

The Way Forward for Special Educational Needs and Inclusion

April 2012

In 2010 the Equality Commission submitted a response to the Department of Education's consultation on *Every School a Good School-The Way Forward for Special Educational Needs*¹. This document provides an overview of the Commission's views as well as some further details, particularly with regards the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

The Equality Commission **supports** the general principles underpinning the Department of Education's proposed actions including: early identification and intervention, greater joint working across sectors; particularly between education and the health and social care sector; and increased sharing of good practice and measures to reduce bureaucracy.

In addition, we **welcome** the Department's proposals to:-

- increase capacity building and training for teachers and Boards of Governors;
- explore with the DHSSPS the possibility of a statutory basis for the health provisions set out in coordinated support plans (CSPs);
- explore further how multi-disciplinary working can be achieved;
- place an increased emphasis on outcomes and targets for SEN children;
- take steps to improve early identification, assessment and intervention in both mainstream schools and early years settings;
- undertake a review of the revised SEN framework in five years; and

¹ Commission response to the Department's consultation on *Every School a Good School-The Way Forward for Special Educational Needs*, 2010,
<http://www.equalityni.org/archive/pdf/FinResptoESAGTheWayforwardforSENandInclus.pdf>

- explore ways to ensure the greater independence of DARS, in line with ETI recommendations.

Summary of ECNI Recommendations

We **recommend** that the Department ensures that its reform proposals reflect the international standards set out in the **UNCRPD**. It is also essential that the Department's policies are not regressive and result in a lowering of protection/rights for disabled children.

In particular, the Commission **recommends** that, in line with the obligations on the UK Government under the UNCRPD, the Department ensures that, in the development, implementation and monitoring of its revised SEN framework:

- the best interests of the child are a priority;
- disabled children have the right to express their views freely and that their views are given due weight;
- the out workings of the Department's proposals are not contrary to the obligation to ensure an inclusive education system;
- steps are taken to promote positive attitudes towards disabled people (including disabled pupils), tackle bullying of disabled children (including those with SEN), and to raise awareness within schools of the rights under the UNCRPD and the disability equality legislation as it applies to schools;
- it considers whether further steps are necessary in order to improve its data collection and analysis so as to ensure that it can effectively monitor and review the impact and outcomes of its proposed changes to the SEN framework.

We further **recommend** that the Department, when taking forward its proposals,

- considers multiple identity issues; for example, difficulties experienced by Traveller children or other black minority ethnic children with SEN;

- ensures that robust policies and procedures are put in place to increase transparency and accountability within schools;
- introduces legislative changes to the Special Educational Needs and Disability (NI) Order 2005 (SENDO 2005) in order to place an additional duty on schools to provide auxiliary aids and services, where reasonable;
- undertakes legislative reform of SENDO 2005 in order to strengthen and harmonise protection for disabled pupils in schools;
- liaises with the Department of Justice (DOJ) in order to ensure that practices and procedures of SENDIST do not restrict access to justice for disabled children, including those with SEN. In particular, we **recommend** that:-
 - the decisions of SENDIST are made publically available;
 - additional access to legal aid or representation at SENDIST for disabled complainants;
 - improvements are made in relation to physical arrangements at SENDIST hearings.

Further Details on Specific Recommendations

We have outlined below further details in relation to specific recommendations.

Meeting UNCRPD Obligations and Standards

The Commission, along with the Northern Ireland Human Rights Commission, has been designated under the UN Convention on the Rights of Persons with Disabilities (UNCRPD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of the UNCRPD Northern Ireland.

It is important that the Department's reform proposals reflect the standards set out in the UNCRPD. In addition, it is essential that the Department's policies are not regressive and result in a lowering of protection/rights for disabled children.

As regards relevant obligations under the UNCRPD, **Article 7** (children with disabilities) places a responsibility on State Parties to ensure that the **best interests** of the child are a primary consideration. This is also reflected in the guiding principles of the United Nations Convention on the Rights of the Child (UNCRC).

Article 7 further places an obligation on State Parties to ensure that children with disabilities have the **right to express their views freely and that their views are given due weight**. This is also reflected in the guiding principles of the UNCRC, namely respect for the views of child and the right to express their views freely on all matters affecting them, with due weight in accordance with their age and maturity.

