

DRAFT

POLICY COMMISSION ENQUIRY SCOPING DOCUMENT

RESPONSIBLE BODY	
Policy Commission for Children and School Results	
ENQUIRY NAME	REFERENCE NUMBER
Special Educational Needs and Statementing Processes	C6/05
PROPOSED OUTPUT/S	RISK
To deliver recommendations to the Cabinet member for Children regarding Special Educational Needs and the Statementing process.	High Medium Low
PROPOSED DATE OF INITIATION	PROPOSED DATE OF COMPLETION
July 2005	
REASON FOR ENQUIRY	
<ul style="list-style-type: none"> • To complete work started by the SEN Taskgroup 	
PROPOSED OUTCOME OF POLICY IMPLEMENTATION	
<ul style="list-style-type: none"> • Greater confidence that National Standards and guidance are being adhered to and followed. 	
TERMS OF REFERENCE	
<p>To review information and evidence from stakeholders and experts including but not limited to:</p> <ul style="list-style-type: none"> • Cllr P Joyce, in his role as former member of the SEN Taskgroup • Senior Officers from the Local Authority <p>About:</p> <ul style="list-style-type: none"> • Evidence gathered since the last meeting of the SEN Taskgroup. • The National and local context. • Budgetary implications. <p>What will not be included:</p>	
KEY STAKEHOLDERS	
<p>Cllr P Joyce David Pettitt</p>	
RELEVANT CORPORATE AND/OR COMMUNITY STRATEGY/IES	
<p><u>Corporate Plan</u></p> <p>TBC</p>	

DRAFT

Community strategy:

Theme # 5– Developing Learning and Skills

Aspirations

- To provide each individual with the opportunity to achieve their full potential
- To ensure that high quality education, learning and training is available and accessible to every member of the community

RELATED PROJECTS

LEAD MEMBER

Cllr M Swan

OFFICER INVOLVEMENT

Lead Link Officer:

David Pettitt

Overview and Scrutiny Team:

Paul Thistlewood – Lead
April West

OTHER RESOURCES REQUIRED

Specialist Council officer input

BACKGROUND BRIEFING NOTE RELATING TO THE SEN TASK GROUP PREPARED BY THE OVERVIEW AND SCRUTINY TEAM

A Task Group was established by the previous Children's Services Select Committee following its meeting on 19 May 2003. It was "To review the Council's SEN procedures to ensure that they were open, fair, legal, effective and adequately resourced particularly in relation to Autistic Spectrum Disorder, and report back with its findings and recommendations to the Select Committee".

Special Educational Needs is a large, complex area and the Task Group decided that it would be beneficial if it concentrated its efforts on one key theme at a time. It therefore made the statementing process as its first priority. This enabled the Task Group to take evidence from relevant officers from the Education Directorate, Legal Services, a parent and agencies that form part of the process.

This also fitted in with the comments made by Ofsted published on 19 January 2004 following its inspection of the LEA in September 2003. The summary commented :-

Provision for children with special educational needs has improved since the last inspection. The LEA has implemented most of the recommendations of the previous report. It has also conducted a review of provision that has resulted in the establishment of three resource centres and in the reorganisation of special schools part of whose remit is to provide outreach, support and training. Its SEN strategy has been revised and closely aligned to the government priorities for inclusion, which are clearly reflected in the increasing focus on inter-agency work, particularly in the areas of school improvement. There is increasing emphasis on monitoring and improving provision but this does not yet focus sufficiently on the actual or intended impact on pupils' attainment and progress. The extent to which the LEA fulfils its statutory obligations has also improved since the last inspection but remains unsatisfactory overall. There are delays in the completion of statements; delays in their amendment following annual review; and a lack of specificity in statement objectives.

