

4 Public Accounts Committee Report on Impact Review of Special Educational Needs. February 2021. Accessible at <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/public-accounts-committee/reports/report-on-impact-review-of-special-educational-needs/>

5 Independent Review of Special Educational Needs Service and Processes in Northern Ireland. IPSOS. Published May 2023. Accessible at <https://www.education-ni.gov.uk/publications/independent-review-special-educational-needs-services-and-processes>

6 Independent Review of Education: Investing in a Better Future. December 2023. Accessible at <https://www.independentreviewofeducation.org.uk/key-documents/investing-better-future>

7 A Fair Start, Report of the expert Panel on Educational Underachievement in Northern Ireland. Published June 2021. Accessible at <https://www.education-ni.gov.uk/publications/fair-start-final-report-action-plan>

8 The UN Convention on the Rights of the Child can be [accessed here](#). In the context of this briefing the Convention should be read with particular attention given to Article 29 and in conjunction with the following General Comments of the UN Committee on the Rights of the Child:

- [General Comment No 1, 2003: On the aims of education](#)
- [General Comment No 9, 2006: On the rights of children with disabilities](#)

9 The UN Convention on the Rights of Persons with Disabilities can be accessible at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

10 The Concluding Observations on the combined sixth and seventh periodic reports of the UK (CRC/C/GBR/CO/6-7) published June 2023, can be accessed at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2F-C%2FGBR%2FCO%2F6-7&Lang=en

11 The recommendations included above are not exhaustive; the entire report of recommendations made by the Committee can be found in their totality at the previous footnote.

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