These two core principles must be reflected at all stages of the Department's proposals, including the degree to which children are involved in the development and implementation of personal learning plans, co-ordinated support plans and appeals or reviews relating thereto.

It is also important for Departmental guidance (such as Codes of Practice) to reiterate these principles and obligations enshrined in the UNCRPD and UNCRC.

In addition, **Article 24** of the UNCRPD (education) places an obligation on State Parties to ensure an **inclusive education system** at all levels. It is therefore important that the Department ensures that the outworking of its proposals is not contrary to the obligation to ensure an inclusive education system and the underlying principle of SENDO 2005 which is to promote inclusion of all disabled children in mainstream schools.

The Commission has recently published independent research entitled “*Disability Programmes and Policies: How does Northern Ireland Measure Up?*²”. This research presents evidence of areas of substantial shortfalls in public policy and programme delivery in Northern Ireland relative to the key requirements of the UNCRPD. The research identified awareness raising, in terms of the rights of disabled people and challenging negative attitudes towards disabled people, as a key area for action.

Article 8 of the UNCRPD places obligations on State Parties to raise awareness of the issues affecting disabled people and to combat stereotypes and prejudices and specifically to ‘**make sure that schools and other places of learning teach respect for the rights of disabled people.**’

The Commission welcomes the proposal to provide additional training and capacity building for Principals and teachers in order to enable them to effectively carry out their responsibilities under a revised SEN framework.

² *Disability Programmes and Policies: How Does Northern Ireland Measure Up?*, Disability Action commissioned by the Equality Commission, 2012, <http://www.equalityni.org/sections/default.asp?secid=7>

As highlighted in our previous response³, whilst we recognise that teachers are competent to make general assessments of educational needs for children, the highly complex and specialised assessment of children with SEN requires specialist training. We consider that without specific qualifications and training there is a high risk of missing early identification of needs and appropriate interventions.

The Commission **recommends** that training also includes **training on positive attitudes** towards disabled pupils, and to raise awareness of disabled people's rights under disability equality legislation and the UNCRPD; in furtherance of the statutory duty on the Department and the Board under the Disability Discrimination Order (DDO) disability duties, and Article 8 of the UNCRPD.

We further **recommend** training for Boards of Governors on these issues. In addition, the need to promote positive attitudes and be aware of disabled people's rights under SENDO and UNCRPD should be reinforced in Departmental Codes of Practice and guidance on the revised SEN framework.

In line with the obligations set out in Article 8, we **recommend** that steps are taken to tackle **disability-related bullying** of children with SEN and to promote positive attitudes towards disabled pupils amongst all pupils.

It is of note that the Education and Library Boards survey of the experiences of children with SEN in schools indicated that 58% of those surveyed at KS2, 55 % of KS3 and 45% of KS4 experienced bullying, and the report indicates that there is a clear link between the incidence of bullying and SEN⁴;

³ Commission response to the Department's consultation on *Every School a Good School-The Way Forward for Special Educational Needs*, 2010,
<http://www.equalityni.org/archive/pdf/FinResptoESAGTheWayforwardforSENandInclus.pdf>

⁴ *It is good to listen, experiences of pupils with special educational needs* , 2010, NI Education and Library Boards and others, <http://www.staffcom.org.uk/pdfs/ItsGoodtoListen.pdf>

In addition, the UNCRPD (see, in particular, **Article 5**) places an obligation on the UK Government to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

Under **Article 4**, there is a general obligation on the UK Government to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

As set out in more detail below, the Commission **recommends** a series of legislative changes to SENDO 2005, which we consider are in keeping with the obligations placed on the UK Government under the UNCRPD.

Finally, **Article 31** of the UNCRPD places obligations on the UK and other Member States to ensure the collection and assessment of statistics and other data in order to enable them to learn more about the barriers that exist for disabled people and to better understand how they can put into practice the UNCRPD.

As set out in the recent independent research commissioned by the Commission, *Disability Programmes and Policies: How does Northern Ireland Measure Up?*, the availability of robust data, information and statistics is central to evidence based policy making and to an effective monitoring process under Article 33 of the UNCRPD. Article 31 identifies the purpose of data and statistics collection and outlines the standards to be used for the collection, and maintenance and use of this information.

