

# RIGHT OF APPEAL TO THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL (SENDIST)

## Advice to the Department of Education (NI)

### Introduction

In her Advice Paper to the Department of Education Northern Ireland in February 2012, the Commissioner for Children and Young People (NICCY) highlighted concerns regarding the continued lack of progress on the implementation of children and young people's right of access to the Special Educational Needs and Disability Tribunal (SENDIST) (Para.5.4).<sup>1</sup> The Department has requested further details and clarification regarding NICCY's calls in respect of this issue.

### NICCY and Children's Rights

The primary aim of NICCY under 'The Commissioner for Children and Young People (Northern Ireland) Order 2003', is to safeguard and promote the rights and best interests of children and young people in Northern Ireland. NICCY's remit includes children and young people from birth up to the age of 18 years or 21 years where a child or young person has a disability or experience of being in care. The 2003 Order requires the Commissioner to have regard to the United Nations Convention on the Rights of the Child (UNCRC) and the protections and provisions contained therein. In carrying out her functions, NICCY also takes account of the provisions contained in other human rights instruments, including the UN Convention on Human Rights (UNCHR) and the UN Convention on the Rights of People with Disabilities (UNCRPD). In reviewing the protections and provisions for children and young people with disabilities, a number of articles in the UNCRC are of specific relevance.

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<sup>1</sup> NICCY (2012) 'Advice to the Department of Education regarding proposals for progressing the Review of Special Educational Needs and Inclusion'.

## Relevant Articles of the UNCRC

Article 23 is particularly relevant to children and young people with Special Educational Needs (SEN) or a disability. Article 23 (1) provides that:

‘States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community’.<sup>2</sup>

Article 23(2) details the right of the disabled child to special care, providing that ‘State Parties shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.’

Article 23(3) states that:

‘Recognising the special needs of a disabled child, assistance extended in accordance with Paragraph 2 of the present Article, shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development’.

Articles 28 and 29 of the UNCRC refer to a child's right to education, emphasizing that education provision should develop each child's personality, talents and *abilities to the fullest*.<sup>3</sup>

In relation to children's rights to participate fully in education and in decision-making about issues affecting them, Article 12 of the UNCRC<sup>4</sup> and Article 7(3)<sup>5</sup> of the UNCRPD address the right of children to be heard. These rights place an obligation on Government to ensure that any child capable of forming his or her own views is afforded the opportunity to express these in all matters affecting them.

‘For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law’.<sup>6</sup>

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<sup>2</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>

<sup>6</sup> <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

In the context of SEN provision, this means that a child capable of forming their own views should be given the opportunity to express these during a redress process.

### **Relevant Concluding Observations and General Comments by the UN Committee on the Rights of the Child**

General Comment 9 (2006) issued by the UN Committee expressed concern that children with disabilities are left out of the decision-making process where issues being discussed affect them. The Committee noted that ‘engaging children in such a process not only ensures policies are targeted to their needs and desires, but also functions as a valuable tool for inclusion since it ensures that the decision-making process is participatory’.<sup>7</sup> The UN Committee specifically highlighted the importance of a young person being able to appeal a decision in their own name, particularly where they are in alternative care. Specifically, it commented, ‘The right to complain regarding educational provisions is restricted to parents, which represents a problem especially for looked after children for whom local authorities have, though mostly do not use, parental authority’<sup>8</sup>. NICCY would also propose that children and young people should have a right to appeal as there are occasions when parents do not assert their parental rights of appeal or operate in the best interests of the child. In such cases, parents may be disinterested or unwilling to make an appeal which will require their participation in a legal process, that may appear intimidating and stressful. The cost of legal representation may also be a deterrent for some families given that legal aid funding is not available for representation before the Tribunal itself and pre-proceedings assistance is limited under the current legal aid scheme.

In its Concluding Observations in 2008, the UN Committee highlighted concerns about the inadequacy of participation opportunities for children and young people in schools in the UK. Paragraph 66 of the Concluding Observations detailed the Committee’s concerns that children do not have a right to appeal the decision of an SEN Tribunal. Therefore, it recommended that the UK Government ‘ensure that children who are able to express their views have...the right, in particular those in alternative care, to appeal to special educational needs tribunals’.<sup>9</sup>

General Comment 12 issued by the UN Committee on the Rights of the Child, details a series of steps which should be implemented to effectively realize Article 12 for children if they are invited to provide their views in formal proceedings. These are grouped under five headings; preparation, the hearing, assessment of the capacity of the child;

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<sup>7</sup> <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/GC/9>

<sup>8</sup> <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

<sup>9</sup> Ibid.

information about the weight given to the views of the child, and complaints, remedies and redress.<sup>10</sup>

### **Provisions for children in relation to SEN appeals in England and Wales**

The Children and Families Bill recently introduced in England, addressed children and young people's right to make special needs appeals.<sup>11</sup> The Bill proposes to extend the SEN system for children and young people aged from 0 to 25 years, and according to the Department of Education, will give children, young people and their parents, greater control and choice in decisions towards ensuring that their needs are properly met.

Three key measures are proposed;

- i. A common right of appeal in relation to SEN appeals and disability discrimination claims would be established across the post-compulsory school (16-25) age range;
- ii. Children would be enabled to make appeals in relation to their SEN assessments and statements/plans and to make disability discrimination claims, and;
- iii. The use of mediation/mandatory mediation information telephone would be promoted.

