

# “Preparing and Presenting a SENDIST Case: A Practitioners Guide”

**Legal CPD Event**



**5th December 2018 - Hilton Hotel, Belfast**

# NICCY Legal CPD Event – December 2018

## Welcome and introduction

**Mairéad McCafferty**  
Chief Executive - NICCY

# NICCY Legal CPD Event – December 2018

## “Preparing and Presenting a SENDIST Case: A Practitioners Guide”

**Guest speaker – Mr Paul Shevlin**  
SENDIST Chairman

# Structure

1. Background – The Warnock Report
2. The Legislation and Code of Practice
3. The Types of Appeal
4. The Regulations
5. The Statistics
6. Fighting a Failure to Assess or Make Statement Case
7. Fighting Parts 2, 3 and 4
8. Back to the Future
9. And its goodbye from him.....

# The Warnock Report

- 1978 Report laid foundations of Statements of Special Educational Needs
- *“We estimate that up to one child in five is likely to require special educational provision at some point during his school career.”*
- Before Warnock- the child should fit the school
- After Warnock – the school should fit the child
- Education Order (Northern Ireland) 1984 later consolidated in Education and Libraries (NI) Order 1986
- Initially parents appealed to the Boards and thereafter to the Minister
- Requirements of natural justice to have appeal body independent of funder

# The Legislation and Code

## **The Education (Northern Ireland) Order 1996**

*Under this legislation the Education Authority has a duty to identify, assess and make provision for children with SEN within their area.*

## **The establishment of SEN Tribunal 1997**

# The Legislation and Code

## **The Special Educational Needs and Disability (Northern Ireland) Order 2005**

*included protections against disability discrimination within the education system*

*enhanced the rights of children with SEN to attend mainstream schools. It states that a child without a statement should be educated in an ordinary school and that a child with a statement should be educated in an ordinary school, unless that is incompatible with:*

- The wishes of his parent; or*
- The provision of efficient education for other children.*

# The Legislation and Code

## The Department of Education's SEN Code of Practice

- in operation since 1998,
- addresses identification, assessment and provision for children who may have SEN.
- Based on a number of principles, including:
  - The needs of all pupils with learning difficulties must be addressed;
  - Children with SEN require a broad and balanced education;
  - The needs of most children will be met in mainstream schools, and without a statutory assessment or a statement; and
  - Parents' knowledge, views and experience are vital.

# The Code

The Code standardised the procedures and timescales for undertaking an assessment and issuing a statement.

It comprises five main stages,

- Stage 1 Teachers identify and register a child's special educational needs, consult with the school's SEN co-ordinator and take initial action.
- Stage 2 The SENCO takes lead responsibility for collecting and recording information, co-ordinating the child's special educational provision, and working with the child's teachers.
- Stage 3 Teachers and the SEN co-ordinator are supported by specialists from outside the school.
- Stage 4 The EA considers the need for a statutory assessment and, if appropriate, makes a multi-disciplinary assessment.
- Stage 5 The EA considers the need for a statement of special educational needs. If appropriate, it makes a statement and arranges, monitors and reviews provision.

# Types of Appeal

An appeal to the tribunal can be made by a parent or carer of a child with special educational needs (SEN) if the EA:

- refuses a request made by a parent or the child's school to carry out a statutory assessment or re-assessment of the child's needs (as long as no assessment has been carried out in the last six months)
- refuses to issue a statement of SEN following a statutory assessment (a Note in Lieu may be issued but this is still a refusal to make a statement)

# Types of Appeal

- has made or amended a statement and the parent disagrees with what it says (ie the description of the child's SEN in Part 2, the special educational provision specified in Part 3, the school named in Part 4 or the fact that no school is named in Part 4)
- decides not to maintain the child's statement any more
- re-assesses the child but refuses to amend their statement
- refuses a request to change the school named in the child's statement (as long as the parent has asked for a grant-aided school and the child's statement has been maintained by the EA for at least a year).

# The Regulations

## Special Educational Needs and Disability Tribunal Regulations (NI) 2005

- **Time Limits** ...7(3) 2 months from date on which EA notified of right of appeal
- **Reasons**...8(1)
- **Case Statement Period** – 28(1) for both sides 30 working days from acknowledgement of appeal from Secretariat
- **For appellants**... 9(1) facts of the case, the views of the child and the evidence to be relied on.
- **Procedure**..42(2) ...it shall as far as it appears appropriate seek to avoid formality in its proceedings

# The Regulations

- **Late Written Evidence**...has to satisfy 43(2)
  1. Was not and could not have been available before the end of case statement period
  2. A copy sent to Tribunal and other party at least five working days before the hearing
  3. The evidence not likely to impede the efficient conduct of the hearing

## **Backstop 43(3)**

1. Exceptional
2. Unless admitted serious risk to prejudice the interests of the child

# The Regulations

- **Witnesses...** 44(1) in appeals 2 witnesses and 5 in disability claims unless permitted by the Tribunal
- **Extensions of time..**60(1) where these regulations requires something to be done within a period of time it may be extended “in exceptional circumstances.”

