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# *The Special Educational Needs and Disability Bill* **[HL]**

**Bill 55 of Session 2000-01**

The Bill is due for its Second Reading debate in the House of Commons on 20 March 2001.

Part 1, which amends the current framework for meeting special educational needs, contained in Part IV of the *Education Act 1996*, applies to England and Wales.

Part 2 amends the *Disability Discrimination Act 1995* to bring within it all providers of education, placing specific duties on schools, institutions of further and higher education, LEAs and education authorities in Scotland.

Part 2 extends to England, Wales and Scotland with the exception of the planning duty on schools which does not extend to Scotland.

The Bill does not extend to Northern Ireland.

Christine Gillie and Gillian Allen

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## Summary of main points

The Bill is in three parts. Part 1 relates to special educational needs, Part 2 to disability discrimination in education, and Part 3 contains supplementary provisions relating to Parts 1 and 2. The *Explanatory Notes* to the Bill provide a clause-by-clause analysis. This paper seeks to outline current arrangements, give background on the legislative proposals, and note the main changes made to the Bill in the House of Lords and the key issues raised.

Part 1 of the Bill makes changes to the existing legislation, contained in Part IV of the *Education Act 1996*, for children with special educational needs (SEN), and applies to England and Wales only. The SEN provisions in the Bill seek to implement proposals requiring primary legislation contained in DfEE and Welsh Office Green Papers and Action Plans, and in a consultation document on the Bill. Other changes proposed in these documents will be made through regulations and a revised SEN Code of Practice. Much of the debate in the House of Lords focused on the Bill's provisions in relation to the revised SEN Code of Practice.

The main SEN provisions in the Bill seek to:

- change the conditions that currently limit the LEA's duty to provide a mainstream place for a child with SEN in order to promote the inclusion of children with SEN in mainstream schools;
- require LEAs to make arrangements for SEN advice and information services – parent partnership services;
- require LEAs to make arrangements for preventing and resolving disputes between parents and schools and parents and the LEA about SEN provision. Parents will continue to have a right of appeal to the Special Educational Needs Tribunal.
- tighten up arrangements for appeals to the SEN Tribunal, and require LEAs to comply, within prescribed time limits, with the decisions of the Tribunal;
- require schools to inform parents when they are making SEN provision for their child, and allow schools to request a statutory assessment of a pupil's SEN;
- revise the procedures which must be followed by LEAs when making, maintaining and amending statements of SEN. Parents are given new rights to a meeting with the LEA when the LEA proposes to amend a statement, and to express a preference for a maintained school when the LEA propose to amend a statement following a reassessment, or when changes are proposed to a statement. There is also a new requirement to send copies of proposed statements, proposed amended statements and proposed changes to statements to the maintained school the LEA is considering naming in a child's statement.

Subject to the passage of the Bill through Parliament, the SEN provisions in the Bill will come into force in September 2001. These provisions in conjunction with the disability discrimination proposals are intended to be a significant step in removing the barriers to a more inclusive education service.

The SEN provisions have been generally welcomed although concern has been expressed about specific issues, particularly about the changes to the conditions limiting the duty to provide a mainstream school place, the resource implications of the changes, and the need to take into account the wishes of the child.

Part 2 of the Bill addresses the key education recommendations of the Disability Rights Task Force report, *From Exclusion to Inclusion*. It extends the *Disability Discrimination Act 1995* - the DDA - by amending Part IV to cover all maintained and independent schools, further and higher education institutions, and LEAs and education authorities in respect of adult education and youth services maintained by them. Specific duties are placed on these bodies in England, Wales and Scotland:

- not to treat disabled pupils or students less favourably, without justification, for a reason which relates to their disability; and
- to make reasonable adjustments to ensure that disabled pupils or students are not put at a substantial disadvantage to pupils or students who are not disabled.

For schools, there is no duty in making reasonable adjustments to remove or alter physical features or provide auxiliary aids and services.

There is a duty on LEAs and schools in England and Wales to produce respectively 'accessibility strategies' or 'accessibility plans' for increasing accessibility to schools' premises and the curriculum, and to improve ways for providing information to disabled pupils.

Any provider of education not covered by the new Part IV duties in the DDA will become subject to the duties in Part III (*Goods, facilities and services*) as the provisions exempting education providers are repealed by this Bill.

Enforcement of the duties relating to schools will be through the renamed Special Educational Needs and Disability Tribunal in England and Wales and through the sheriff court in Scotland. Cases for disability discrimination in further and higher education will be heard in the county court in England and Wales and in the sheriff court in Scotland.

The role of the Disability Rights Commission is extended and it will produce two codes of practice, one for schools and one for further and higher education. It will also have the power to make arrangements for the provision of conciliation services in disputes about the provision of education arising under new Part IV.

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## I Introduction

The Government announced in the November 1999 Queen's Speech its intention to introduce legislation to improve the quality of education for children with SEN.<sup>1</sup>

A consultation document, *SEN and Disability Rights in Education Bill*, was published in March 2000.<sup>2</sup> It set out in detail the Government's proposals to introduce legislation to extend disability rights to education and implement the proposals in the DfEE and Welsh Office Action Plans on SEN. Consultation on the proposals closed on 28 April 2000.

It was expected that the Bill would be introduced in the 1999-2000 session.<sup>3</sup> However, in answer to a parliamentary question in June 2000 the Secretary of State for Education and Employment announced that there were some detailed issues which required further consultation, and that only a draft Bill would be introduced in the 1999-2000 Session.<sup>4</sup> On 6 November 2000 the Secretary of State announced that it had not been possible to introduce a draft Bill but the actual Bill would be introduced in Parliament early in the 2000-2001 session.<sup>5</sup> Jane Davidson, Minister for Education and Lifelong Learning at the National Assembly for Wales, welcomed the announcement.<sup>6</sup>

The Queen's Speech on 6 December 2000 announced legislation to improve the framework for meeting special educational needs and access to learning for disabled people. The *Special Educational Needs and Disability Bill* was presented in the House of Lords on 7 December 2000.

The House of Lords Delegated Powers and Deregulation Committee has considered the delegated powers in the Bill.<sup>7</sup>

The Bill was brought from the Lords on 5 March 2001.<sup>8</sup> The *Explanatory Notes*<sup>9</sup> state that its provisions are compatible with the European Convention on Human Rights.

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<sup>1</sup> 17 November 1999

<sup>2</sup> *SEN and Disability Rights in Education Bill*. Consultation Document, DfEE, National Assembly for Wales, Scottish Executive and Scotland Office, 2000. <http://www.dfee.gov.uk/sen/news.htm>

<sup>3</sup> HC Deb 1 February 2000 cc 503-4W

<sup>4</sup> HC Deb 21 June 2000 c 209W

<sup>5</sup> HC Deb 6 November 2000 c 45W

<sup>6</sup> <http://www.wales.gov.uk/show.dbs?3A0946AF0001BA380000311100000000>

<sup>7</sup> Select Committee on Delegated Powers and Deregulation, 3<sup>rd</sup> Report, Session 2000-01, HL Paper 9. Available on the House of Lords Select Committee Home Page: <http://www.parliament.uk>

<sup>8</sup> Bill 55, Session 2000-01

<sup>9</sup> Bill 55-EN, Session 2000-01

## II Special Educational Needs

### A. Current Position

#### 1. Statutory provisions relating to SEN

The main legislation on special educational needs is set out in Part IV of the *Education Act 1996*, consolidating what had previously been Part III of the *Education Act 1993*. The *Education Act 1993* re-enacted and strengthened the provisions of the *Education Act 1981*, relating to the education of children with special educational needs, and in doing so made two major changes:

- It introduced a statutory *Code of Practice on the Identification and Assessment of Special Educational Needs*.<sup>10</sup> This came into effect on 1 September 1994, giving practical guidance to LEAs and school governing bodies on their duties.
- It established an independent Special Educational Needs Tribunal to hear parents' appeals against LEA decisions on statutory assessments and statements.

Special educational needs comprise learning difficulties of all kinds, including mental or physical disabilities that hinder or prevent learning. Section 312 of the *Education Act 1996* states that a child has "special educational needs" for the purposes of the Act if he has a "learning difficulty which calls for special educational provision to be made for him". A child has a "learning difficulty" if:

- (a) He has a significantly greater difficulty in learning than the majority of children his age,
  - (b) He has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of the local education authority, or
  - (c) He is under [compulsory school age] and is, or would be if special educational provision were not made for him, likely to fall within paragraph (a) or (b) when of ... that age.
- (3) A child is not to be taken as having a learning difficulty solely because of the language (or form of the language) in which he is, or will be, taught is different from a language (or form of a language) which has at any time been spoken in his home.<sup>11</sup>

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<sup>10</sup> *Code of Practice on the Identification and Assessment of Special Educational Needs*, DfE, 1994, ISBN 0855224444

<sup>11</sup> Section 312 (2) (3)

LEAs must exercise their powers so as to identify children for whom they are responsible who have special educational needs, and for whom the LEA may need to determine special educational needs provision.<sup>12</sup> Where such children are identified the LEA must carry out statutory assessments and, where appropriate, make and maintain statements of special educational needs.<sup>13</sup> Parents are entitled to request the LEA to carry out an assessment, and the LEA must comply with such requests unless it decides that an assessment is not necessary, or an assessment has been made within the six month period before the request.<sup>14</sup>

School governing bodies have a duty to ‘use their best endeavours’ to see that pupils with SEN at their schools receive the special educational provision their learning difficulties call for.<sup>15</sup>

LEAs and school governing bodies must have regard to the 1994 *Code of Practice on the Identification and Assessment of Special Educational Needs*. When the code was introduced, it was envisaged that nationally about 20% of children might have some form of special educational needs at some time and that for the vast majority of children such needs would be met by their schools – with outside help if necessary. A minority of cases – nationally around 2% of children - would have needs of a severity or complexity which would require a statement of SEN.<sup>16</sup> However, there has been a marked increase in recent years in the number of statemented children. The percentage of children with statements of SEN in England increased to 3% in January 2000. About 60% of children with SEN statements are educated in maintained mainstream schools. There is a widespread expectation by parents and schools that a statement of SEN guarantees access to new additional resources, and therefore there is greater pressure for more statements.

The Code of Practice recommended the general adoption of a five-stage model for dealing with SEN children. The first three stages are based in the school, which will, as necessary, call upon the help of external specialists; at stages 4 and 5 the LEA share responsibility with schools:

Stage 1: class or subject teachers identify or register a child’s special educational needs and, consulting the school’s SEN co-ordinator, take initial action;

Stage 2: the school’s SEN co-ordinator takes lead responsibility for gathering information, and for co-ordinating the child’s special educational provision, working with the child’s teachers;

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<sup>12</sup> section 321

<sup>13</sup> sections 323 and 324

<sup>14</sup> section 329

<sup>15</sup> *Education Act 1996*, section 317

<sup>16</sup> *Code of Practice on the Identification and Assessment of Special Educational Needs*, DfE, 1994, paragraph 2.2

Stage 3: teachers and the SEN co-ordinator are supported by specialists from outside the school;

Stage 4: the LEA consider the need for a statutory assessment and, if appropriate, make a multidisciplinary assessment;

Stage 5: the LEA consider the need for a statement of special educational needs and, if appropriate, make a statement and arrange, monitor and review provision.<sup>17</sup>

Stages 2 and 3 involve the production of Individual Education Plans (IEPs) which set out:

- the nature of the child's learning difficulties
- action taken
- the staff involved
- the help given to parents at home
- the targets to be achieved and the timetable for their achievement
- any pastoral care and medical requirements
- monitoring and assessment arrangements, and
- review arrangements.

The procedures to be followed when carrying out statutory assessments and making statements are laid down in the *Education (Special Educational Needs) Regulations 1994*, as amended.<sup>18</sup> The regulations prescribe time limits for each stage in the process, amounting to six months overall. SEN statements must be reviewed annually by the LEA. The procedure for reviews is laid down in the regulations.

A statement of SEN must give details of the assessment of SEN and specify the special educational provision to be made. The provision must include:

- the type of school, or other institution, which the LEA considers appropriate to the child's needs;
- the name of the school preferred by the parents (unless it is unsuitable to the child's age, ability or aptitude or his special educational needs or it is incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources<sup>19</sup>); and
- any provision for which arrangements are made otherwise than at school.

Since the publication of the 1994 Code of Practice there have been three OFSTED surveys following up how it has been working in practice, and making recommendations for future

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<sup>17</sup> *Code of Practice on the Identification and Assessment of Special Educational Needs*, paragraph 1:4

<sup>18</sup> SI 1994 No 1047

<sup>19</sup> *Education Act 1996*, Schedule 27, paragraph 3

development.<sup>20</sup> (The third survey looked at the effectiveness of the Code with particular reference to the development of IEPs.)

## 2. Education of children with SEN in mainstream schools

Section 316 of the *Education Act 1996* seeks to give effect to the principle that pupils with SEN should normally be educated in mainstream schools:

**316.** Children with special educational needs normally to be educated in mainstream schools. **(1) Any person exercising any functions under this Part in respect of a child with special educational needs who should be educated in a school shall secure that, if the conditions mentioned in subsection (2) are satisfied, the child is educated in a school which is not a special school unless that is incompatible with the wishes of his parent.**

(2) the conditions are that educating the child in a school which is not a special school is compatible with—

- (a) his receiving the special educational provision which his learning difficulty calls for,
- (b) the provision of efficient education for the children with whom he will be educated, and
- (c) the efficient use of resources.

In 1999-2000, in England and Wales, 61% of all school pupils with statements of SEN attended maintained mainstream schools, 34% attended maintained special schools and Pupil Referral Units, and 4% attended independent schools, including independent special schools.<sup>21</sup>

Over the past two decades there has been significant progress in the development of more inclusive education policies, and the Government has sought to move matters forward with its education policies, in line with its broader social agenda. One of the key principles underlying the Government's SEN policies is to promote more inclusion in mainstream schools where parents want it. While acknowledging the vital role that special schools play, the Government is seeking to redefine their role to strengthen the links between special and mainstream schools to support greater inclusion. The main thrust of the Government's policies is covered in more detail in the section of this paper dealing with the Green Papers and Action Plans.

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<sup>20</sup> *The implementation of the Code of Practice for pupils with special educational needs*, OFSTED, 1996; *The SEN Code of Practice – two years on*, OFSTED 1997; *The SEN Code of Practice: three years on*, OFSTED 1999.

<sup>21</sup> DfEE statistical bulletin 09/00, *Special educational needs in England: January 2000*; NAW statistical brief 73/2000, *Pupils with statements of special educational needs: January 2000*

International developments have also been aimed at promoting inclusive education. In 1994 the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) adopted a statement on SEN (known as the Salamanca Statement) which called on governments to adopt the principle of inclusive education, educating all children in regular schools unless there are compelling reasons for doing otherwise. The Government supports the statement.