The Bill also provides for the establishment of a series of pilot schemes in selected local authority areas which will explore opportunities for children aged under 16 years to make an appeal. The aim of the scheme is to explore the possibility of extending the provisions for over 16s to all children. The pilot schemes will be rolled out from September 2014.

In Wales, the Education (Wales) Measure, 2009 makes provision for children and young people to have a right to appeal regarding SEN and to make a claim in respect of disability discrimination in schools to the SEN Tribunal, Wales (SENTW).<sup>12</sup> The Education (Wales) Measure 2009 (Pilot) Regulations 2012 came into force in February 2012 and the rights and duties under the Measure are currently being piloted in two local authority areas; Carmarthenshire and Wrexham until 30 June 2015. Once the pilot Regulations cease to have effect, the rights and duties will automatically apply to all local authorities throughout Wales.

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<sup>10</sup> <http://www2.ohchr.org/english/bodies/crc/comments.htm>

<sup>11</sup> <http://www.education.gov.uk/a00221161/>

<sup>12</sup> <http://www.legislation.gov.uk/mwa/2009/5/section/5>

## **NICCY's proposals in relation to extending the Right of Appeal for Children and Young People**

With regard to provisions for children and young people in Northern Ireland, NICCY proposes that children and young people, capable of forming their own views, should have the right to appeal to SENDIST. This position is consistent with the recognition of children's status as rights bearers under Article 12 of the UNCRC and informed by the Concluding Observations and General Comments submitted by the UN Committee on the Rights of the Child. This right should exist in parallel to the right of parents to appeal. NICCY would propose that children and young people from the age of 11 years should therefore be presumed competent to exercise their independent right to appeal. Research indicates that from this age, children are generally competent to understand different options put to them, to express their views and opinions and to communicate these to others when information is provided and/or adapted appropriately.<sup>13</sup>

NICCY proposes that an underpinning principle in the SENDIST appeals process should be a presumption of capacity on the part of the child. Therefore any child aged 11 years or over should be deemed capacitous unless there is compelling evidence to suggest otherwise. Similar to civil and criminal proceedings for children, the Tribunal should determine the competency of the child. This will ensure impartiality and address any potential conflict which may arise between the parent and child.

NICCY has proposed the age of 11 years as, if a higher threshold is set, for example, 16 years, many children and young people in schools would be excluded from participation in the appeals process. Such a decision would not give full effect to the relevant rights contained in the UNCRC or respond effectively to the UN Committee's Concluding Comments (2008) which highlighted concerns about children's right to appeal SEN Tribunal decisions.

Consideration should also be given to extending the right of appeal to children under the age of 11 years, where they are capable of formulating and communicating their views and can demonstrate an understanding of the tribunal process and the implications it will have for their educational provision. The provisions under Article 12 of the UNCRC support this position;

'State parties shall assure to the child who is capable of forming his or her views, the right to express these views freely in all matters affecting them...The child shall in particular be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child'.

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<sup>13</sup> Disability Rights Commission (2007). *My School, My Family, My Life: Telling it like it is*. March 2007.

## **Parents and Children – Competing Rights**

There may of course be situations where the views of a competent child differ from those of their parents. This is a situation that the Court and Tribunals systems will be familiar with. Courts grapple on a daily basis with competing views and rights of parents and young people and are required to weight them in the balance and giving such weight to each as they deem appropriate. Guidance is given to the Court on the weight that is to be attached to each in a number of provisions. The UNCRC would require the Tribunal to have the best interests of any child appellant as a primary consideration when making any decision concerning them. Where cases are brought under the Children (NI) Order 1995 the Court would be required to have the welfare of the child as the paramount consideration. NICCY would suggest that in weighing the potentially competing rights as between parents and child the approach in the Children (NI) Order should be followed by SENDIST.

## **Pilot Schemes**

As stated, NICCY would strongly support the introduction for children of the right of appeal from the age of 11 years. However, the Office recognizes that the Department may wish to investigate the appropriateness of this proposed age threshold for itself and establish the extent of support for such provision amongst relevant stakeholders. Therefore, the Department may wish to introduce a pilot scheme across the Education and Library Board areas, similar to those introduced in England and Wales. In implementing a pilot scheme, DE may also wish to review the accessibility of the Tribunal and consider whether the processes and procedures may be regarded as ‘child friendly.’

## **Provision of Advocacy Services**

NICCY would strongly recommend the provision of independent, well-resourced advocacy services for children and young people, tailored to their individual needs, to ensure they are empowered to use the right of appeal. These services would be particularly important for looked after children or children whose parents are unable to represent their views. Furthermore, where children may hold views divergent from their parents, it is important they can access advocacy services to support their appeal. In Wales a ‘case friend’ may make an appeal to the SEN Tribunal Wales, on behalf of a child or young person to support their participation in the Tribunal.<sup>14</sup>

It should be noted that while children and young people may, under the current legal aid scheme, access some legal aid assistance for the pre-proceedings stages of an appeal there is no provision for legal aid assistance for representation before the Tribunal.

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<sup>14</sup> <http://www.legislation.gov.uk/wsi/2012/322/part/C/made>  
<http://wales.gov.uk/docs/dcells/publications/120316sendiscyp3en.pdf>