The Department will note that one of the findings of the research in relation to the statistical and data requirements of the UNCRPD, is that statistics on policies and programmes were very rarely disaggregated to give information on persons with disabilities or on the **type of disability**.

The research further commented that it was ‘currently extremely difficult to measure the effectiveness of government policies in relation to people with disabilities’ and this was ‘due to a lack of co-ordinated and effective monitoring to quantify the impact of policy change’. The research also highlighted difficulties in that systems were not monitored or policed and where information was available, it was not readily accessible or available in formats required by disabled people.

The research highlighted that statistics, data collection and access information was one of three **priority areas** identified as a key area where the UNCRPD is not being fully implemented in Northern Ireland with respect to policies and programmes.

In light of this, we **recommend** that the Department considers whether further steps are necessary in order to improve its data collection and analysis relating to disabled children in schools so as to ensure that it can effectively monitor and review the impact of its proposed changes to the SEN framework.

It is important that the Department effectively monitors the overall **outcomes** associated with the revised SEN framework; for example, as regards the educational attainment of children with SEN, experiences of pupils with SEN who access support through the SEN framework, the performance of schools/boards in meeting their revised duties.

The Commission’s research report on **Inequalities in Education** in 2010, has, for example, highlighted the fact that the gap in educational attainment has widened between disabled children and non-disabled children between 1998-2008.

Progress can be monitored through school leaver surveys, school reports, school census, ETI reports, as well as the nature and level of complaints to DARS and SENDIST. The Education and Library Boards survey of the experiences of disabled children in schools in 2010, referred to above, is

also a useful benchmark against which to assess whether or not a revised framework has improved their experiences, in certain areas.

Multiple Identity Issues

The Commission also **recommends** that the Department considers **multiple identity** issues when taking forward its proposals. The Department will, for example, be aware of the high incidences of SEN amongst Traveller children.

We recommend that the Department considers whether there are particular barriers experienced by Traveller children or other black minority ethnic children (for example, who experience language barriers) due to their multiple identities, and that specific measures (with associated outcomes) are set to address these barriers.

It is also important that any **training** for Teachers / Principals / Governors or any guidance issued by the Department specifically refers to the need to address barriers faced by, and challenge negative stereotypes of, disabled children with multiple identities.

Transparency and accountability

We note that the Department has indicated that ‘further consideration needs to be given to determine how funding arrangements will support the new policy’.

As highlighted in our earlier consultation response, the Commission indicated that the emphasis in devolving the overall SEN budget to schools is not necessarily the most cost-effective use of this resource. In particular, we were of the view that it shifts the responsibility for outcomes to schools and away from a higher level strategic over-view that could be built into an area based planning framework.

It is of note that parents have on a number of occasions raised with the Commission the difficulties they have experienced when schools have used money allocated to be spent for the purposes of meeting special educational needs, on other non-related areas.

In addition we would raise concerns, as highlighted in the Department's report, that according to ETI reports 18% of primary schools and 38% of post primary schools inspected in 2010/11 did not have arrangements to identify, assess and meets the needs of SEN pupils to a sufficiently high standard.

These concerns highlight the importance of ensuring that robust policies and procedures are put in place to increase transparency and accountability within schools, so that money allocated for special educational needs is used solely for that purpose.

Legislative reform (DDA 1995 and SENDO 2005)

Although not specifically raised as part of the Department's consultation on the reform of the SEN framework, the Commission is of the view that there are a number of important issues within the responsibility of the Department which impact on disabled children, both those with or without SEN.

In particular, as set out in detail in the Commission's proposals for disability law reform ***Strengthening Protection for Disabled People***⁵, there are a number of further changes which are required in order to strengthen protection for disabled pupils in schools.

⁵ *Strengthening Protection for Disabled People, proposals for Reform – March 2012* ECNI,
http://www.equalityni.org/sections/default.asp?cms=The Law_Pressing for reform_Disability law reform&cmsid=4_967_970&id=970&secid=5

For example, the Commission **recommends** changes to SENDO 2005 in order to place an additional duty on schools to provide **auxiliary aids and services** for disabled pupils, where reasonable; in circumstances where a failure to do so would put the disabled pupil at a substantial disadvantage compared to non-disabled pupils.