The rate of change in England and Wales has been variable, and different approaches have been taken in different areas. In 1997 a review of research on inclusive education carried out for Barnardo's highlighted the potential benefits of inclusion to both pupils with SEN or disabilities and to those without such difficulties.<sup>22</sup> Several Peers referred to this research during the debates on the Bill; Lord Morris of Manchester highlighted the benefits of inclusion and successful educational strategies.<sup>23</sup>

A recent report by the Education Network, *Ten*,<sup>24</sup> looked at the development of inclusive provision for children with SEN, and the different approaches being taken by a selection of LEAs in England and Wales.<sup>25</sup>

### **3. The Special Educational Needs Tribunal**

The Special Educational Needs Tribunal (SENT) was established on 1 September 1994, as a non-departmental public body, to resolve disputes between parents and LEAs about provision made for children with SEN. The current powers and procedures of the SEN Tribunal are contained in sections 333 to 336 of the *Education Act 1996* and the *Special Educational Needs Tribunal Regulations 1995*.<sup>26</sup> The SENT's remit extends to England and Wales, and covers specific types of appeal identified in Part IV of the 1996 Act.

A DFEE booklet, *Special Educational Needs Tribunal: How to Appeal*, explains the appeals process.<sup>27</sup> Parents can appeal to the SEN Tribunal if the LEA refuse to carry out a formal assessment, or refuse to issue a statement of their child's SEN after making a formal assessment. If the LEA has made a statement or has changed a previous statement, parents can appeal against:

- the description of their child's SEN (in part 2 of the statement)
- the description of the special help needed (in part 3 of the statement)
- the school named (part 4 of the statement), or

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<sup>22</sup> Judy Sebba with Darshan Sachdev, *What works in inclusive education?* Barnardo's, 1998 (first published in 1997)

<sup>23</sup> HL Deb, 20 February 2001, 766-7

<sup>24</sup> *Ten* is an independent policy, research and information organisation set up to develop, promote and disseminate good practice of local authorities. It is funded by subscription membership from LEAs.

<sup>25</sup> Pam Baldwin, *Inclusion of Pupils with Special Educational Needs*, *Ten*, January 2000

<sup>26</sup> SI 1995 No 3113

<sup>27</sup> DfEE, 1997

the LEA's decision not to name a school.

Parents can also appeal if:

the LEA refuse to change the school named in the statement (but parents can only ask for a LEA maintained school)  
 the LEA refuse to re-assess their child's SEN  
 the LEA decide not to maintain a statement, or  
 the LEA do not amend a statement following a reassessment of a child.

The Quinquennial Review of the Special Educational Needs Tribunal was published in August 2000.<sup>28</sup> The review team found clear support for a formal system of resolving disputes between LEAs and parents about SEN provision. It raised a number of issues, including whether the Tribunal's remit should be extended to include a role in conciliation. The Review noted that many of the parents who were interviewed said that they had found taking cases to the SENT stressful and worrying. Most said that they would have preferred to resolve the dispute by some other means, including conciliation, but only if it was truly independent. The arguments for and against conciliation as a formal interim stage in the appeal process were considered. The Review noted that although there was overall support for the introduction of conciliation arrangements as a method of enhancing the SENT process, there was concern that extending the remit of SENT to include conciliation would compromise the appeal process, the independence of its functions, and parents' perception of it. It concluded that the Review Team would look at the issue further in Stage 2 of the review. (*The SEN and Disability Bill* does not oblige parents to use the conciliation services if they do not wish to, and the Bill's provisions do not remove the rights of parents to lodge an appeal with SENT.)

Appeals registered with the Tribunal have risen each year since it was established. In the 1994-95 school year there were 1,161; in 1995-96, 1,626; in 1996-97, 2,051; in 1997-98, 2,191 and in 1998-99, 2,412.<sup>29</sup>

## **B. The Government's Proposals**

### **1. The Green Papers and Action Plans**

Before the 1997 General Election the Labour Party issued a policy document, *Every Child is Special*,<sup>30</sup> suggesting that too high a proportion of the resources devoted to special

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<sup>28</sup> *The Quinquennial Review of the Special Educational Needs Tribunal Prior Options Report*, DfEE, August 2000

<sup>29</sup> *ibid*, p 11

<sup>30</sup> Labour Party, March 1997

educational needs were being spent on bureaucratic procedures; and on increasingly confrontational relationships between parents and local authorities.

This document was followed by the publication in October 1997 of the DfEE Green Paper: *Excellence for All Children: Meeting Special Educational Needs*<sup>31</sup>, and in Wales, *The BEST for Special Educational Needs*.<sup>32</sup>

The Green Paper, *Excellence for All Children: Meeting Special Educational Needs*, focused on six main themes:

- setting high expectations for children with SEN;
- supporting parents of children with SEN;
- promoting the inclusion of children with SEN within mainstream schooling wherever possible; recognising the paramount importance of meeting individual children's needs; and developing the role of special schools to meet the continuing needs of some of them;
- shifting the focus in meeting special educational needs from procedures to practical support;
- boosting opportunities for professional development, for teachers and others;
- promoting partnership in dealing with SEN, locally, regionally and nationally.

Following consultation on the Green Paper, the DfEE published its Action Plan: *Meeting Special Educational Needs: A Programme of Action*,<sup>33</sup> and the Welsh Office published its action programme for Wales, *Shaping the Future for Special Education*.<sup>34</sup> They built on the Green Papers by setting out specific objectives and the strategies for meeting them.

The DfEE Green Paper and Action Plan identified the main ways of supporting parents of children with SEN, and proposed expanding and extending the scope of parent partnership schemes, which provide information and advice for parents. (The Government has expected all LEAs to have such schemes in place since 1999.)

The Green Paper also proposed replacing the 'Named Person' arrangement (currently the source of independent advice and support offered to parents only when a child receives a statement of SEN) with an Independent Parental Supporter (IPS) available to all parents whose children's needs are being formally assessed.<sup>35</sup> The Green Paper had sought views on the role of the 'Named Person', and many respondents said that parents need independent advice at an earlier stage. The Action Plan noted that IPSs might be people who are currently Named Persons, or come from a local voluntary group, or are part of the parent partnership

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<sup>31</sup> *Excellence for All Children: Meeting Special Educational Needs*. Green Paper Cm 3785 DfEE October 1997

<sup>32</sup> *The BEST for Special Education*, Welsh Office, October 1997

<sup>33</sup> *Meeting Special Educational Needs: A programme of action*. DfEE November 1998

<sup>34</sup> *Shaping the Future for Special Education: an action programme for Wales*, Wales Office, January 1999

<sup>35</sup> *Excellence for All Children: Meeting Special Educational Needs*. Green Paper, Cm 3785 DfEE October 1997, p 26, paragraph 8



scheme itself. The draft revised Code of Practice on SEN emphasised that the IPS will be a central component within the services offered by the parent partnerships; they will be drawn from a wide range of backgrounds and require training and on-going development.

A study carried out by Jeni Vernon, of the National Children's Bureau, examined a range of parent partnerships in order to identify good practice among schools, LEAs and voluntary organisations.<sup>36</sup> She found significant differences between them: for example, in the degree to which they focus on working with parents as individuals or as groups, and whether they adopt an advocacy, conciliation or facilitating role.

On the principle of inclusion, the Green Paper emphasised that the needs of the child should be paramount, and that where these cannot be met in mainstream schools, specialist provision should be available. However, it stressed that the Government wants to develop an educational system in which 'specialist provision is seen as an integral part of overall provision, aiming wherever possible to return children to the mainstream and to increase the skills and resources available in mainstream schools.' The Green paper went on to outline a new role for special schools to work more closely with mainstream schools.<sup>37</sup>

A summary of responses to the DfEE Green Paper is given in Annex B of the DfEE Action Plan. It notes that the subject on which most comment was made was the inclusion of more children with SEN within maintained schools. The vast majority of respondents supported the principle but expressed reservations about the adequacy of funding, training, physical access, and about the problems associated with the inclusion of pupils with particular types of SEN, such as children with emotional and behavioural difficulties.<sup>38</sup> The Annex notes that a small number of responses, mainly from parents, expressed concern about the future of special schools, and that the majority of those commenting supported the development of special schools as centres of expertise and excellence, working with mainstream schools in a more inclusive education system.

Other main points noted in the summary included a strong endorsement of the proposals to improve support for parents of children with SEN. The concept of parent partnership was widely welcomed, and concern was expressed about the lack of such partnership schemes in some LEAs. There was general support for conciliation agreements to reduce the number of appeals to the SEN Tribunal. Although the Tribunal was considered effective, several specific suggestions were made to improve its operation and decision-making process. Support was expressed for a review of the SEN Code of Practice, and there was broad support for greater national consistency when drawing up statements of SEN, although few respondents wanted to see the development of statutory national criteria. There was strong

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<sup>36</sup> *Parent Partnership and Special Educational Needs: Perspectives on Developing Good Practice*, October 1999, Research Brief No 162 – available at: <http://www.dfee.gov.uk/research/>

<sup>37</sup> *Excellence for All Children: Meeting Special Educational Needs*. Green Paper, pp 44-5

<sup>38</sup> Action Plan, Annex B, paragraph 10

support for improved training about SEN for all teachers. Proposals for improved training and development of staff were welcomed.

The Action Plan stated that the Government would make improvements in the effectiveness of the SEN Tribunal.<sup>39</sup>

The report of the Disability Rights Task Force on Civil Rights for Disabled People, *From Exclusion to Inclusion*, recommended that the Government should continue to implement the Action Programmes in England and Wales. It recommended that in reviewing the statutory framework for inclusion the Government should strengthen the rights of parents of children with statements of SEN to a mainstream placement, unless they want a special school and a mainstream school would not meet the needs of the child or the wishes of either the parent or child. Also the Task Force recommended that there should be a review of the measures in the SEN Action Programme to assess their effectiveness in meeting the needs of children with SEN/disability, including access to auxiliary aids and services.<sup>40</sup>

## **2. The Consultation Document on the Bill**

The consultation document, *SEN and Disability Rights in Education Bill*, published in March 2000, set out in detail the Government's proposals to introduce legislation to extend disability rights to education, and to implement the proposals in the Action Plan on SEN. The SEN proposals included:

- A duty on LEAs to make a Parent Partnership Service available to all parents of children with SEN.
- A requirement on LEAs to establish conciliation arrangements for resolving disputes with parents. (At present there are no procedures for dispute resolution other than the SEN Tribunal.)
- A requirement on school governing bodies and LEAs to notify parents of a decision by the school that their child has been identified as having SEN.
- An amendment to the existing regulation-making powers governing the time limits relating to the process of making a statutory assessment. (At present under Schedule 26 of the Education Act 1996 the time limits become effective only when a LEA has made a decision to make an assessment.)
- An amendment to section 324 of the *Education Act 1996*, so that LEAs need specify only the type of school, but not name a particular school, where the child's parents themselves

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<sup>39</sup> Action Plan, Chapter 2, paragraph 25

<sup>40</sup> DfEE, December 1999, Annex E, recommendations 4.1, 4.2 and 4.9

have made suitable arrangements for their child. The consultation document observed that if a LEA is required to name a school for a child who is attending an independent school, it might result in the named school keeping open a place that could otherwise be taken up by another child.

- A right for schools to request a statutory assessment. (At present, a school has no right to request an assessment.) As a consequence of this new right for schools, parents would be given the right to appeal to the SEN Tribunal against a decision by a LEA to refuse to agree to a school's request for a statutory assessment.
- Measures to reinforce and strengthen parental rights in relation to appeals to the SEN Tribunal. These include requirements on LEAs:

to comply with parents' request within a prescribed time where the LEA has decided not to defend an appeal.

to state the time limits in writing when notifying a parent of a right of appeal

to maintain a statement until the outcome of an appeal is known.

- A new section 316 of the *Education Act 1996*, stating the principle that a child with SEN shall be educated within a mainstream school, unless this is against the wishes of the parent, or a school or LEA cannot take reasonable steps to adapt its provision.

The Government's assessments of the costs of the new provisions were set out in the final section of the consultation document, in the Regulatory Impact Statement. The SEN provisions were assessed as having minimal costs to the public sector.

Consultation on the proposals closed on 28 April 2000. Responses to the consultation from individual organisations are available at the Public Enquiry Unit at the DfEE. However, the DfEE has not published a summary of the responses.

Many of the Peers speaking in the debates on the Bill have put forward arguments and proposed amendments representing the views of the major SEN and disability organisations.

### **3. The draft revised SEN Code of Practice**

The DfEE Green Paper, *Excellence for All Children: Meeting Special Educational Needs, and Shaping the Future for Special Education* in Wales proposed revising the current statutory *Code of Practice on the Identification and Assessment of Special Educational Needs*.<sup>41</sup> The

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<sup>41</sup> DfE 1994.

Green Paper noted that schools had suggested there was too much emphasis on getting the paper work right, at the expense of providing practical support to the child.

The DfEE Action Plan envisaged that a consultation paper on the revision of the Code would be issued in early in 1999, leading to the circulation of a draft revised code later in the year. A consultation paper was issued on 12 January 1999 and the consultation ended on 31 March 1999. Initially, the revised Code was due in autumn 1999, to come into effect during the school year 2000/2001. However, subsequent developments, including those on post-16 education policy and the Disability Rights Task Force recommendations, led to the Government setting a longer time-scale.

The draft revised code and a SEN Threshold document, which offers guidance in decision-making on provision for pupils with SEN, were published on 7 July 2000 for consultation.<sup>42</sup> A DfEE Press Notice announcing the publication of the revised draft code stated:

“The revised Code sets out to reduce bureaucracy and paperwork and the demands on teachers’ time without diminishing the quality of teaching and help for individual children by:

simplifying the annual review process

simplifying Individual Education Plans

reducing the 5-stage framework for meeting needs to 3

reinforcing the roles and responsibilities of all teachers for all pupils and describing clearly the role of the SEN Co-ordinator.”<sup>43</sup>

The draft revised Code emphasises consultation and joint working, and the involvement of parents and children in the SEN process. It makes specific and different reference to provision in early years’ settings; in primary, secondary, and special schools; and encourages a flexible approach, which can include more children in mainstream schools. While stressing that there are no hard and fast categories of SEN, the guidance suggests that children with SEN will fall into a number of broad areas of need: communication and interaction; cognition and learning; behaviour, emotional and social development; and sensory and/or physical.

The five-stage model is to be replaced with a new framework for a “graduated response” to pupils with SEN. The first 3 stages of the current model would be replaced by 2 new school-based elements: action that might be taken by the school alone - “School Action” - and action taken by the school with support from external agencies - “School Action Plus”. The draft revised code also takes into account developments that have taken place since the current

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<sup>42</sup> a reference copy is available in the Library and is also on the internet: <http://www.dfee.gov.uk/sen/standard.htm>

<sup>43</sup> DfEE Press Notice, *Code of Practice will improve educational opportunities*, 7 July 2000

code was published in 1994, for example, the new national curriculum, the new foundation stage curriculum, and new DfEE guidance on social inclusion and pupil support.

Some of the draft revised Code's contents relate to the amendments to the law proposed in the Bill, and set out the Government's thinking on their implementation, including parent partnership services and the new SEN conciliation arrangements.