Statutory Requirements

The Department for Education and Skills has a SEN Toolkit which comprises 12 individual booklets explaining the principles and policies contained in the Education Act 1996 and the SEN Code of Practice. The Task Group utilised Section 7: Writing a Statement of Educational Needs, Section 8: Guidelines for Writing Advice and Section 12: The Role of Health Professionals. These documents assisted the Task Group in identifying the key steps that should occur in making a statutory assessment of those children whom the LEA believes probably have SEN.

Under the Regulations a proposed statement must be issued within 18 weeks of the formal start of the assessment process. A final statement must be issued within 26 weeks.

Definition of Special Educational Needs

Under Section 312 of the Education Act 1996 children have special educational needs if they have a learning difficulty, which calls for special educational provision to be made for them. A learning difficulty is where a child :

- (a) has a significantly greater difficulty in learning than the majority of children of the same age; or
- (b) has a disability, which prevents or hinders the child from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the local education authority; or
- (c) are under and fall within the definition at (a) or (b) above or would so do if special educational provision was not made for them.

Special educational provision means :

- (a) For children of two or over, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of their age in maintained schools, other than special schools, in the area.
- (b) For a child under two, educational provisional provision of any kind.

Meetings of the Task Group

These concentrated on obtaining a basic understanding of what the statutory position is, what actually happens and why. Separate sessions were held with a parent of a child with SEN and who had experience of the process, health workers who submitted written advice on SEN, officers from the Education Directorate who were responsible for dealing with the Council's responsibilities for SEN and officers from the Council's Legal Services Section.

All these meetings were informal thereby enabling all parties to be involved in a full and frank exchange of views.

It was nearing completion on its deliberations into aspects of the statementing process and had reached the stage where there was a need to clarify the statementing process whereby advice must be sought from the Health Authority on the provision of services that was required for a child identified with SEN. The Select Committee therefore agreed to seek specialist legal advice from outside the Council on five questions aimed at resolving the areas of concern.

These questions centred around the duty of the Local Authority to seek medical advice from the Health Authority when making an assessment of special education needs. A copy of the questions and response from David Ruebain of Levenes Solicitors is attached.

Special Educational Needs

I am asked to consider answers to five questions in respect of obligations by the Isle of Wight County Council concerning the drafting of statements of special educational needs ("statements"), in accordance with the provisions of *Part 4 of the Education Act 1996* as amended. I set out, below, those questions, together with my answers.

1. To what extent does the law require statements of special educational needs to particularise, in detail, special educational provision?

The duty to particularise provision is rooted in the duty set out in *section 324(2-3) of the Education Act 1996*. This provides that:

"The statement shall be in such form and contain such information as may be prescribed. In particular, the statement shall give details of the authority's assessment of the child's special educational needs, and specify the special educational provision to be made for the purposes of meeting those needs, including the particulars required by subsection (4)"

The prescription referred to in this section is contained within *regulation 16 of, and schedule 2 to, the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001*. *Regulation 16(a)-(b)* provides that:

"A statement shall be in a form substantially corresponding to that set out in schedule 2 to these Regulations; containing information therein specified,"

Then, *schedule 2* sets out a "model" statement and, at Part 3 of the model statement, in the section headed "Educational Provision to meet Needs and Objectives" provides a subsection (a) as follows:

"Here specify the special educational provision which the authority consider appropriate to meet the needs specified in Part 2 and to meet the objectives specified in this part, and in particular, specify any appropriate facilities and equipment, staffing arrangements and curriculum,"

Then, paragraph 8:34b of the Special Educational Needs Code of Practice (which is made, and has statutory force, pursuant to the provisions of section 313 of the Education Act 1996) provides that:

"The second subsection should specify all of the special educational provision the LEA consider appropriate for all the learning difficulties in Part 2, even where some of the provision will be made by direct intervention on the part of the authority, some will be made by the child's school from within its own resources, and some may be made by the Health Authority. It is the LEA that is responsible for arranging the provision in the statement, irrespective of who actually delivers it, unless the LEA is satisfied that the child's parents have themselves made suitable arrangements".