# The Statistics- 1 April 2017 to 31 March 2018

Refusal to Assess - Parent	133	44.33%
Refusal to Assess - School	54	18.00%
Refusal to make a Statement	22	7.33%
Refusal to Re Assess - Parent	0	0.00%
Refusal to Re Assess - School	1	0.33%
Refusal to Change Name of School	5	1.67%
Decision to Cease to Maintain Statement	3	1.00%
Failure to Name School	0	0.00%
Contents of Statement - Parts 2 & 3 or Both	50	16.67%
Contents of Statement - Parts 2, 3 & 4	8	2.67%
Contents of Statement - Parts 4	3	1.00%
Discrimination	21	7.00%
Check Total	300	

# The Statistics- 1 April 2017 to 31 March 2018

Autism	142	47.33%
Emotional & Behavioural Difficulties	47	15.67%
Epilepsy	1	0.33%
Hearing Impairment	4	1.33%
Moderate Learning Difficulties	14	4.67%
Multi-sensory Impairment	0	0.00%
Physical Disability	8	2.67%
Severe Learning Difficulties	1	0.33%
Specific Learning Difficulties	56	18.67%
Speech & Language Difficulties	14	4.67%
Visual Impairment	1	0.33%
Other/Unknown	12	4.00%
Check Total	300	

# Fighting a Failure to Assess or Make Statement Case

- **Provisional Criteria for Statutory Assessments and Statements**
- The Education Authority adheres to legislation and has due regard to the Code of Practice and the Supplement to the Code in making decisions as to whether or not to proceed with a Statutory Assessment of a child's special educational needs and then, when statutory assessment has been completed, whether or not to issue a Statement of Special Educational Needs.
- The Education Authority uses Provisional Criteria to guide decision making. The Provisional Criteria can be downloaded.

# Issues under Provisional Criteria

## 1. Which categories apply?

- Learning Difficulties  
Moderate  
Severe  
Specific
- Social emotional and behavioural difficulties
- Physical or medical difficulties
- Sensory impairments
- Speech and language difficulties
- Complex interaction of needs

# Issues under Provisional Criteria

## **2. In deciding for making a statutory assessment does the balance of evidence suggest that:**

- a, The child 's performance meets the significant and/or complex threshold?
- b.(i) the school has put in place relevant and purposeful measures?
  - (ii) the child is making adequate progress?
- c. The child is able to access the curriculum or be included in the day-to-day activities of the school without special educational provision that cannot reasonably be provided within the resources normally available to the school?

# Appealing Parts 2 and 3

- **Part 3 the Needs**
- **Part 4 the Provisions**

# Appealing Part 2

- Statements to be intelligible
- Part 2 first then 3 and 4
- Can include narrative description of the child

# Appealing Part 3

- Each 2 need to be met by 3 provision
- Educational or Non-Educational is not a matter of law but for EA or Tribunal on appeal
- Speech therapy usually educational
- Must specify all aspects of provisions which differ from provisions in mainstream
- Must be quantified in terms of hours, staffing etc.

# Classroom Assistants

- Most common request in terms of provision
- Hindering independence?

# Appealing Part 4

Article 16 of the 1996 Order provides for the contents of a statement of special educational needs. Paragraph 4 is in the following terms:

- 4) The statement shall
  - (a) specify the type of school or other institution which the Board considers would be **appropriate** for the child;

# Grant-Aided v Private

## BM and SENDIT and WELB O'Hara J 6.6.14

*“In my judgment education at a non-grant aided school in Northern Ireland (such as Y) does not fall to be considered unless and until a decision has been taken under Article 16 that there is no grant-aided school which is **appropriate** for that particular child. If there is such a school (eg X) then it is highly unlikely that provision of education at a non-grant aided school is required by the statute. “*

# Parental Choice

## Grant-Aided v Grant -Aided

- Parental Preference
- Unless
  - a. School is **unsuitable**
  - b. Incompatible with provision of efficient education of for others or the efficient use of resources

# Back to the Future

## **The Special Educational Needs and Disability Act 2016 (Royal Assent March 2016)**

- Requiring a personal learning plan for each child with SEN;
- Requiring the Education Authority and health and social services bodies to co-operate in regard to identifying, assessing and providing for children with SEN.
- A new right to appeal where the Education Authority does not make changes to a statement following annual review; and for parents of children with SEN under the age of two to appeal against statement contents or the failure to make a statement;
- An independent mediation service for those appealing to the Tribunal;
- Giving children with SEN over compulsory school age rights previously exercisable by parents;
- Allowing the Department of Education to make regulations for a pilot scheme enabling children within the compulsory school age to make an appeal to the Tribunal.

# Four elements to new framework

- Primary Legislation - Special Educational Needs and Disability Act (Northern Ireland) 2016 ...Royal Assent given
- Secondary Legislation - New SEN Regulations
- Guidance - a new statutory Code of Practice
- SEN capacity building (training) on the new SEN framework

**..and its goodbye from him**

---

- The importance of informality
- The position of school witnesses
- Solutions, solutions, solutions
- Key Facts

# Key Facts

- **76,300** children with reported special educational needs in 2016-17
- **£217m** spent by the Education Authority on children with special educational needs in 2015-16
- **£55m** spent on classroom assistants for children in mainstream schools in 2015-16

# Key Facts

- 13% percentage increase in children with special educational needs since 2011-12
- 63% percentage of children with special educational needs who are male in 2016-17
- 21% percentage of statements of special educational needs issued within the 26 week statutory limit
- 86% percentage of children with special educational needs leaving school with at least 5 GCSEs A\*-G in 2014-2015

# NICCY Legal CPD Event – December 2018

## Q&A Session

**Mairéad McCafferty**  
Chief Executive - NICCY

# NICCY Legal CPD Event – December 2018

**Thank you for attending and please remember to complete an evaluation form**

You can out more about our work at: [www.niccy.org](http://www.niccy.org)

**And follow us on:**

**Twitter - @nichildcom**

**Facebook – nichildrenscommissioner**

**Instagram – niccy\_yp**