The SEN Threshold document provides guidance on when schools should move to "Action" or "Action Plus". The guidance is based on research the DfEE commissioned from University of Newcastle. It includes case studies to illustrate how pupils' levels of difficulties were related to forms of action in particular circumstances. The document emphasises that it sets out in general terms the main actions and interventions usually thought to be appropriate for meeting SEN. However, it is not intended to provide detailed criteria that can be used for individual cases.<sup>44</sup>

The consultation period ended on 13 October 2000. The Government also consulted, to the same time scale, on the SEN Threshold document. The final version of the Code (which is subject to the affirmative resolution procedure) will be placed before Parliament for approval once the Bill receives the Royal Assent. It is intended that the revised Code should come into effect in September 2001 at the start of the 2001/2002 school year.

There was a similar consultation exercise in Wales.<sup>45</sup> The consultation period ended on 3 November 2000.

A DfEE summary of the responses to the consultation on the draft revised Code of Practice was provided in the DfEE *SEN Update* for December 2000.<sup>46</sup> This noted that the consultation had received a positive response from most respondents; however, issues were raised about:

- the strategic responsibilities of LEAs and schools for pupils with SEN;
- making links between the proposed Disability Rights Code;
- specifying provision in statements of SEN;
- accountability for funding delegated to schools for children with statements of SEN;
- the relationship between the Code and other proposed guidance, including material on SEN Thresholds;

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<sup>44</sup> *SEN Thresholds, Good Practice Guidance in Decision-making and Identification and Provision for Pupils with Special Educational Needs*, DfEE, July 2000, paragraph 1.2

<sup>45</sup> *National Assembly for Wales – Consultation on Draft Revised Special Educational Needs (SEN) Code of Practice; SEN Threshold Guidance and Proposed Changes to Associated SEN Regulations, September 2000*

<sup>46</sup> available on the internet at <http://dfee.gov.uk/sen/update>

- guidance on parent partnerships;
- support for the SEN Co-ordinator (SENCO) - ensuring that Heads and Governors recognise the need for time and support for SENCOs to co-ordinate SEN activity in schools.

The *SEN Update* also outlined the changes the Government intended to make to the draft revised Code in the light of the responses to the consultation. Essentially, the changes involve providing additional guidance and clarification on each of the issues noted above.

**a. *Specifying and quantifying provision in statements of SEN***

Proposals relating to specifying provision in statements of SEN have been particularly controversial. The 1994 Code has a paragraph providing advice that provision in SEN statements should be specific, detailed and quantified:

The provision set out in this sub-section should normally be specific, detailed and quantified (in terms, for example, of hours of ancillary or specialist teaching support) although there will be cases where some flexibility should be retained in order to meet the changing special educational needs of the child concerned.<sup>47</sup>

No comparable paragraph was proposed in the draft revised Code. There were also points in the description of the provision to be made where ‘set out’ replaced ‘specify’. (There was no suggestion that Section 324 of the *Education Act 1996*, which requires statements of SEN to specify special educational provision, would be changed.)

Groups with an interest in SEN, particularly the Independent Panel for Special Education Advice – IPSEA - regarded the proposed change in the Code as weakening the LEA’s duty to make SEN provision. IPSEA and Action on Entitlement (an umbrella group of parent organisations) have been campaigning on this issue, and have written to parents of children with SEN urging them to lobby their MPs to block the new Code unless it makes it clear that statements should be quantified. For further details, including correspondence between IPSEA and the DfEE on the issue, see the IPSEA website.<sup>48</sup>

In response to the concern expressed, the Education Secretary announced on 19 December 2000 that the final Code would emphasise the need for statements to be clear and specific about a child’s needs.<sup>49</sup> Furthermore, the DfEE *SEN Update* for December 2000 stated that provision specified in statements of SEN would be quantified if necessary:

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<sup>47</sup> para. 4.28

<sup>48</sup> <http://www.ipsea.org.uk/news.htm>

<sup>49</sup> DfEE Press Notice, *Blunkett will strengthen special needs code*, 19 December 2000

The proposal to omit the advice that provision in statements should be described in terms which are "specific, detailed and quantified" from the Code and to amend the SEN Regulations to require provision to be set out for all of a child's special educational needs was perceived by a number of respondents as weakening the legal protection for pupils with statements. Others saw some benefits to describing provision in more flexible terms, particularly in relation to the inclusion of children with SEN in mainstream schools, as long as the needs of the individual child could be met.

In response to these concerns, Ministers have decided to retain the requirement in the SEN Regulations to "specify" provision (dropping the proposal to replace it with "set out") and to enhance the guidance in the Code of Practice. The revised Code will emphasise the need for statements to provide a full description of the child's special educational needs **and to detail clear and specific provision, quantified** as necessary, to meet those needs. The aim will be for schools and others to know, from the statement, what interventions will be made to help the child to learn and develop.

Furthermore, Ministers believe that it is important for the guidance to stress the need for statements to set out broad objectives against which the child's progress, and the provision being made, can be monitored and reviewed. They will also make clear that LEAs should not have a blanket policy of not quantifying provision in statements as that would prevent authorities from doing so in cases where it was necessary.<sup>50</sup>

The issue has been raised repeatedly in the debates in the House of Lords on the Bill, particularly on clause 1, and Ministers gave assurances that the final Code will require LEAs to specify provision and, as necessary, to quantify provision. Ministers stressed that it would not be right to require provision to be specified in terms of its duration and frequency in every case, but that the final Code will make it clear that LEAs should not have blanket policies against quantifying provision in statements. It will also be made clear in the final Code that those giving professional advice for assessments can comment on the amount of provision that they consider appropriate for a child (see Part II of this Research Paper covering the debate on clause 1 of the Bill).

#### **4. The SEN Regulations**

A separate consultation paper was issued on proposed amendments to the *Education (Special Educational Needs) Regulations 1994* and the *Education (Special Educational Needs) (Information) Regulations 1999*.<sup>51</sup> The proposals depend on the enactment of the Bill. Subject to Parliamentary approval, the DFEE envisage that the new regulations will come into force on 1 September 2001, at the same time as the revised SEN Code of Practice.

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<sup>50</sup> DfEE Information Note, SEN special edition, December 2000, Ref 0346/2000, December 2000

<sup>51</sup> Consultation on the amendments to the *Education (Special Educational Needs) Regulations* and the *Education (Special Educational Needs) (Information) (England) Regulations 1999*, DfEE, 2000. Available on the internet at: <http://www.dfes.gov.uk/sen/regulations0307.doc>.

The draft regulations have not yet been laid.

Many of the proposed amendments to the regulations reflect, or are consequential to, the changes made in the Bill. The proposed amendments to the SEN regulations include:

- A new statutory requirement to allow Tribunal appeals from parents where a school has requested an assessment. (This is linked to the provision in the Bill to give a new right to schools to request a statutory statement.)
- An amendment to remove the provision requiring a school to seek educational advice from the head teacher of a child's previous school. The requirement is no longer necessary as there is now a requirement on schools to transfer a child's records to the new school as soon as a child leaves a school.
- A revised duty to name a school or type of school in a statement of SEN. LEAs would be allowed to name only the type of school, but not any particular school which the LEA considers appropriate, in circumstances where the parents have themselves made "suitable arrangements", such as placing a child at an independent school. (This reflects the provision in the Bill to amend the *Education Act 1996* to allow a LEA not to name a particular school in a child's statement of SEN where the parents have made suitable arrangements.)
- Changes in the arrangements for, and reduction of, paper work on annual reviews.
- New requirements for the handling of transition reviews on statements. In future the transition review of a child's statement must be carried out in Year 9 to ensure that the statements of all children aged 14 or more are subject to transition review in the same year.
- Connexions Service personal advisers must be invited to attend the Year 9 review and must attend.
- A new requirement on LEAs to amend a child's statement by 15 February where a child is due to transfer between educational phases (except transfers from early education setting to schools).
- A new duty on a child's home LEA to provide, on request, a copy of a child's statement to the Connexions Service or other agency arranging an assessment, the local Learning and Skills Council, a Youth Offending Team, or a penal institution.

The proposed amendments to the *Education (Special Educational Needs) (Information) (England) Regulations 1999* included a requirement on LEAs to set out their detailed arrangements for what schools might normally provide from their budgets under School Action and School Action Plus. There would also be a requirement for LEAs to publish their



plans for the provision of appropriate SEN support. LEAs would be required to provide a more comprehensive picture of their SEN policies.

## 5. The SEN Tribunal Regulations

The draft *Special Educational Needs Tribunal Regulations 2001* were laid before Parliament on 27 February 2001 and are due to take effect on 1 September 2001. They deal with the making and determination of appeals to the Tribunal. The *Special Educational Needs Tribunal Regulations 1995*<sup>52</sup> are revoked and re-enacted with amendments. The main differences between the draft Regulations and the 1995 Regulations, as summarised in the Explanatory Note to the draft Regulations, are:

- (a) The child who is the subject of the appeal will have the right to attend the hearing. In addition the LEA will have to ascertain the views of the child on the issues raised by the appeal (or give reasons why it has not done so).
- (b) The appeal procedure will be in two stages rather than the present three stages. Once an appeal is made both parties have the same period of time in which to make their case.
- (c) Members of the lay panel will be required to have knowledge or experience of SEN.

## C. The Bill<sup>53</sup> and debate in the Lords<sup>54</sup>

Part I, clauses 1 to 10 and Schedules 1, 8 and 9, of the Bill makes changes to the existing legislation for children with SEN, contained in Part IV of the *Education Act 1996*.

### 1. Mainstream education: Clause 1

Clause 1 introduces a new section 316 and inserts a new 316A into the *Education Act 1996*. Under the new section 316 (2) a pupil with SEN but without a statement must be educated in a mainstream school. New section 316 (3) states that a pupil with SEN and a statement must be educated in a mainstream school unless it is incompatible with the wishes of his parent, or with the provision of efficient education for the other children with whom the child would be educated.

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<sup>52</sup> SI 1995 No 3113

<sup>53</sup> Bill 55, Session 2000-01

<sup>54</sup> The Lords had agreed that there would be no divisions in the Grand Committee and that any issue on which agreement could not be reached would be returned to on Report, when, if necessary a division could be called.

Two of the caveats in the existing section 316 are removed (i.e. where education in a mainstream school would be incompatible with the child receiving the special educational provision which his learning difficulty calls for, and the efficient use of resources). The two remaining conditions are: the parents' wishes and the efficient education of other children. The definition of a mainstream school is provided in section 316 (4).

The *Explanatory Notes*<sup>55</sup> on the Bill state that this means that a LEA does not have to provide a mainstream place where parents do not want one. It also states that, in practice, incompatibility with the efficient education of others is likely to be 'where pupils present severely challenging behaviour that would significantly disrupt the learning of other pupils or place their safety at risk.'

In response to an amendment raised in Grand Committee, Baroness Blackstone gave a commitment that OFSTED would be asked to examine the impact of the new inclusion provisions; she repeated this at Third Reading.<sup>56</sup>

New section 316A (1) states that section 316 does not prevent a child with SEN being educated at an independent school or a non-maintained special school if the LEA is not funding the placement. Ministers stressed that this provision has the effect of lifting the duty imposed by section 316(3) where a parent wants their child to attend an independent school, but that it will not affect the LEA's duty to pay for a non-maintained school place if the LEA has agreed that the child should be educated at a non-maintained school and has named the school in the child's statement.<sup>57</sup>

316A (2) sets out the exceptional circumstances in which a child with SEN but without a statement may be educated at a special school. Section 316A (2)(b) provides that regulations can prescribe circumstances in which a child, admitted for the purposes of an assessment, can remain in a special school after the assessment has been carried out. In Grand Committee the Bill was amended by Government amendment<sup>58</sup> to provide that 'prescribed' in relation to Wales means prescribed in regulations made by the National Assembly for Wales (section 316A (10)).

316A (3) and (4) set out how new section 316 interacts with the operation of section 348 of the *Education Act 1996* (which relates to the provision of special education at non-maintained schools) and Schedule 27 (3) of the *Education Act 1996* (which relates to parents' school preference). The *Explanatory Notes* on the Bill state that LEAs will not be prevented from naming independent or non-maintained special schools in statements by the (general) requirement to educate children with SEN in mainstream schools.

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<sup>55</sup> Bill 55-EN, Session 2000-01

<sup>56</sup> HL Deb 23 January 2001, CWH 51 and HL Deb, 1 March 2001 c 1299

<sup>57</sup> HL Deb 1 March 2001 c 1306

<sup>58</sup> HL Deb 23 January 2001 CWH 61-2

Section 316A (5) and (6) place a requirement on LEAs seeking to demonstrate that education at a mainstream school would be incompatible with the efficient education of the other children, to show that there are no reasonable steps they could take to prevent that incompatibility. Section 316A (7) ensures that if an LEA has named a maintained school in a statement the governing body of the school cannot use the exception in section 316 (3) – that the child’s inclusion would be incompatible with the efficient education of other pupils.

Section 316A (8) requires LEAs and school governing bodies to have regard to guidance about section 316 and 316A issued by the Secretary of State in England and, in Wales by the National Assembly for Wales. In response to amendments moved by Lord Addington on Report the Government amended the Bill at Third Reading to add 316A (9), which states that the guidance must relate to steps which may, or may not, be regarded as reasonable. Baroness Blackstone emphasised that the guidance will explain the kinds of reasonable steps that maintained schools and LEAs would need to consider to prevent inclusion being incompatible with the efficient education of others.<sup>59</sup> The *Explanatory Notes* issued with the Bill as presented in the Lords state that the guidance will cover what is meant by reasonable steps and by incompatibility with the efficient education of other pupils.

## **2. Other issues raised in the debate on clause 1**

Peers were generally in favour of strengthening the right of children with SEN to be educated in mainstream schools, but expressed concern about various aspects of provisions, often quoting from briefings prepared by SEN and disability groups. Amendments focused on:

- the proposed changes to the conditions that currently limit the duty to provide a mainstream place for a child with SEN;
- the need to ensure that education at a mainstream school is appropriate for a child with SEN, and that adequate support and facilities are available;
- the need to ensure that provision is in the best interests of the child;
- the potential impact of the Bill on special schools and on independent special school provision; and,
- whether a child who is registered with a particular school could continue to receive a mixture of provision offered in that school and in other settings.

There was much debate about the draft revised Code of Practice, particularly since Ministers said that many of the issues raised would be covered by the Code. Several Peers, including Baroness Blatch and Lord Baker of Dorking urged the Government to make the final Code available so that it could be considered with the Bill. During the debate in Grand Committee, Baroness Blackstone said that the final version of the revised Code would not be available until the Bill had been passed because the Code has to be subject to the framework provided by the Bill. The final version of the Code will be placed before Parliament under the

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<sup>59</sup> HL Deb, 1 March 2001 cc 1310-3

affirmative procedure.<sup>60</sup> The issue was again raised on Report. Lord Baker of Dorking noted that the Code cannot be amended by Parliament, and again asked if it could be made available so that Peers could have a clearer understanding of the proposed arrangements while considering the Bill.<sup>61</sup>

**a. *The condition set out in section 316(3) relating to efficient education***

Lord Ashley of Stoke moved an amendment on behalf of Lord Beaumont of Whitley, which was subsequently withdrawn, and spoke to related amendments on this issue. An amendment sought to remove the condition in the proposed new section 316 (3) (b), i.e. that a statemented child would not be educated in a mainstream school if it would be incompatible with the efficient education of other children. Lord Ashley argued that the condition could leave a loophole for LEAs to exclude SEN children from mainstream education who would otherwise benefit from it.<sup>62</sup> Lord Rix and Lord Morris of Manchester supported the amendment.