Then, paragraph 8:36 of the Code of Practice provides that:

"A statement should specify clearly the provision necessary to meet the needs of the child. It should detail appropriate provision to meet each identified need. It will be helpful to the child's parents and teachers if the provision in this subsection is set out in the same order as the description of needs in Part 2."

Finally, paragraph 8:37 of the Code of Practice goes on to state:

"LEAs must make decisions about which actions and provision are appropriate for which pupils on an individual basis. This can only be done by a careful assessment of the pupils' difficulties and consideration of the educational setting in which they may be educated. Provision should normally be quantified (e.g. in terms of hours of provision, staffing arrangements) although there will be cases where some flexibility should be retained in order to meet the changing special educational needs of the child concerned. It will always be necessary for LEAs to monitor, with the school or other setting, the child's progress towards identified outcomes, however provision is described. LEAs must not, in any circumstances, have blanket policies not to quantify provision."
(My emphasis.)

A child's needs may be "changing" in that way because the child itself is changing or because of the interaction between the child and its environment but not because of external factors or changes (see *IPSEA -v- Secretary of State [2003] EWCA Civ 07*).

The extent of these duties have been considered in a significant number of cases before the High Court and beyond. In particular, in *L - v- Clarke and Somerset County Council* [1998] ELR 129, Laws J said at pp. 136 - 137:

"In my judgment a requirement that the help to be given should be specified in a statement in terms of hours per week is not an absolute and universal precondition of the legality of any statement ... There will be cases where flexibility should be retained. However it is plain that the statute requires a very high degree of specificity ...

... [I]t seems to me that in very many cases it will not be possible to fulfil the requirement to specify the special educational provision considered appropriate to meet the child's needs ... unless hours per week are set out.

The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done."

This approach was endorsed by the Court of Appeal in *Bromley - v - Special Educational Needs Tribunal* [1999] ELR 260, at 297C, and has been cited on numerous occasions since. For example, in *E -v- Flintshire* [2002] EWHC 388 (Admin), the Court held that the requirement to specify is:

"not a bureaucratic purpose.... by that provision, local authorities ... and tribunals... are required to give full and adequate specific consideration to the needs of the child... the requirement for specificity outlaws ... a general statement in such broad terms that it could lead to specific needs being ignored or inadequately focussed upon.... the second purpose is that, once made in terms which are specific the purpose of the provision can be furthered and effected by enforceability....":.

Then, in *IPSEA Ltd -v- Secretary of State for Education* [2002] EWHC 504 (Admin), the Court held that the legislative purpose is:

"to require focussed and express consideration to be given to the specific needs of a child and then to provide for them in terms which will further and effect its enforceability as a provision..."

The thrust of this approach - generally requiring particularity - was tempered somewhat by the Court of Appeal in *E - v - London Borough of Newham and The Special Educational Needs Tribunal* [2003] ELR 286, who at para 64, said:

"(i) *At one extreme, a tribunal plainly cannot delegate its statutory duty to some other person or body, however well-qualified. Equally the statutory duty will not be discharged if the description of the special educational provision which is to be made is framed in terms so vague and uncertain that one cannot discern from it what (if anything) the tribunal has decided in that respect.*

(ii) At the other extreme, the statutory duty plainly cannot extend to requiring a tribunal to 'specify' (in the sense of identify or particularise) every last detail of the special educational provision to be made. (Indeed ... in an appropriate case a tribunal may lay down minimum requirements.)

(iii) Between those two extremes, the degree of flexibility which is appropriate in 'specifying' the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases, a high degree of flexibility may be appropriate, in others not."

(Although these comments relate to the Tribunal, the same will equally apply to LEAs, in whose shoes the Tribunal stands.) However, this case turned very much on its facts - involving a child with a need for provision which was itself unclear, and would be provided in a specialist environment in any event. Certainly, having regard to the legal framework described above, it is clear that the law requires a high degree of particularity, with the only exception being set out in *paragraph 8:37 of the Code of Practice*; relating to the changing needs of the child him/herself.