The Commission also **recommends** that the current residual duty on the Education & Library Boards under SENDO 2005 in relation to the making of reasonable adjustments for disabled pupils or prospective pupils, is extended so that it includes a requirement to provide auxiliary aids and services. This recommendation is in line with changes due to be implemented in Great Britain under the Equality Act 2010 in September 2012.

In addition, wider changes are needed both to the Disability Discrimination Act 1995 (DDA 1995) and SENDO 2005 in order to address inconsistencies and strengthen protection against discrimination and harassment for disabled people.

For example, there is currently **less protection** for disabled pupils in schools than for disabled students in further and higher education. In addition, legislative changes are required in order to address the impact of the House of Lords' decision in *Malcolm*⁶ in 2008 which significantly restricted the ability of disabled people (including disabled pupils in schools) to pursue complaints of disability-related discrimination.

Again, these changes will help ensure that Northern Ireland equality law **keeps pace** with changes which already have taken place in Great Britain or are due to be implemented.

⁶ Mayor and Burgesses of the London Borough of Lewisham v Malcolm [2008]UKHL 43

Accessibility Plans

The Department will be aware that under SENDO 2005, there is a **duty on Education and Library Boards** to plan for accessibility over time. In particular, there is a duty on Boards to produce a **written strategy** on how, over a prescribed period, they intend to improve the physical environment of schools for the purpose of increasing the extent to which disabled pupils are able to take advantage of education and associated services provided by schools.

Boards also have a duty to take into account any **guidance** issued by the Department of Education about the content of their strategy, as well as the need to allocate adequate resources for implementing the strategy. We understand that the Department has undertaken a pre-consultation on this guidance but that no formal guidance had been issued.

In addition, there is also a **duty on schools** (Board of Governors) to prepare and implement a **written accessibility plan** for a prescribed period which must include information on the physical accessibility of school premises, accessibility of the curriculum and the provision of alternative formats. In addition, schools are under a **duty to have regard to the need to allocate adequate resources** for implementing the plan.

The Commission seeks **clarification** from the Department as to whether or not the Boards have produced a written strategy on how they intend to improve the physical environment of schools and whether or not schools have prepared and implemented written accessibility plans.

The difficulties faced by disabled pupils is highlighted by the case supported by the Commission of *Michaela Hollywood*; a case brought under SENDO 2005, a wheelchair user, who experienced difficulties due to

her disability when she attempted to transfer to a new school in order to pursue an ‘A’ level.⁷

Reform of SENDIST

The Commission had raised with the Department in its previous response the need for changes to SENDIST including difficulties experienced by disabled applicants when seeking the urgent listing of their cases. The Commission welcomes the improvements that have been made to the listing of cases.

However, the Commission concerns remain in relation to the following issues as regards SENDIST. We **recommend** that the Department liaises with the DOJ in order to ensure that the following policies, practices and procedures relating to SENDIST do not restrict access to justice for disabled children, including those with SEN.

First, the Commission **recommends** that decisions of SENDIST are made **publicly available**. Increased transparency and accessibility of decisions will assist potential complainants, who will have access to previous decisions of SENDIST to consider whether or not they have been subjected to disability discrimination.

Currently SENDIST decisions are restricted to the parties involved in the dispute. As a consequence, Boards will have access to all decisions, whereas only the individual complainant in a case will have access to the decision relating to their particular case.

This places a potential complainant and their legal advisor at a disadvantage as they are unable to ascertain what caselaw has developed relevant to their particular complaint. As set out below, complainants are

⁷ Further details of this case, which settled, are highlighted in *Real People, Real Change, ten real stories*, ECNI, 2009, <http://www.equalityni.org/archive/pdf/RealPeople1009.pdf>

already at a disadvantage due to their inability to access legal aid for representation at SENDIST. The Commission recognises that in certain circumstances it may be necessary to anonymise the decision in order to protect the identity of the child.

As highlighted in the *Access to Legal Aid Review*, there is not an ‘equality of arms’ between complainants and Boards due to the inability of complainants to access legal aid or representation at a tribunal. The Commission has recommended an extension of legal aid in these circumstances.

The Commission raised concerns in its original response to the SEN review, in relation to the physical arrangements made at SENDIST hearings. The Commission is concerned that although this had been raised in its response in January 2010, there are still outstanding issues in relation to the physical arrangements at SENDIST hearings which have contributed to increase stress of disabled children when giving evidence in relation to a complaint.