Responding to this and the related amendments raised, Baroness Blackstone rejected arguments for an absolute right to a mainstream place for a child with SEN. She sought to reassure Peers that the guidance that will back up the new inclusion framework will underline that a mainstream place should be refused in a very small number of cases. She outlined the circumstances where inclusion would not be appropriate:

where the behaviour of the child is so challenging that the safety of other children cannot be guaranteed;  
where the child's behaviour would persistently and systematically disrupts the learning of other children;  
where the child has been abused and is himself an abuser;  
where a child's inclusion would mean that, even with other support, the teacher would have to spend a disproportionate amount of time with the child in relation to the rest of the class, and the efficient education of others could not be safeguarded.<sup>63</sup>

**b. *The child's best interests and the wishes of the child***

Several Peers moved amendments or spoke to amendments aimed at establishing the principle that provision should be made only if it were in the child's best interests, and that the wishes of the child should be taken into account. The need for the 'voice of the child' to

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<sup>60</sup> HL Deb 23 January 2001 CWH 40

<sup>61</sup> HL Deb 20 February 2001 c622

<sup>62</sup> HL Deb 23 January 2001 CWH 1-12

<sup>63</sup> HI Deb 23 January 2001 CWH10

be heard was a recurring theme throughout the debates in Grand Committee<sup>64</sup>, on Report<sup>65</sup> and at Third Reading.<sup>66</sup>

Comparisons were made with the provisions in the *Children Act 1989* which require that the ‘ascertainable wishes and feelings of the child considered in the light of his age and understanding’ should be taken into account when particular decisions are being taken about a child. Peers questioned whether the Bill complied with the UN Convention on the Rights of the Child and the Human Rights Act. Addressing these issues, Baroness Blackstone stressed that the Bill complied fully with them.<sup>67</sup>

An amendment moved on Report (and subsequently withdrawn) by Baroness David sought to require LEAs to take account of the wishes of the child when carrying out assessments, and making and maintaining SEN statements. Responding, Baroness Blackstone said that the Government did not believe that putting the provision on the face of the Bill was the right way forward, and that the matter would be dealt with in the Code of Practice. She emphasised that the views of the child were given clear prominence as a fundamental principle in the draft revised Code of Practice. The final version of the Code will be strengthened to carry the expectation that schools and LEAs will seek and take into account the views of the child wherever possible.<sup>68</sup>

At Third Reading, Lord Northbourne returned to the issue, and on this occasion sought to amend new section 316 (3) to ensure that the best interests of a child with a statement of SEN would be taken into account when determining whether the child should attend a mainstream school.<sup>69</sup> Lord Northbourne noted that although the Bill provided for the wishes of the parent to be taken into account, such wishes might not always be in the best interest of the child. Supporting the amendment Lord Baker of Dorking emphasised that he was not against inclusion (provided LEAs provide the necessary support to educate children with SEN in mainstream schools), and that a statutory entitlement for the best interests of the child to be taken into account would provide additional protection.

Speaking for the Liberal Democrats, Baroness Sharp of Guildford could not support the amendment. Although she had moved an amendment in Grand Committee and supported other attempts to amend the Bill to ensure that the child’s interests and views are taken into account, she had subsequently been persuaded by the argument that such a statement could be used to prevent inclusion in mainstream education. Baroness Blackstone reiterated the Government’s position that the proposed amendments would reintroduce a condition to limit the LEAs’ duty to provide a mainstream place for a child with SEN, which would be open to misuse. She argued that the practical impact would be that children who could benefit from

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<sup>64</sup> e.g. see HL Deb 23 January 2001 CWH 13-19 and CWH 31-43

<sup>65</sup> HL Deb 20 February 2001 c 611-12 and c651-55

<sup>66</sup> HL Deb 1 March 2001 c1283-1302

<sup>67</sup> HL Deb 23 January 2001, CWH 39; HC Deb 1 March 2001 c 1298

<sup>68</sup> HL Deb 20 February 2001 c 651-5

<sup>69</sup> HL Deb 1 March 2001 cc1283-1302

inclusion would be prevented from gaining a mainstream place. The amendment was defeated by 146 votes to 102.<sup>70</sup>

*c. Special schools and independent school placements*

The potential impact of the Bill on special schools and on placements at independent schools was raised on many occasions. For example, during the debate in Grand Committee Lord Pearson of Rannoch said that the Bill did little to protect the wishes of parents who want a special school place for their child.<sup>71</sup>

At Report, Baroness Blatch sought to add a new clause to the Bill to establish the principle that ‘the best and most appropriate education available should be offered’ to those who have a disability or learning difficulty. She said that she believed that asserting the principle that the needs of the child should be paramount would help overcome fears that the Bill would threaten special schools. Baroness Blackstone rejected the amendment, arguing that it would make inclusion in mainstream education more difficult - that it would reinstate the equivalent of the first caveat in the existing legislation. She referred to the continuing and vital role for special schools, noting that the size of the special school sector has remained static, catering for about 1.2% of all children, and said that the Government do not envisage that will change. The amendment was rejected by 162 votes to 86.<sup>72</sup>

In Grand Committee, Baroness Blatch sought clarification of the effect of the Bill on independent school placements, fearing that new section 316A (1) would prevent LEAs from funding independent school placements for children with special educational needs.<sup>73</sup> Returning to the issue at Third Reading she placed on the record, “for *Pepper v. Hart*<sup>74</sup> purposes”, the contents of a letter she had received from Baroness Blackstone relating to the issue:

"Clause 1 of the Bill makes it clear that section 316 does not affect the requirement in section 348 of the Education Act 1996 that local education authorities should fund the placement of children with special educational needs at non-maintained schools if those schools are named in their statements, or if the authority believe that provision in a non-maintained school is necessary and the particular school is appropriate."

"If a parent wants their child to attend an independent school, the duty to educate that child in a mainstream school imposed by section 316(3) is immediately lifted. If the LEA agrees that the child should be educated in a non-maintained school and name that school in the child's statement, the LEA will, under section 348, have to pay for that school. Nothing in section 316A is capable of affecting this. Section 316A qualifies

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<sup>70</sup> HL Deb 1 March 2001 cc1301-2

<sup>71</sup> HL Deb 23 January 2001 CWH 43-47

<sup>72</sup> HL Deb 20 February 2001 cc603-5

<sup>73</sup> HL Deb 23 January 2001 CWH 52-7

<sup>74</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 - the decision that if primary legislation is ambiguous or obscure, the courts may in certain circumstances take account of statements made in Parliament by Ministers.

section 316. It does not impose 'independent' rights or duties to the effect that a child can only be educated in a non-maintained school if the LEA is not funding that placement. It does not affect the operation of section 348 and there is therefore no need to make provision to that effect."<sup>75</sup>

Lord Davies of Oldham confirmed that this was the Government's view, and again emphasised that new section 316A will not affect the LEA's duty to pay for a non-maintained school place if the LEA has named the school in the child's statement. Baroness Blatch's amendment was defeated by 125 to 93 votes.

**d. *Dual placements***

Concern was also expressed about whether the Bill might have adverse consequences for dual placements where a child is registered at one school but also receives part of his education elsewhere. The issue was raised in Grand Committee and returned to at Report and Baroness Blackstone confirmed that such placements would continue to be possible.<sup>76</sup>

**e. *Specifying and quantifying special educational provision***

The issue of specifying and quantifying special educational provision in statements was raised in Second Reading debate<sup>77</sup>, Grand Committee, and returned to on Report. In the Grand Committee Baroness Darcy de Knayth moved amendments proposed by IPSEA to provide a new clause to the Bill requiring LEAs to seek advice on both the type and the amount of provision to meet a child's SEN.<sup>78</sup> Specifying provision was again discussed when Baroness Sharp of Guildford spoke to an amendment to provide for statements of SEN to state the duration and frequency of SEN provision.<sup>79</sup>

Ministers gave assurances that the final SEN Code of Practice will require LEAs to specify provision and, as necessary, to quantify provision. Ministers stressed that it would not be right to require that provision be specified in terms of its duration and frequency in every case, but that the final version of the Code will make it clear that local education authorities should not have blanket policies against quantifying provision in statements. Also the Code will note that those giving professional advice for assessments can comment on the amount of provision that they consider appropriate for a child.<sup>80 81</sup>

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<sup>75</sup> HL Deb 1 March 2001 c 1304

<sup>76</sup> HL Deb 20 February 2001 cc 625-9

<sup>77</sup> HL Deb 19 December 2001, for example, see c636, c 643,649,

<sup>78</sup> HL Deb 29 January 2001, CWH 64

<sup>79</sup> HL 29 January 2001, CWH 89-94

<sup>80</sup> HI Deb 29 January 2001, CWH 90-3

<sup>81</sup> HL Deb 20 February 2001, c 725

*f.*     **Resources**

Peers questioned whether sufficient resources would be made available to implement the Bill's provisions and amendments raised in Grand Committee, and sought to ensure that adequate resources would be available to support children with SEN in mainstream schools.<sup>82</sup> On Report, Baroness Sharp of Guildford<sup>83</sup> and Lord Baker of Dorking<sup>84</sup> again questioned whether the necessary resources would be available to provide for a child's special educational needs. On several occasions Baroness Blackstone referred to the increased funding that was being made available.<sup>85</sup> The *Explanatory Notes* to the Bill give details of the estimated effect of the SEN provisions on public expenditure and public service manpower (the relevant paragraphs are reproduced at the end of section C of this paper).

**3.     Advice and information for parents: Clause 2**

At present, LEAs provide advice and information about SEN through parent partnership services, but there is no statutory requirement on them to do so.

Clause 2 amends the *Education Act 1996*, by inserting a new section 332A, to place a duty on LEAs to make arrangements for providing information on SEN matters to parents of children with SEN. In making such arrangements, LEAs must have regard to statutory guidance issued by the Secretary of State (or in Wales, the National Assembly for Wales). LEAs must also publicise the service to parents and schools in their area, and to such other persons as they consider appropriate.

The December 2000 issue of the DFEE *SEN Update* said that Ministers plan to include guidance within the revised Code of Practice on SEN on minimum standards that might be expected of parent partnership services, without stifling local initiative. It will also highlight the role that partnership services can play in helping to promote a culture of positive relationships between LEAs, schools and parents. The *Explanatory Notes* on the Bill make clear that the new duty would not mean that LEAs will have to provide the services themselves. They could contract with a provider from the voluntary sector.

It is intended that instead of a 'Named Person' there will be an independent parental supporter (IPS) available to all parents of all children with SEN (not only those with statements). This change was proposed in the Green Paper and Action Plan. The Bill does not make statutory provision for IPSs, however, the draft revised Code of Practice emphasises their importance.

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<sup>82</sup> e.g. see HL Deb 23 January 2001, CWH 22-7

<sup>83</sup> HL Deb 20 February 2001, cc 612-13

<sup>84</sup> HL Deb 20 February 2001 c 615 and cc 622

<sup>85</sup> HL Deb 23 January 2001 CWH 27; HL Deb 30 January 2001 CWH 154-5



During the debates on the clause concern was expressed about the extent and nature of the parent partnership service, and whether specific entitlements should be written into the Bill. For example, Baroness Blatch raised an amendment in Grand Committee to extend the clause 2 requirements to provide advice and information to parents who believe that their child may have SEN. Baroness Blackstone stressed that the service was designed for those parents whose children have special needs. However, she said that the final version of the SEN Code of Practice would explain that partnerships would be expected to be flexible and to deal sensitively with parents who believe their child has SEN, but where the school and the LEA do not.<sup>86</sup> On Report, Baroness Blatch argued that there should be a statutory entitlement to advice and information for parents who think their child might have SEN and that the matter should not be left to the discretion of the partnership. The amendment was put to a division and was defeated by 146 to 57 votes.<sup>87</sup>

Lord Baker of Dorking argued that parents of children with SEN should be given information about all options relating to the child's needs, and amendments to place a requirement to this effect were moved in Grand Committee and again on Report.<sup>88</sup> Other issues raised included independent schools receiving information from partnerships. There was some discussion about the legal meaning of the term 'proprietor' of schools. An amendment moved by Baroness Blatch relating to this was defeated by 95 to 31 votes.<sup>89</sup>

Lord Lucas raised amendments in Grand Committee relating to the funding of research on the operation of the Bill, and on the effectiveness of different types of provision, and on the collection of data. Baroness Blackstone argued that the amendments were unnecessary because there are already powers to fund such research and data collection.<sup>90</sup>

#### **4. Resolution of disputes: Clause 3**

This clause inserts a new section 332B into the *Education Act 1996* to provide an additional means of resolving disputes between parents and the LEA and/or the school. It also makes provision for arrangements aimed at avoiding such disputes. The new arrangements are intended to provide an informal way of exploring and resolving disagreements, and do not affect a parent's right of appeal to the Special Educational Needs Tribunal.

Under section 332B (1) and (2) the LEA must make the arrangements, and subsection (3) requires the LEA to appoint an independent person to facilitate the avoidance or resolution of disputes. The *Explanatory Notes* to the Bill state that, in practice, this will often be someone from the voluntary sector. LEAs will be required to have regard to any guidance given in England by the Secretary of State, and, in Wales, by the National Assembly for Wales

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<sup>86</sup> HL Deb 29 February 2001 c94-7

<sup>87</sup> HL Deb 20 February 2001 cc 666-7

<sup>88</sup> HL Deb 29 January 2001 CWH 97-9; HL Deb 20 February 2001 cc 659-4

<sup>89</sup> HL Deb 20 February 20001 cc 685-9

<sup>90</sup> HL Deb 29 January 2001 cc104-5

(section 332B (4)). The *Explanatory Notes* state that the guidance will be contained in the revised SEN Code of Practice. The LEA must ensure that the new arrangements are known to parents, head teachers and proprietors of schools in their area, and to other interested parties as they think appropriate (section 332B (5)). The arrangements do not affect the entitlement of a parent to appeal to the Special Educational Needs Tribunal (section 332B (6)). Section 332B (7) and (8) defines those to whom the section applies.

The main themes raised by Peers in relation to clause 3 included:

- the need to ensure that the independent person is genuinely independent and has no connection with the parties to the dispute;
- the knowledge and qualities that the independent person should have;
- the need to ensure that disputes are resolved quickly;
- who should have access to the service,
- whether it will extend to independent schools; and,
- the resource implications of the new service.