Finally, the following cases are further particular examples, turning on their own facts, illustrating how the courts have applied the general guidance set out above:

- *Manchester City Council - v - Special Educational Needs Tribunal and S, and Manchester City Council - v - Special Educational Needs Tribunal and M* {2000} EdCR 80,
- *H - v - Leicestershire County Council* (2000] ELR 471,
- *E - v - Flintshire County Council and the Special Educational Needs Tribunal* (2002] ELR 378.

- *M -v- Brighton and Hove City Council [2003] EWHC 1722 (Admin)*: The Court held that the following provision within a statement was impermissibly ambiguous (especially the last sentence):

"Opportunities for individual an/or small group support within class and a withdrawal basis as considered appropriate to target literacy difficulties and specific areas of the curriculum. J needs to be in a class setting with others who have similar severity of specific learning difficulty and work across the curriculum. He needs to be taught by specialist teachers trained in teaching pupils with severe specific learning difficulties."

- *E -v- Rotherham MBC (2002) ELR 266, [2001] EWHC Admin 432* which held that the following was unlawful:

"Any change in the level [of] support will require a formal discussion between the LEA, the NHS Trust and one or both of [C]'s parents, but the above level of support is to remain at no less than the present level until June this year'.

2. To what extent does the law distinguish that which is special educational provision and that which is non-educational provision?

Regulation 16 of, and Schedule 2 to, the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (SI 2001/3455) establish that a statement should distinguish special educational needs and special educational provision (in Parts 2 and 3 of a statement) **from non-educational needs and non-educational provision (in Parts 5 and 6 of a statement)**. What is, and what is not, an educational need and provision as against a non-educational need and provision have also been the subject of a number of cases before the High Court and beyond. The issue is of particular importance since, pursuant to the provisions of *section 324(5)(a)(i) of the Education Act 1996* and the High Court decisions in *R - v- London Borough of Harrow ex pane M [1997] ELR 62*, *R - v - Oxfordshire County Council ex pane P [1996] ELR 153* and *R - v - Hillingdon London Borough Council ex parte the Governing Body of Queensmead School [1997] ELR 331*, LEAs have an absolute, non-delegable duty to arrange *special* educational provision, but only have a power, not a duty, to arrange non-educational provision.

In any event, much provision centring around ordinary school activities - such as teaching and access to the curriculum - will be obviously educational. Some - such as the need for housing

(as distinct from boarding accommodation at school) - will clearly not be. The difficulty arises in respect of those matters which could be, but equally may not be. There is undoubtedly an area of overlap, and in *Bromley - v - Special Educational Needs Tribunal* [1999] ELR 260, at page 295 the Court of Appeal said:

"The potentially large intermediate area of provision which is capable of ranking as educational or non-educational is not made the subject of any statutory prescription precisely because it is for the LEA, and of necessary the SENT, to exercise a case-by-case judgment which no prescriptive legislation could ever hope to anticipate"

However, the courts have upheld the argument that most speech and language therapy provision is educational; as set out in the decision of the High Court in *R - v - Lancashire County Council ex parte M* [1989] 2 FLR 279, subsequently affirmed in the current Code of Practice at paragraph 8:49, which provides that:

"case law has established that speech and language therapy can be regarded as either educational or non-educational provision, or both, depending on the health or developmental history of each child. It could, therefore, appear in either Part 3 of Part 6 of the statement or in both. However, since communication is so fundamental in learning and progression, addressing speech and language impairment should normally be recorded as educational provision unless there are exceptional reasons for not doing so").

With respect to occupational therapy and physiotherapy, the Court of Appeal in *Bromley - v - Special Educational Needs Tribunal* [1999] ELR 260 indicated that the question of whether such provision is educational or non-educational would turn very much on the facts of each case (see also *B - v - The Isle of Wight Council* (1997) ELR 279.) On the other hand, the courts have held that nursing support is non-educational provision (*C - v - The Special Educational Needs Tribunal* [1997] ELR 390 and *City of Bradford - v - A* [1997] ELR 417) - although the need for nursing support may, separately, impact on decisions as to whether or not a particular school is appropriate.