These and related issues were discussed in Grand Committee, on Report and at Third Reading, when Baroness Blackstone and Lord Davies sought to reassure Peers about the operation of the new arrangements.<sup>91</sup> The Ministers said that the SEN Code of Practice would set out the range of skills, knowledge and expertise that the independent facilitator will need. An assurance was given, in response to concerns expressed by Lady Sharpe, that the persons appointed would have a sound understanding of SEN systems and procedures. The guidance will also emphasise that that the independent person must be acceptable to all the parties involved. Ministers said that it would not be practical to require the independent facilitator to have no connection with the LEA, for then they could not deal with the LEA or school on more than one occasion. Moreover, it was pointed out that the duty on the LEA would be to ensure that conciliation arrangements are in place. This does not mean that that LEAs have to carry out the dispute resolution themselves.

Lord Davies emphasised that the new dispute resolution arrangements should be available to the parents of all children with special educational needs, whether or not the child has a statement of SEN. On the issue of resources, he said that £2 million would be made available from April 2001 to support the independent element of the new dispute resolution arrangements. Resources will also be made available in the subsequent year.<sup>92</sup>

Responding to concern that the dispute resolution arrangements may delay parents making an appeal to the Tribunal, Lord Davies said that the regulation-making powers (contained in clause 8 and Schedule 8) will require LEAs to inform parents that using these arrangements will not affect their right to appeal. LEAs will need to inform parents of the statutory time

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<sup>91</sup> HL Deb 29 January 2001 cCWH 108-115; HL Deb 20 February 2001 cc 689-93; HL Deb 1 March 2001 cc 108-115

<sup>92</sup> HL Deb 29 January 2001 CWH 111

limit for lodging an appeal and make it clear that the dispute resolution arrangements can run alongside the appeals procedure.<sup>93</sup>

In relation to independent schools, Lord Davies said that the new arrangements would be available to parents whose children have been placed in an independent school by a statement, and where the LEA is funding the place either in full or in part. However, the new arrangements will not cover parents who have chosen to pay for an independent school place for their child. The Government take the view that that is a private matter, and it would not be right to place a duty on LEAs to provide arrangements to resolve disputes between the parents and the independent school, since the LEA have no direct involvement in the education of the child.<sup>94</sup>

## 5. Compliance with orders: Clause 4

Clause 4 inserts a new section 336B into the *Education Act 1996* to provide that an LEA must comply with orders of the Special Educational Needs Tribunal before the end of the prescribed period beginning with the date the order is made. Regulations will be made to prescribe the period. The clause was amended by Government amendment in Grand Committee, to provide that regulations relating to Wales made under the section will require the agreement of the National Assembly for Wales.<sup>95</sup>

LEAs are already under a duty to comply with Tribunal orders; however, there is no timescale laid down for compliance. The DfEE has referred to evidence from correspondence, with the department and other contacts, that suggests that LEAs are not always quick to implement orders. Prescribing time limits by way of regulations will allow for operational flexibility. The regulations will be subject to the negative resolution procedure, in line with current regulations that prescribe time limits for SEN assessments and the making of SEN statements.<sup>96</sup>

Amendments raised in Grand Committee sought to ensure compliance with an order within 6 months from the date it was made, and to require LEAs to provide written confirmation of compliance. Baroness Blackstone felt that it was unnecessary to place such requirements on the face of the Bill, and outlined a provisional timetable for compliance with orders:

The regulations to be made under Clause 4 will be informed by detailed consultation that has already been undertaken on this issue during late 1999, with a wide range of interested parties including parental and voluntary groups, LEAs and others. The consultation put forward suggested timescales for different types of orders.

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<sup>93</sup> HL Deb 29 January 2001 CWH 112

<sup>94</sup> *ibid*

<sup>95</sup> HL Deb 29 January 2001 CWH 118

<sup>96</sup> House of Lords Select Committee on Deregulated Powers and Deregulation, 3<sup>rd</sup> Report, Session 2000-01, HL Paper 9, p 14.

Respondents supported the introduction of specific timescales for implementation of SEN tribunal rulings and were clear as to the need for them. We are still considering the consultation responses but I can set out our provisional plans on timetables. Taking account of views expressed during consultation, we envisage that the likely timescales for orders, such as making or amending a statement which is the most time-consuming, will not exceed five weeks. In some cases, orders will have to be carried out to a shorter timetable; for example, starting the assessment or reassessment process where we envisage the timescale being no more than a month. We also intend to require that reinstatement of a statement shall take place within a week, while seeking to maintain a statement shall be carried out immediately or on the LEA's proposed date.

These are demanding timetables but they take account of views expressed during the consultation exercise. We have sought to balance the wishes of parents for speedy compliance with tribunal orders with the practicalities for LEAs of complying with the orders. The timescales were also informed by the views of the SEN Tribunal itself on how long LEAs would realistically need to comply with an order.

It must be remembered that when the tribunal comes to make an order there will normally have been a substantial amount of work already undertaken. For example, an LEA would have 20 working days, once it had been notified by the tribunal of an appeal, to submit its comments on the appeal if they wished to oppose it.

On average, a tribunal decision is now made in just over four months from when it receives an appeal. That reflects an increase in tribunal efficiency since it was first established when the time was over five months. I should like to make the point, however, that this efficiency of the tribunal is not at the expense of parental appeals. It would be quite wrong if it were to be. Of the 1,196 decisions made in 1999-2000, over three-quarters--78 per cent--involved the tribunal upholding some or all of the parents' cases.

It is unnecessary to require on the face of the Bill a six-month limit for complying with tribunal orders, as that will be substantially in excess of the longest period we envisage requiring under the regulations.<sup>97</sup>

On Report Baroness Blatch sought to introduce a new clause to give the school governors of a mainstream schools a veto over the admission of a child with a statement of SEN if there are inadequate facilities or insufficient staffing for the child, until such time as the LEA makes appropriate extra provision or the Tribunal has ruled that the existing provision is satisfactory. The amendment was defeated by 86 to 23 votes.<sup>98</sup>

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<sup>97</sup> HL Deb 29 January 2001 CWH 117

<sup>98</sup> HL Deb 20 February 2001 c694-8

## 6. Unopposed appeals: Clause 5

Clause 5 amends the *Education Act 1996* by inserting a new section 326A. It provides for the prescribing of a timescale within which the LEA must comply with the parent's wishes, where the LEA has conceded to a parent who has appealed to the Special Educational Needs Tribunal. At present, many parents continue with appeals, even where the LEA does not defend the appeal, to ensure that the LEA complies with their request. This results in many needless appeals.<sup>99</sup>

During the Report Stage, Baroness Blatch argued for amending the clause so that it specifically stated that, where the LEA conceded to the parent, the case should be treated as though the Tribunal has determined in favour of the parent. The Bill as originally drafted would have treated the case as having been withdrawn. Baroness Blatch felt that this could lead to ambiguity, which could result in the LEA continuing to oppose the parent's wishes. Baroness Blackstone agreed that the drafting could be improved and the Bill was amended at Third Reading.<sup>100</sup> Section 326A (2) and (3) accordingly provide that the appeal will be treated as determined in favour of the parent, and the Tribunal need not make an order. LEAs will be required to meet the parent's wishes within the prescribed timescale. The provision applies to appeals against the LEA's decision not to make a statement of SEN, not to make a reassessment of SEN, or not to substitute a school named in a statement for a different school named by the parents. The *Explanatory Notes* state that appeals against the contents of statements and appeals against a decision to cease to maintain a statement have been excluded, because deciding an appeal without a hearing would not always be suitable. These types of appeal, even if the LEA does not contest them, will go to a hearing with the parent present.

Regulations made under this section, so far as they relate to Wales, require the agreement of the National Assembly for Wales.

## 7. Maintenance of a statement during an appeal: Clause 6:

One of the grounds on which parents can appeal to the SENT is where an LEA proposes to cease to maintain a statement of SEN. Clause 6 adds a new sub-paragraph to paragraph 11 of the Schedule 27 of the *Education Act 1996* to prevent the LEA from ceasing to maintain a statement until the outcome of the appeal is known.

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<sup>99</sup> DfEE Consultation Document on the SEN and Disability in Education Bill, p 28

<sup>100</sup> HL Deb 20 February 2001 cc 698-9 and HL Deb 1 March 2001 cc1319-9

## 8. Duty to inform parents where special education provision is made: Clause 7

Clause 7 amends the *Education Act 1996* by inserting a new section 317A, to ensure that parents of children with SEN, but without statements of SEN, will be informed that special educational provision is being made for their child. At present there is no statutory requirement on governing bodies or LEAs to notify parents of a decision that their child has SEN, although under the existing section 317 they must inform those who will teach the child. New section 317A (1) and (3) requires the governing bodies of community, foundation and voluntary schools to inform the parents of non-statemented children that special educational provision is being made for the child because it is considered that he has SEN. In the case of a child attending a Pupil Referral Unit, the LEA (through the head teacher) is responsible for carrying out this duty.

The clause also amends section 123 of the *School Standards and Framework Act 1998* to place the same duty on providers of relevant nursery education. Relevant nursery education is defined in section 123 (4) of the 1998 Act to include nursery education provided by the LEA, or by any person who receives financial assistance from an LEA and whose nursery education is taken into account in the LEA's Early Years Development Plan.

The *Explanatory Notes* to the Bill states that although city academies are not specifically covered by the clause, the Government intends that they will be required under their funding agreements to inform parents when they are making special educational provision for a child.

Baroness Blatch argued that the clause should be amended to give the parents of non-statemented children a right to challenge the provision being made for their child, and for the special educational provision not to be provided until the matter is resolved. The issue was debated in Grand Committee, and returned to on Report and at Third Reading. Responding, Ministers said that such amendments would hamper schools, nursery providers and Pupil Referral Units from making speedy responses to a child's SEN, and would interfere with the professional judgement of teachers. In effect the amendments would have given parents a veto over the SEN provision to be made for their child. Baroness Blackstone emphasised that clause 3 already provides for the resolution of disputes, but that if there were a requirement for disputes to be resolved through these procedures before provision could be made, it would lead to delays in making SEN provision, and to unnecessary bureaucracy. The amendments were withdrawn.<sup>101</sup>

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<sup>101</sup> HL Deb 29 January 2001 CWH 121-6; HL Deb 20 February 2001 cc 702-5; HL Deb 1 March cc 1317-20

## 9. Review or assessment of special educational needs at request of responsible body: Clause 8

Clause 8 amends the *Education Act 1996*, by inserting a new section 329A, to give schools and other education providers the right to ask the LEA to carry out a statutory assessment or re-assessment of a child, to determine whether the child needs a statement of SEN.

At present a school has no right to request an assessment. The DfEE believe that this may disadvantage the less articulate or less confident parent, who may rely on the school to approach the LEA on their behalf.<sup>102</sup>

Clause 8 places a duty on the LEA to decide whether to make an assessment or re-assessment in response to a request from a school. It places a duty on the LEA, before deciding whether to comply with the request, to send a notice to the parents informing them that a request from the school has been made, that of the procedures that will be followed, the name of the LEA officer who can provide further information, and, that they have a right to make representations within a minimum of 29 days beginning from the date the notice is served.

The LEA must notify the child's parents, and the school that made the request, if the LEA decides to assess the child. Where the LEA decides not to make an assessment it must notify the parent and school of that decision, and the reasons for it. The LEA must also notify the parents of their right of appeal to the Special Educational Needs Tribunal, and give details of any further information required by regulations. The *Explanatory Notes* state that this might include details of the new conciliation service provided under section 332B. In England, the Secretary of State makes the regulations and, in Wales, the National Assembly for Wales.

In Grand Committee, Baroness Blatch argued that the clause should be amended to include independent schools and non-maintained special schools. In response, at Report Stage, the Government amended the definition of 'relevant school' in section 329A (12) to include independent schools and non-maintained special schools. These schools will therefore have the right to ask an LEA to assess or reassess a registered pupil.<sup>103</sup>

The Government amended the clause at Third Reading to clarify the application of the section to providers of nursery education who are in receipt of public funds and whose provision is taken into account by the local authority in Early Years Development and Childcare Partnerships.<sup>104</sup>

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<sup>102</sup> DfEE Consultation Document on the SEN and Disability Rights in Education Bill, p 28

<sup>103</sup> HL Deb 20 February 2001 cc 715-7

<sup>104</sup> HL Deb 1 March 2001 c1320

## **10. Duty to specify named school: Clause 9**

Clause 9 amends the *Education Act 1996*, by inserting a new section 324 (4A), to allow the LEA not to name a particular school in a child's statement of SEN where the child's parents have made suitable arrangement.

At present, under section 324 of the 1996 Act, a statement must specify the type or name of school or other institution which the LEA consider would be appropriate for the child. This can result in a maintained school keeping a place open for a child whose parents have made provision for the child in the independent sector. The purpose of the new section is to avoid having to keep a place open at a school when the LEA know that that the child will not be taking it up.

Baroness Blatch expressed concern about the possible closure of maintained special schools and wished to ensure that LEAs continue to fund or part fund those places. She argued against the change, pointing out that the statementing procedures may take so long to complete that, in frustration, some parents place their child in the independent sector at their own expense, while having a preference for suitable provision in the maintained sector. The various amendments proposed included a requirement for the educational provision specified by the LEA in a statement to be made available for a limited period, except in particular circumstances. The amendments were debated and subsequently withdrawn.<sup>105</sup>

In Grand Committee several Peers sought to introduce new clauses after clause 9. Lord Rix spoke to an amendment to require nursery providers to have SEN and disability policies. Lord Lucas sought to introduce a new clause to give the child a right of appeal to the Tribunal. He was concerned about the potential conflicts of interest where the local authority acts as the parent. Baroness Blatch spoke to an amendment to empower the Secretary of State to require LEAs to reserve sufficient resources to meet their duties under Part IV of the Education Act 1996. Baroness Blackstone explained why these proposals were not necessary.<sup>106</sup>

## **11. Amendment of statements of special educational needs: Clause 10 and Schedule 1**

Clause 10 provides for Schedule 1, which makes amendments to Schedule 27 of the *Education Act 1996* relating to the procedures followed by LEAs when making, maintaining and amending statements of SEN. The *Explanatory Notes* to the Bill state that the changes will give parents new rights to a meeting with the LEA when the LEA proposes to amend a statement; and a right to express a preference for a maintained school when the LEA propose to amend their child's statement, following a reassessment or when changes are proposed

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<sup>105</sup> HL Deb 29 January 2001 CWH 134-8; HL Deb 20 February 2001 cc 717-21; HL Deb 1 March 2001 cc1320-24

<sup>106</sup> HL Deb 30 January 2001 CWH 139-150



relating to the type or name of the school or non-school provision in a statement. LEAs will also be required to send copies of the proposed statements, proposed amended statements and proposed changes to statements, to maintained schools which LEAs are considering naming in a statement, and to other LEAs if those schools are in their areas.

At present, under the *Education Act 1996*, Schedule 27, paragraph (10), when a statement of SEN is first being made parents can express a preference for a school. There is also provision in Schedule 27, paragraph (8), for the parent to request a change of named school. The aim of the Bill's amendments to Schedule 27 is to provide additional opportunities to allow the parent to express a school preference.

These arrangements were introduced at Report Stage by the Government in response to amendments raised by Baroness Darcy de Knayth in Grand Committee. Speaking to amendments that had been suggested by IPSEA (the Independent Panel of Special Education Advice), Baroness Darcy de Knayth had highlighted the problem of parents, whose children were assessed when very young, having limited opportunities to express a preference for a school.<sup>107</sup> Introducing the Government amendment at Report Stage<sup>108</sup>, Baroness Blackstone outlined the changes, and indicated that further consequential amendments would be brought forward at Third Reading.<sup>109</sup> She also indicated that the Government had given further consideration to proposals that Baroness Darcy de Knayth had made, to require LEAs, when making statutory assessments, to seek professional advice on the type and amount of provision needed by a child. However, the Government had decided that the current arrangements are sufficient and do not need amending.

## 12. Minor and consequential amendments: Schedule 8

This Schedule makes a number of amendments to the *Education Act 1996*, and are described in the *Explanatory Notes* as minor or consequential arising from the Bill.

The changes include amendments providing for regulations prescribing the information that LEAs must include in notices to parents, informing them of their right of appeal against decisions made by the LEA. The changes also allow for regulations to make provision relating to time limits in relation to the service of notices, and for regulations providing for the time limits within which LEAs must take action relating to assessments and re-assessments.

A technical change to section 347 of the *Education Act 1996* seeks to make clear that an LEA does not have to obtain the Secretary of State's consent to a child being educated in an independent school, where the child's parents are themselves making the arrangements.

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<sup>107</sup> HL Deb 29 January 2001 CWH 63-74

<sup>108</sup> HL Deb 20 February 2001 cc 724-6 and c 801

<sup>109</sup> HL Deb 1 March 2001 cc 1352-3

The name of the Special Educational Needs Tribunal will be changed to the Special Educational Needs and Disability Tribunal. A number of changes are made to section 336 of the *Education Act 1996*, ensuring that the power of the reconstituted Tribunal to regulate procedure for SEN appeals is the same as that for disability discrimination claims.

There is also a change relating to amendments to statements required as a result of a school attendance order.

The *Explanatory Notes* to the Bill provide a fuller description of these and the related changes.

### **13. Effect of the SEN provisions on public sector finances and public service manpower**

The *Explanatory Notes* to the Bill state:

#### SEN provisions

141. Funding has already been allocated to LEAs over the past few years to help prepare for the new duties in the Bill. In England, resources have been provided via the SEN Standards Fund (£6m in 1999-00 and £12m in 2000-01, rising to £18m in 2001-02) to help LEAs set up their parent partnership and conciliation services. An additional £2m will be available in 2001-02 to help LEAs develop and expand these services. In Wales funding has been made available through the NAW's Grants for Education Support and Training (GEST) Programme. The GEST Programme is the equivalent, in Wales, of the Standards Fund in England. Provision for SEN within the Programme was £2.3 million for 2000-2001. The Bill will strengthen the right of children with SEN to be educated in mainstream schools and will require LEAs and schools (except independent schools and special schools) to facilitate inclusion. There is support for inclusion through the Standards Fund (£15m in 2000-01) and the GEST Programme in Wales (£3m in 2000-2001). The other SEN provisions in the Bill are relatively minor changes and will not have significant resource implications. The SEN provisions will come into force in September 2001.

142. The SEN provisions will have very few manpower implications. The vast majority of LEAs in England and Wales already have parent partnership services in place, some of which also offer dispute resolution services.

Lord Baker of Dorking asked the following question about what estimate the Government has made of the numbers of extra teachers and extra teacher assistants needed to implement the SEN provisions in the Bill:

**Lord Baker of Dorking** asked Her Majesty's Government: What estimate has been made of the numbers of extra teachers and extra teacher assistants trained in special educational needs skills who will be needed to implement the provisions of the

Special Educational Needs and Disability Bill in each of the years 2001, 2002, 2003 and 2004.

**The Minister of State, Department for Education and Employment (Baroness Blackstone):** The *Explanatory Notes* that were published when the Special Educational Needs and Disability Bill received its First Reading in the House of Lords on 6 December gave an estimate of the effect of the Bill on public sector finances, including the effect on public service manpower (paragraph 141). The Government also published, last year, a Regulatory Impact Assessment of the effect of the Bill on the private and voluntary sectors.

We are making significant resources available to support implementation of the Bill. In support of the planning duty, we are making available £220 million between 2001 and 2004 to help schools widen access to premises and the curriculum for pupils with SEN and disabilities.

We are also supporting implementation by providing significant--record--levels of financial support for the training and professional development of teachers and other staff working with pupils with special educational needs. Under the Standards Fund 2000-01, we are supporting expenditure of £26 million on SEN training and development--an increase from £21 million in 1999-2000. In 2001-02 we envisage that £30 million of the overall SEN Standards Fund allocation (£82 million) will be spent on SEN training. LEAs will be free to spend more.

In the Green Paper *Teachers: meeting the challenge of change* we set ourselves an ambitious target of recruiting the equivalent of an additional 20,000 teaching assistants between April 1999 and March 2002. Over that period, around £350 million is being made available for recruitment and training of the newly recruited teaching assistants working in schools in England, and also to support further training opportunities for more experienced assistants. This of course includes teaching assistants who, under various titles, specialise in working with children with SEN.<sup>110</sup>

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<sup>110</sup> HL Deb 28 February 2001, WA 146-7

### III Disability Rights

#### A. Background

##### 1. *Disability Discrimination Act 1995*

The *Disability Discrimination Act (DDA) 1995* gives disabled people rights in employment, access to goods, facilities and services and buying or renting land or property.

Part II of the DDA contains the employment provisions which came into force on 2 December 1996. These provisions apply to employers, including the governing bodies of schools and other educational institutions and LEAs, with an exception until 2004 for small employers. Advice for LEAs and school governing bodies on these provisions is contained in DfEE Circular 20/99, which also covers their duties as providers of non-educational services.<sup>111</sup>

Part III of the DDA covers the rights of access to goods, facilities and services. The provision of education is excluded from this part of the Act.<sup>112</sup> The rights of access, which are being introduced in stages, apply to all “service providers”, including governing bodies and LEAs, where they provide non-educational services, e.g. since 2 December 1996 when the first of the rights of access came into force, a school governing body must ensure that there is no discrimination against disabled people who might wish to attend a school fundraising event. From 1 October 1999 they have had to make ‘reasonable adjustments’ for disabled people using a non-educational service. They do not have the same obligations under the DDA to disabled children at the school. However the position of pupils with special educational needs is covered by Part IV of the *Education Act 1996*.

Part IV of the DDA places duties on the governing bodies of schools, further and higher education institutions, the Further Education Funding Council, the Higher Education Funding Council, the Teacher Training Agency (TTA) and LEAs in relation to publishing information or statements about arrangements for disabled students.<sup>113</sup> The three sections 29-31 insert sections in the appropriate Education Acts.

##### 2. Background to the 1995 Act

The reasons for excluding education from the rights of access to goods and services in Part III of the DDA were stated by William Hague, then Minister for Social Security and Disabled People, in moving the Second Reading of the Bill:

The potential interaction between proposals to include education in the Bill and the 1993 Act<sup>114</sup> is unclear, but it would certainly cause severe difficulties for local

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<sup>111</sup> *What the Disability Discrimination Act (DDA) 1995 means for schools and LEAs* DfEE Circular 20/99 [www.dfee.gov.uk/circulars/dfeepub/dec99/02099](http://www.dfee.gov.uk/circulars/dfeepub/dec99/02099) See also Welsh Circular 20/97

<sup>112</sup> Section 19 (5) and (6) and SI 1996/1836 Reg 9

<sup>113</sup> Sections 29 -31

<sup>114</sup> at that point the provisions relating to special educational needs were in the Education Act 1993

education authorities. There would be conflicts between the responsibilities of the local authority as set out in the 1993 Act and the idea that adaptations should not cause the provider “undue hardship”—a stipulation that is very difficult to define in terms of schools and local education authorities. The provisions would undermine local authorities’ planning role and increase overall costs.

The inclusion of education might have the effect of not allowing schools to teach children with special needs separately, preventing them from benefiting from supplementary help or from gradual inclusion into mainstream tuition. It would replace a carefully worked out system, which was established as a result of a great deal of consultation, with a set of provisions inappropriate to efficient education.<sup>115</sup>

Tom Clarke, Opposition spokesman, made the Labour case and was challenged by Mr Hague to clarify Labour’s position on education:

The hon. Gentleman has mentioned education. Perhaps he can clear up any confusion which might arise from the Opposition amendment—it does not mention education—and confirm whether it is Labour party policy to include education in any right of access, and also tell us what assessment he has made of the public expenditure consequences of so doing.

**Mr. Clarke:** I find it astonishing that the present Minister, of all people, should refer to education when he did not even include it in his consultation document last July. Not once in our debates has he referred to the fact that fewer than one in 1,000 such teachers has access to schools. Nor has he referred to the fact that the Bill does nothing for further and higher education. Just to reassure the hon. Gentleman, I stress that I am happy to support the measures for education in the Bill introduced by my hon. Friend the Member for Kingswood and I hope that, as a result of today’s debate, the Minister, too, will find them acceptable.<sup>116</sup>

Later in his speech on Second Reading, Mr. Clarke criticised the Government Bill for failing to deliver on education. Liz Lynne, the Liberal Democrat spokeswoman, referred to the grave<sup>117</sup> omission of education from the Bill. She also supported Tom Clarke’s Reasoned Amendment which, although it declined to support the Bill because it did not go far enough, did not specifically mention education<sup>118</sup>.

The *Civil Rights (Disabled Persons) Bill* had been presented by Dr. Roger Berry, Labour Member for Kingswood, who had drawn seventh place in the ballot for Private Member’s Bills in the previous session. It had specifically listed education in its section dealing with the provision of goods, facilities and services.<sup>119</sup> Although attracting cross party support and a good deal of publicity, it had failed to progress past Report Stage in May 1994.<sup>120</sup> A very similar Bill<sup>121</sup> was introduced in December 1994 by Harry Barnes MP who had drawn fifth

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<sup>115</sup> HC Deb 24 January 1995 c152

<sup>116</sup> HC Deb 24 January 1995 c 159

<sup>117</sup> HC Deb 24 January 1995, c 182

<sup>118</sup> HC Deb 24 January c156

<sup>119</sup> Bill 16 of 1993-94 Part IV

<sup>120</sup> HC Deb 10 May 1994 c 155

<sup>121</sup> Civil Rights (Disabled Persons) Bill, Bill 12 of 1994-95

place in the ballot. It was seen as a competitor to the Government's Bill and was due to be debated some three weeks later.<sup>122</sup>

Tom Clarke attempted to make amendments to the Government's Bill relating to education but was unsuccessful<sup>123</sup>. In response to his amendments, William Hague announced the Government's intention to put provisions in the Bill to require schools, colleges and universities to publish statements about arrangements for disabled pupils<sup>124</sup>. The amendments were made at Committee stage in the Lords<sup>125</sup>. The amendments in their final form became Sections 29-31 of the DDA.

The details of these Bills and the reactions to them in the 1990s can be traced in Library Research Papers 94/37, 94/97, 95/9 and 95/18. Lord Morris of Manchester traced the history of the current Bill even further back to the *Chronically Sick and Disabled Persons Act 1970* in his speech on Second Reading in the Lords<sup>126</sup>.

### 3. Current situation

#### Schools

##### *England and Wales*

The *Disability Discrimination Act 1995* currently requires the governing bodies of maintained schools to publish information about arrangements for disabled pupils.<sup>127</sup> The employment provisions of the DDA apply to maintained and independent schools, although until 2004 there is an exception for small employers.<sup>128</sup> The provisions of the DDA on rights of access to goods, facilities and services also apply to all schools in relation to non-educational services, for example fund-raising events by parents or leisure activities for children without any element of educational development. Guidance is given in two circulars *What the Disability Discrimination Act means for Schools and LEAs*: DfEE circular 20/99 and Welsh Office circular 20/97.

Children whose disability constitutes a "learning difficulty"<sup>129</sup> are covered by the special education legislation, now in the *Education Act 1996*.

##### *Scotland*

In Scotland there is a requirement to publish a statement of the school's policy on special educational needs but no specific requirement on schools relating to disability. The other parts of the DDA apply as they do in England. As in England and Wales, disabled children

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<sup>122</sup> HC Deb 10 February 1995 cc 569-634

<sup>123</sup> HC Deb 27 March 1995 cc 740-761

<sup>124</sup> HC Deb 27 March 1995 cc 750-753

<sup>125</sup> HL Deb 15 June 1995 c 2031 and 27 June 1995 c 736

<sup>126</sup> HL Deb 19 December 2000 cc 663-666

<sup>127</sup> *Education Act 1996* s.317(6) inserted by section 29 of the *Disability Discrimination Act 1995*

<sup>128</sup> "Government extends rights for disabled people – Hodge" DfEE PN 5 March 2001

<sup>129</sup> *Education Act 1996* s. 312 quoted in full in this paper in Part II A

are covered by education legislation if they have special educational needs.<sup>130</sup> A draft order issued under section 4 of the recent *Standards in Scotland's Schools Act 2000* lists five key outcomes which Ministers believe represent the key priorities for school education in the immediate future. The third priority is:

To promote equality and help every pupil benefit from education, with particular regard paid to pupils with disabilities and special educational needs, and to Gaelic and other lesser used languages.<sup>131</sup>

Education Authorities are required to set objectives in respect of each of the national priorities. National policies, local improvement plans and school development plans will all be focused on the priorities.<sup>132</sup>

## Further education

### *England and Wales*

Section 30 of the DDA inserted provisions into the *Further and Higher Education Act 1992*.<sup>133</sup> These require the governing bodies of further education institutions, as a condition of grant from the Funding Councils, to issue disability statements. Conditions may also be imposed relating to the provision to be made with respect to disabled persons. It also required each Council to report annually on the provision of FE for disabled students.<sup>134</sup>

Disability statements are defined as statements containing information of a prescribed description about the provision of facilities made by the institution in respect of disabled persons. Regulations issued in 1996 set out the prescribed information which covers admission arrangements, support in relation to the curriculum and examinations, including technology and equipment available and relevant staff expertise. It also must cover arrangements for handling complaints and appeals.<sup>135</sup> The power to make these conditions of funding is transferred to the Learning and Skills Council (LSC) from April 2001 in relation to England by Section 6 (4) and (6) of the *Learning and Skills Act 2000*; and to the National Council for Education and Training in Wales (CETW) in relation to Wales by section 35 (4) and (6) of the same Act. In both cases the conditions will apply to any provider of post-16 education and training.

The specific duty on the Further Education Funding Councils to have regard to the needs of students with learning difficulties and/or disabilities when carrying out their responsibilities is also transferred to the LSC and the CETW.<sup>136</sup> This duty had been placed on the Funding Councils by the 1992 *Further and Higher Education Act*. Colleges as employers are covered by Part II of the DDA.