Curiously perhaps, the High Court has held that translation/interpretation support for a parent could constitute special educational provision for a child (*Vu - v - Lewisham Borough Council and the Special Educational Needs Tribunal, unreported, 31 July 2000*).

In summary, the more proximate the provision to "core" educational activities - teaching, delivery of the national curriculum, etc - for the child in question, the more likely it is educational provision, and vice versa. Thus, class sizes may be set out in Part 3 of a Statement (*H -v- Leicestershire [2000] ELR 471*); as may staff qualifications/experience (*R -v Wandsworth ex parte M [1998] ELR 424*); the size of any small group work, their length and frequency and the amount of 1:1 work (*L -v- Clarke and Somerset [1998] ELR 129*); and input from other professionals such as sessions of speech therapy) *R -v- Harrow ex parte M [1997] FCR 761*). Arguably, Part 3 can also specify that a child is placed in a different year group to that indicated by their age (*C -v- Lambeth [2003] EWHC 1195*). However, subject to the guidance and case law set out, each case will very much turn on it's own facts.

3. To what extent does the law require local education authorities to obtain advices, whether it be medical advice or otherwise, which will enable it to particularise special educational provision?

As set out in the letter of advice of John Lawson, Head of Legal and Democratic Service of Isle of Wight Council, to Councillor Joyce of 12 October 2004, the obligations in respect of the "information gathering" process are primarily contained within regulations 7-11 of the *Education (Special Educational Needs) (England) (Consolidation) Regulations 2001*. In summary, the duties require that advices must be sought from the child's parents and from certain specified professionals. In particular, regulation 7(2)(c) provides that:

"The advice referred to in paragraph (1) shall be written advice relating to the provision which is appropriate for the child in light of those features of the child's case whether by way of special educational provision or non-educational provision, but not relating to any matter which is required to be specified in a statement by virtue of Section 324(4)(b)"

Section 324(4)(b) is a reference to the placement or location that it is intended the child will receive the special educational provision.

Clearly, the obligations do not, of themselves, express the requirement that any advices sought should particularise provision. However, given the duties on LEAs to particularise provision, as described above, and given that such provision cannot be particularised without the clear evidence of those qualified to comment on the extent of such provision, arguably at least, advices obtained in accordance with these Regulations would, by definition, be inadequate unless they were of a sufficient degree of comprehensiveness to enable a LEA to deduce the nature of provision required, with the necessary degree of particularity. Further, even if this is not correct, the LEA would not then be absolved of any duty to particularise provision, as described, so that, in order to discharge this duty, they would have to obtain further or different advices.

4. Insofar as the advices that a local education authority receives as part of a statutory assessment, whether it be medical or non-medical, does not afford the local education authority sufficient information to particularise provision, to what extent must local education authorities take other steps to secure additional or different advice to enable it to particularise provision?

In one sense, the answer to this question is dependant on the answer to 3 above. However, my view is that, in summary, it does not matter which way one approaches the issue. If it is accepted that, generally, LEAs have a duty to particularise provision (which, in my view, subject to the exceptions set out in the Code of Practice and as exemplified in the decision of the Court of Appeal in *Newham*, is the case,) then whether the information required to meet that duty is contained in the advices sought pursuant to the above stated regulations, or otherwise, is of little consequence.

5. Notwithstanding the above, if a local education authority has insufficient advice to particularise provision, to what extent does this absolve it of the duty to particularise special educational provision in a statement of special educational needs?

As indicated, the fact that advices may not provide a LEA with sufficient information to meet its duty to particularise provision would not absolve that local education authority of its duty to particularise provision since the case law does not, anywhere, make an exception to the duty on the basis of inadequate information

obtained by a local education authority as part of a statutory assessment or reassessment.

David Ruebain
Levenes Solicitors
January 2005