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<sup>130</sup> *Education (Scotland) Act 1980* and *Standards in Scotland's Schools Act 2000* ss1, 2 and 15

<sup>131</sup> *The Education (National Priorities) (Scotland) Order 2000*

<sup>132</sup> Draft *The Education (National Priorities) (Scotland) Order 2000*: Executive Note 6 November 2000

<sup>133</sup> Section 5 (6) amended; (7A) and (7B)

<sup>134</sup> Section 8 (6) and (7)

<sup>135</sup> *Education (Disability Statements for Further Education Institutions) Regulations 1996* SI 1996/1664

<sup>136</sup> Sections 13 (England) and 41 (Wales)

The FEFC's Learning Difficulties and/or Disabilities Committee published its report, *Inclusive Learning*, ("the Tomlinson Report") in September 1996.<sup>137</sup> The report, which was warmly welcomed by the Government and the FEFC, set out a programme for improved quality for students with learning difficulties and/or disabilities in FE. The FEFC has built on this approach by producing an Inclusive Learning Quality Initiative Prospectus in 1998 offering a framework for whole-college activities to extend the principles of inclusive learning to all students. It encouraged institutions to carry out an inclusive learning audit and draw up an action plan.<sup>138</sup>

LEAs are required to publish disability statements relating to further education provided by them.<sup>139</sup> This requirement was placed on them by Part IV of the DDA<sup>140</sup> and the prescribed information is set out in regulations.<sup>141</sup>

### ***Scotland***

The *Further and Higher Education (Scotland) Act 1992* placed a duty on the Secretary of State for Scotland in fulfilling his duties in regard to further education to have regard to the requirements of those with learning difficulties. Learning difficulties are defined in terms of difficulties in learning and disabilities.<sup>142</sup> Until 1 January 1999 the Secretary of State paid grant to the boards of management of FE colleges. While there was no statutory requirement for FE colleges in Scotland to produce disability statements, the Secretary of State did require, as a condition of grant, that each college's Annual Report contained a statement as to how students with learning difficulties were provided for.<sup>143</sup> This is still required by the Scottish Further Education Funding Council (SFEFC).<sup>144</sup> The duty originally placed on the Secretary of State is now exercised on behalf of Scottish Ministers so far as it can be done by the use of the express powers and functions that it is authorised to exercise.<sup>145</sup>

### **Higher Education**

#### ***England and Wales***

The *Further and Higher Education Act 1992*<sup>146</sup> was amended by the DDA<sup>147</sup> to place a duty on the funding councils in exercising their functions to have regard to the requirements of disabled persons. The councils were also to make it a condition for the receipt of grant that higher education institutions should publish disability statements. The statements were to contain information about the provision of facilities for education and research made by the institution for disabled persons. There is no power for the HEFCE or other councils to put

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<sup>137</sup> Recommendations are summarised in FEFC Circular 97/05

<sup>138</sup> FEFC circular 98/40

<sup>139</sup> *Education Act 1996* s. 528

<sup>140</sup> section 30 (7) and (8)

<sup>141</sup> SI 1997/1625 for England; SI 1997/2353 for Wales

<sup>142</sup> Section 1

<sup>143</sup> HC Deb 23 March 1998 c 44W

<sup>144</sup> SPOR 11 January 2000 S1W-3386

<sup>145</sup> *Scottish Further Education Council (Establishment) (Scotland) Order 1998* SI 1998/2887

<sup>146</sup> *Further and Higher Education Act 1992* s.65 (4A) and (4B)

<sup>147</sup> Section 30 (5) and (6)



conditions on grant in relation to the provision made for disabled persons as there is in further education. Section 68(3) of the 1992 Act guarantees a certain level of independence to the HE sector. Government grants cannot be conditional by reference to course, teaching or admissions criteria.

As with further education colleges, higher education institutions are covered as employers by Part II of the DDA and for non-educational services by Part III.

Disability statements are published by each institution and were all available on the Careers Advisory Network on Disability (CANDO) web site.<sup>148</sup> At present this site is suspended, as CANDO is amalgamating with SKILL, the National Bureau for Students with Disabilities. The HEFCE guide to good practice in disability statements can be read on their web site.<sup>149</sup>

### ***Scotland***

The *Further and Higher Education (Scotland) Act 1992* was amended in the same way by the DDA to place a similar duty on the Scottish Higher Education Funding Council and a similar requirement on Scottish institutions of higher education.

### **LEAs and education authorities**

LEAs in England and Wales and education authorities in Scotland are covered by Part II of the DDA in relation to their role as employers and by Part II in relation to non-educational services.

### **Teacher Training Agency**

The duty on the TTA to have regard to the requirements of disabled persons is in the *Education Act 1994*.<sup>150</sup>

## **4. The Disability Rights Task Force report, *From Exclusion to Inclusion***

The Labour Party's Election Manifesto in 1997 had committed it to 'comprehensive, enforceable civil rights for disabled people'.

As soon as the Labour Government came to power, it transferred overall responsibility for disability issues from the Department of Social Security to the Department for Education and Employment. In a press release issued in May 1997, Andrew Smith, the Minister for Employment, Welfare to Work and Equal Opportunities, said:

“The transfer of responsibility from the Department of Social Security to the Department for Education and Employment means that we will be able to work towards ensuring that disabled people fulfil a wider role in society as people able to take advantage of education, training opportunities and the employment market. I

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<sup>148</sup> [www.cando.lancs.ac.uk/script/d/start.idc](http://www.cando.lancs.ac.uk/script/d/start.idc)

<sup>149</sup> [www.hefce.ac.uk](http://www.hefce.ac.uk) Report 98/66

<sup>150</sup> Section 1 (4)

intend disabled people to play a full part in the opportunities that our Welfare to Work initiative will provide.”

The future of the DDA was clarified a few months later, when Andrew Smith said that there would be a three-point strategy on disability rights, including a Government commitment to implement the remaining stages of the DDA.<sup>151</sup> According to a later statement, Andrew Smith said that the three-point strategy was to:

- establish a Ministerial Task Force to undertake a wide consultation on how to implement comprehensive and enforceable civil rights for disabled people
- move to establish a Disability Rights Commission;
- go ahead with implementing the remaining rights of access to goods and services in the *Disability Discrimination Act*.<sup>152</sup>

The Disability Rights Task Force was set up by the Government in December 1997 to consider how best to secure comprehensive, enforceable civil rights for disabled people and to make recommendations on the role and functions of a Disability Rights Commission (DRC).<sup>153</sup> Its interim report on a DRC in April 1998 led to the Government White Paper *Promoting Disabled People's Rights: Creating a Disability Rights Commission fit for the 21<sup>st</sup> Century*<sup>154</sup> and the *Disability Rights Commission Act 1999*. The Act replaced the National Disability Council with a more powerful Disability Rights Commission which has the power to assist individual disabled people in securing their rights under the 1995 Act. The DRC started work on 25 April 2000.

The Disability Rights Task Force issued its report on civil rights *From Exclusion to Inclusion* on 13 December 1999.<sup>155</sup> It recommended major extensions to the coverage of the DDA as well as refinements to the detail. It also called for public sector leadership in promoting equal opportunities and the use of non-legislative measures as levers for changes in the lives of disabled people. In Chapter 4 it made a number of key recommendations on education. The Task Force found that the exclusion of education from the DDA access to services provisions<sup>156</sup> left disabled people without legal protection from unfair discrimination. However, the Task Force did not feel that simply removing the education exclusion from the DDA was the best way forward. Instead, it set out recommendations for comprehensive, enforceable civil rights for disabled children and students and urged the Government to use appropriate legislation to bring them about.<sup>157</sup>

The Task Force's recommendations on education were:

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<sup>151</sup> DfEE Press Notice, 1 October 1997

<sup>152</sup> DfEE Press Notice, 3 December 1997

<sup>153</sup> DfEE Press Notice, 3 December 1997

<sup>154</sup> Cm 3977, July 1998

<sup>155</sup> *From Exclusion to Inclusion: A Report of the Disability Task Force on Civil Rights for Disabled People* DfEE 1999 [www.disability.gov.uk](http://www.disability.gov.uk)

<sup>156</sup> Part III

<sup>157</sup> Chapter 4

- 4.1 The Government should continue to implement the SEN Action Programmes in England and Wales.
- 4.2 In reviewing the statutory framework for inclusion, the Government should strengthen the rights of parents of children with statements of SEN to a mainstream placement, unless they want a special school and a mainstream school would not meet the needs of the child or the wishes of either the parent or child.
- 4.3 Both the National Curriculum and the Early Learning Goals should continue to reflect the needs of children with SEN. The new opportunities for raising awareness of disability issues in schools within Citizenship and Personal, Social and Health Education should be used to the full.
- 4.4 Providers<sup>158</sup> of school education should be placed under a statutory duty not to discriminate unfairly against a disabled pupil, for a reason relating to his or her disability, in the provision of education. There should be a defence for acceptable less favourable treatment. The pupil's parents should have a right of redress.
- 4.5 Providers of school education should be placed under a statutory duty to review their policies, practices and procedures and make reasonable adjustments to any that discriminate against disabled pupils for a reason relating to their disability.
- 4.6 Where a policy, practice or procedure places an individual disabled pupil at a substantial disadvantage in comparison with pupils who are not disabled, the provider of school education should be under a statutory duty to make a reasonable adjustment so that it no longer has that effect. The pupil's parents should have a right of redress.
- 4.7 Where a physical feature places an individual disabled pupil at a substantial disadvantage in comparison with pupils who are not disabled, the provider of school education should be under a statutory duty to take reasonable steps to provide education using an alternative method, so that the disabled person is no longer at a substantial disadvantage. The pupil's parents should have a right of redress.
- 4.8 A separate Code of Practice should be produced on school education in relation to the proposed new rights.
- 4.9 The rights conferred by education legislation for pupils to have their special educational needs identified and met, and in England and Wales, the right to appeal to the Special Educational Needs Tribunal, should be maintained. There should be a review of the measures in the SEN Action Programme to assess their effectiveness in meeting the needs of children with SEN/disability, including access to auxiliary aids and services.
- 4.10 Providers of school education should be placed under a statutory duty to plan to increase accessibility for disabled children to schools. This duty should cover both

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<sup>158</sup> LEAs, maintained schools, non-maintained special schools, independent schools and pupil referral units

adjustments for physical access, including those for children with sensory impairments, and for access to the curriculum.

- 4.11 The jurisdiction of the SEN Tribunal should be extended to hear cases brought in relation to the new rights in recommendations 4.4, 4.6 and 4.7.
- 4.12 There should be a public consultation, with all those with an interest, on the practical implementation of the new rights proposed.
- 4.13 A separate section on further, higher and LEA-secured adult education should be included in civil rights legislation to secure comprehensive and enforceable rights for disabled people.
- 4.14 The legislation should have an associated statutory Code of Practice, explaining the new rights.
- 4.15 The Department for Education and Employment should consult with interested parties on improved rights of redress for disabled students in relation to complaints of discrimination, although ultimately the new rights proposed should be exercisable through the courts or tribunals.
- 4.16 Non-legislative measures to improve the rights of disabled people to further and higher education should continue to be developed and implemented to underpin civil rights legislation.
- 4.17 The new rights recommended in further, higher and LEA-secured adult education should be applied to the Youth Service.
- 4.18 The exclusion from the DDA access to services provisions of voluntary organisations providing education, social, cultural and recreational activities and facilities for physical education and training should be ended.<sup>159</sup>

Following publication of the Task Force report, Baroness Blackstone announced that the Government would legislate to address the recommendations on education.<sup>160</sup>

A consultation paper *SEN and Disability Rights in Education Bill*, on the measures to be included in the legislation was issued on 17 March 2000.<sup>161</sup>

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<sup>159</sup> Rec. 4.1 to 4.18, Annex E

<sup>160</sup> DfEE Press Notice, 17 January 2000

<sup>161</sup> *SEN and Disability Rights in Education Bill* Consultation Document, DfEE, National Assembly for Wales, Scottish Executive and Scotland Office, 2000 [www.dfee.gov.uk/sen/news.htm](http://www.dfee.gov.uk/sen/news.htm)

## 5. The consultation document, *SEN and Disability Rights in Education Bill*

The consultation paper set out in detail the Government's proposals for legislation for disability rights in education together with the implementation of the action programme for SEN.

The proposals on rights for disabled people in education were to apply to England, Wales and Scotland - except for the new duty on education providers in the school sector to plan for increased accessibility, which is a devolved matter. In Scotland it will be a matter for the Scottish Executive. It was intended that the proposed planning duty would apply to Wales but that the National Assembly for Wales should determine how it would be implemented. The proposals in the consultation document relating to special educational needs apply to England and Wales only.

Ministers accepted the view of the Disability Rights Task Force that it would not be appropriate simply to lift the education exemption from Part III of the Act, and proposed new duties to be placed on education providers to ensure that disabled children and students had enforceable rights against discrimination in education.

The consultation document proposed that the definition of disability given in the *Disability Discrimination Act 1995* should be used with the proposed new duties. The DDA defines a disabled person as someone who has "a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities." DfEE Circular 20/99, *What the Disability Discrimination Act (DDA) 1995 Means for Schools and LEAs*, provides guidance on what this definition covers. The DDA definition differs from the definition used in education legislation for SEN in schools or learning difficulties in further education. The consultation document observed that not all disabled children would have a special educational need or a learning difficulty, although many would.<sup>162</sup>

The disability rights proposals included:

*Schools and LEAs (local authorities in Scotland)*

- New duties on education providers<sup>163</sup>
  - a) not to discriminate against disabled children, without reasonable justification;
  - b) to take reasonable steps to change policies, practices or procedures that discriminate against disabled children;

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<sup>162</sup> Consultation document, *SEN and Disability Rights in Education Bill*, Annex A, paragraph 5 and 6

<sup>163</sup> Education providers in the school sector are defined in the consultation document on p 7. In England and Wales, education providers are taken to mean LEAs and schools. The responsibility of the new duties falling on governing bodies of maintained schools, LEAs in relation to maintained nursery schools and Pupil Referral Units, and proprietors of independent schools. In Scotland, education providers would be taken to mean local authorities and independent and grant-aided schools.

- c) to take reasonable steps, where a physical feature places a disabled child at a substantial disadvantage compared to a non-disabled child, to provide education using a reasonable alternative method.
- A Code of Practice prepared by the Disability Rights Commission would be issued on the new duties.
  - A new duty on education providers in England and Wales to plan for increasing systematically, over time, the accessibility of schools for disabled children. The consultation document stressed that LEAs would have freedom to determine how to implement this duty. (As noted above, planning for access in Scotland is a matter for the Scottish Executive.)
  - New rights of redress for individuals in relation to these new duties (apart from breaches of the planning duty).

In England and Wales the means of redress for disability discrimination cases against schools and LEAs will be through the Special Educational Needs Tribunal. (Disability cases against further, higher and adult education providers will be through the court system – see below.)

In Scotland the rights of redress in all disability in education cases will be through the sheriff court.

The Disability Rights Commission will be able to conduct formal investigations into disability discrimination in education and will be able to assist parents in disability discrimination cases. The consultation document stated that Ministers did not believe that financial compensation should be awarded in relation to disability discrimination cases but rather that the emphasis should be on securing the appropriate educational remedy.

#### *Post 16 education*

- New duties on education providers<sup>164</sup> not to discriminate against a disabled person, in relation to the provision of education and services provided primarily for students, by:
  - a) failing to make a reasonable adjustment, where any arrangements, including physical features of premises, place him at a substantial disadvantage in comparison to persons who are not disabled; or
  - b) unjustifiably treating him less favourably, for a reason which relates to his disability, than the provider treats others to whom that reason does not apply.
- A Code of Practice prepared by the Disability Rights Commission would be issued on the new duties.

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<sup>164</sup> Education providers in the post-16 sector are defined on pp 14 and 15 of the consultation document as publicly funded further and higher education sector institutions, LEAs, and local authorities in Scotland.

- A disabled person complaining of discrimination would have redress through the county court (in Scotland, the sheriff court). The Government also proposed that there should be voluntary conciliation arrangements.
- Providers of education services to the public who do not fall within the specified definition of “education providers” will be covered by the existing Part III of the DDA since the exclusion of education from the Act’s access to services provisions will be removed.

The consultation document stated that the Government wished to implement the duties as soon as was reasonably practical but that consideration would need to be given as to whether implementation should be staged. For the duties to be implemented, the rights of redress mechanisms would need to be established.<sup>165</sup>

Consultation on the Government’s proposals closed on 28 April 2000. The DfEE do not intend to issue a summary of the responses. Press reports suggested that the proposals were widely welcomed by the voluntary organisations.<sup>166</sup>

In announcing that the Bill would be introduced in the 2000-2001 session, the Secretary of State set out the funds to support the disability proposals in England:

**Mr. Blunkett:** The Government are committed to securing comprehensive civil rights for disabled people. That commitment will be underpinned by a significant investment over the next three years until 2003-04. Over the period 2001-02 to 2003-04 the Government will be investing £220 million through the Schools Access Initiative in England to help improve the accessibility of the school building stock. The spending will be £50 million in 2001-02, rising to £70 million in 2002-03 and £100 million in 2003-04. In addition, over the period 2002-03 to 2003-04, £172 million will be made available to the post-16 sector (Further Education, Higher Education, Adult Education and the Youth Service) to improve accessibility for disabled students and adult learners in England. Provision in Wales and Scotland is a matter for the National Assembly for Wales and the Scottish Executive respectively..<sup>167</sup>

On 7 November 2000 Jane Davidson, Minister for Education and Lifelong Learning at the National Assembly for Wales, welcomed the announcement that the legislation would be introduced early in the next session, and commented on funding the additional costs for schools:

Unlike in England where it is proposed to support these additional costs from the Schools Access Initiative, in Wales LEAs will be able to draw from the significant additional resources that are to be made available from the New Deal: Additional Funding for Schools Programme and from the additional £85 million allocated for the 3 year period from 2001-02 to 2003-04 for school building. Taken together with existing provision this will provide some £300 million for school buildings over the forthcoming 3 year period.

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<sup>165</sup> Consultation document, Annex A, paragraph 12

<sup>166</sup> “new Bill will bring civil rights into schools” *ACE Bulletin* 93 February 2000 p 5

<sup>167</sup> HC Deb 6 November 2000, c 45W

In welcoming the announcement, Jane Davidson said that; " This is an important piece of legislation for those disabled and disadvantaged young people of our society. It will very much strengthen and reinforce some of the key objectives of the National Assembly which are to foster equal opportunities and inclusion."<sup>168</sup>

## **B. The Bill**

### **1. Human Rights Act 1998**

The *Explanatory Notes* carry the statement of compliance with the European Convention on Human Rights.<sup>169</sup>

Peers raised the question of compliance with the Human Rights Act ( HRA ) at various points in the debates, notably on the right of the child to take cases under the DDA to the Special Educational Needs and Disability Tribunal.<sup>170</sup> The Government position was stated on Second Reading:<sup>171</sup>

Several noble Lords raised the issue of compatibility with the Human Rights Act. Some speakers suggested that the fact that claims are brought in the SEN tribunal by the parent and not by the child is not compatible with the Act. My legal advice is that this system is compatible with the Act. Article 6 of the European Convention on Human Rights is the relevant article, but it only applies to claims where people's civil rights and obligations are at issue. Civil rights for convention purposes do not include educational rights which fall squarely in the domain of public law. I am advised that all the rights which the tribunal will rule on under the Bill, SEN and disability, are predominantly public law rights so that Article 6 does not apply.

This question was considered by the Disability Rights Task Force (DRTF) in their paper on civil rights in relation to school education where they noted that in a civil rights context the rights to be enforced might be those of the child rather than the parents.<sup>172</sup> In their final recommendation that the jurisdiction of the SEN Tribunal should be extended to hear cases of disability discrimination, they commented:

We understood that further work would be required on the rights of children to bring cases in their own name and the implications of this for education legislation.<sup>173</sup>

The Government consultation paper on the Bill appeared to leave the question open as it stated that there should be rights of redress for disabled children and their parents.<sup>174</sup>

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<sup>168</sup> <http://www.wales.gov.uk/show.dbs?3A0946AF0001BA380000311100000000>

<sup>169</sup> Bill 55-EN para 144

<sup>170</sup> HL Deb 20 February 2001 cc 781-3

<sup>171</sup> HL Deb 19 December 2000 c 708

<sup>172</sup> DRTF 18/98 Section B

<sup>173</sup> *From Exclusion to Inclusion* DRTF report December 1999 Chapter 4 para 34

<sup>174</sup> *SEN and disability rights in education Bill: consultation document* DfEE 2000 Annex A para 17



The National Disability Council and the National Institute for Deaf People have published a paper on the impact of the Human Rights Act on disabled people.<sup>175</sup> They consider very briefly the question of the child's individual rights, suggesting that a requirement that the SEN Tribunal consider the child's views would be sufficient to comply with HRA. The Government response to that paper, as set out in a Written Answer from Margaret Hodge, was that it was an interesting report and they were considering how to make best use of the material it contained.<sup>176</sup>

## 2. Costs

The Government's assessment of the costs of the disability proposals for the public sector in England, Wales and Scotland are set out in some detail in the *Explanatory Notes*.<sup>177</sup> The *Notes* include an account of the funding to be made available in England through the Schools Access Initiative which has run since 1996 but is to be substantially increased over the next three years. A DfEE press notice issued on 13 March 2001<sup>178</sup> gives details of allocations to LEAs for 2001-2 and to post-16 sectors from 2002-2004.

The Regulatory Impact Assessment (RIA) issued with the Bill covers the financial impact on the private sector: independent schools, non maintained and independent approved special schools ( in Scotland grant-aided schools )– voluntary youth services , private and voluntary providers of early years education and other voluntary providers of education.<sup>179</sup>

In summary, the RIA suggests a maximum of £1 million per annum for all schools, giving an average cost per school of approximately £400 per annum. Costs are expected to be lower in Scotland as the planning duty does not apply.

For voluntary youth organisations, recurrent costs are likely to range between £50 and £300 per year. The total estimate for non-recurrent costs for the whole voluntary youth services sector is in the range of £5.5m-£8.6m with total recurrent costs of £0.7m-£0.9m per year.

The Bill will only affect those private and voluntary providers of nursery education who do not also provide childcare, since childcare is already subject to Part III of the DDA. They may, in practice, already be covered in part because playgroups, for example, often take place in church halls which are already subject to Part III of the DDA. For those providers coming within the scope of this Bill, the RIA estimates total non recurrent costs to the sector of between £0.33m and £0.53m and recurrent costs of between £0.18m and £0.24m. There are approximately 18,000 private and voluntary providers of early years education so the RIA suggests that the average cost per provider would be insignificant.

The voluntary sector providers cover a wide range of organisations from residential and community colleges to national community providers where education is combined with

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<sup>175</sup> *Human rights and disability*, Rowena Daw. National Disability Council and RNID, 2000 pp summary and pp 55-6

<sup>176</sup> HCDeb 9 May 200 c 375W

<sup>177</sup> Bill 55-EN para 130-140

<sup>178</sup>“£50m for access in schools-Smith” DfEE PN 13 March 2001

<sup>179</sup> RIA 00/152

social activity such as the Women's Institute. The estimate for total non recurrent costs to the sector is between £1.5m and £3.5m with recurrent costs between £0.5m and £0.7m. The diverse nature of the sector makes estimates at the individual level difficult but the RIA suggests non recurrent costs of £750 and recurrent annual costs of not more than £200.

Baroness Blatch and Lord Baker of Dorking questioned the Government's assessment of the costs of inclusion. Lord Baker described the funding requirements of the Bill as 'astronomic in educational terms' and felt that the Government had not estimated the financial consequences of what they were doing.<sup>180</sup> Baroness Blatch also felt that the provisions would be costly to implement and called on the Government to make a clear commitment to fund the Bill in full. Lord Davies' response was that the duty was to plan to increase accessibility over time. Plans should be consistent with available resources.<sup>181</sup> Baroness Warwick, declaring an interest as chief executive of Universities UK, welcomed the Bill but warned that work undertaken in the HE sector with a number of pilot institutions suggested that the costs of implementing the Bill might be as large as £250 million rather than the £56 million quoted.<sup>182</sup>

The Local Government Association (LGA) has drawn attention to the need for adequate resources to be provided to those responsible for implementing the new arrangements.<sup>183</sup> The National Association of Schoolmasters Union of Women Teachers (NASUWT) felt that the absence of a central strategic funding source for schools could seriously hinder the ability of mainstream schools to deliver the Government's inclusion agenda.<sup>184</sup>

Disability organisations in the main accepted the announced funding as going a long way towards implementing the Government's plans.<sup>185</sup>

### 3. **Extent**<sup>186</sup>

4. The provisions on rights for disabled people in education will extend to England, Wales and Scotland since equal opportunities issues are matters reserved to the UK Parliament under the Scottish and Welsh settlements. The exception is the duty to produce an accessibility strategy or plan, which, although intended to help disabled pupils, primarily relates to the organisation and administration of schools and hence is a devolved matter. This aspect of the Bill will therefore not extend to Scotland, and it will be for Scottish Executive Ministers to consider whether to apply this policy in Scotland. This planning duty will extend to Wales though it will be for the National Assembly for Wales (NAW) to consider implementation.

5. This Bill will not extend to Northern Ireland since responsibility for equal opportunities matters has been transferred and is now a matter for the Northern Ireland Assembly.

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<sup>180</sup> HL Deb 19 December 2000 cc 659-663

<sup>181</sup> HL Deb 20 February 2001 cc 768-773

<sup>182</sup> HL Deb 19 December 2000 cc 668-9

<sup>183</sup> LGA briefing 234

<sup>184</sup> NASUWT response to the SEN and Disability Rights in Education Bill consultation 20 April 2000

<sup>185</sup> Special Educational Consortium briefing on the Bill.

<sup>186</sup> Bill 55-EN para 4 and 5

The section below on structure draws attention to those clauses which do not apply to Scotland and gives a reference to the House of Lords paper which lists the powers to be exercised by the National Assembly.

SKILL<sup>187</sup> in Northern Ireland have been told by Dr Sean Farren MLA Minister of Higher and Further Education, Training and Employment that the Northern Ireland Executive Committee would introduce similar legislation in due course in order not to disadvantage students in Northern Ireland.

#### **4. Structure**

Part II of this Bill: *Disability Discrimination in Education* amends the *Disability Discrimination Act 1995*. Clauses 10-32 insert new sections into Part IV of the *Disability Discrimination Act 1995*. This part of the DDA currently contains the requirements on publishing information about arrangements for disabled students. Subject to the passage of this legislation, Part IV will now start with Chapter I: Schools (Clauses 11-25 and Schedule 2 and paragraph 1 of Schedule 3) then Chapter II: Further and Higher Education (Clauses 26-33 and Schedules 3 para 2, 4, 5 and 6).

Clauses 14,15 and 22( accessibility plans); Clauses 17 - 19 (SENDIST) and Clauses 20-21(admissions and exclusions) do not apply to Scotland.

Clause 23 ( enforcement procedure in Scotland) only applies to Scotland

Clause 34 amends certain Education Acts and part of the existing Part IV of the DDA.

There are eighteen regulatory powers in Parts II and III of this Bill as originally drafted. They are listed in the Department for Education Employment memorandum to the Select Committee on Delegated Powers.<sup>188</sup> All the powers with the exception of commencement Orders are subject to the negative procedure. The House of Lords paper provides a convenient guide to those Regulations and Orders which will be made by the National Assembly of Wales under its own procedures and those regulations exercisable in relation to Wales with the agreement of the NAW. It also lists the guidance to be produced by the Secretary of State and by the NAW.<sup>189</sup>

#### **5. Reaction**

The Bill has been welcomed by disability organisations and, on Second Reading, by Baroness Blatch for the Conservative Party and Baroness Sharp of Guildford for the Liberal Democrats.<sup>190</sup> All speakers on Second Reading welcomed the disability provisions in principle, some very warmly. Baroness Brigstocke, however, was concerned that a policy so

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<sup>187</sup> National Bureau for Students with Disabilities

<sup>188</sup> Select Committee on Delegated Powers and Deregulation 3<sup>rd</sup> Report HL Paper 9 of 2000-01

<sup>189</sup> References are to HL Bill 3

<sup>190</sup> HL Deb 19 December 2000 cc 640-650

geared to inclusion would not meet all children's individual needs.<sup>191</sup> In the succeeding stages there was lengthy discussion of the detail of the complex provisions.

## **C. The Bill and debates in the Lords: Schools**

### **1. Duties on schools: Clauses 11-13 and Schedule 2**

Clauses 11-13 and Schedule 2 place new duties on all schools in England, Wales and Scotland prohibiting them from discriminating against disabled pupils and requiring them to take reasonable steps to ensure disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.

Clause 11 and Schedule 2 set out the prohibition on discrimination in relation to admissions, education and associated services, and exclusions. It places the duty on the responsible body: for maintained schools in England and Wales, the governing body or the LEA, according to which has the function in question e.g. admissions to community schools are normally a matter for the LEA, while voluntary and foundation schools control their own admissions. In independent schools and non-maintained special schools, the duty is on 'the proprietor', normally the governing body. For schools in Scotland, other than self-governing schools, the duty is placed on the education authority.

The responsible body for each type of school in England and Wales and Scotland is defined in Schedule 2.

The new duties are being placed on governing bodies at a point when the Government has been consulting on removing some of their duties. The *Consultation on School Governing Bodies*<sup>192</sup> closed on 14 March 2001. The proposals are that some staffing, dismissal and grievance decisions should be taken by the head teacher rather than the governing body. It is also proposed to remove from the governing body the responsibility for carrying out health and safety risk assessments. At the same time the consultation paper sought the views of governors and others on the new duty under Clause 14 of this Bill to prepare an accessibility plan.

Educational organisations not listed in Schedule 2 eg private nursery schools and pre-school playgroups will be covered by the existing Part III of the DDA relating to goods and services following the repeal of the exclusion in Section 19 of that Act.<sup>193</sup>

Clause 11 extends the duty not to discriminate to cover people who are not disabled.<sup>194</sup> This extends the protection against victimisation in the DDA<sup>195</sup> to the new education provisions. It could, for example, protect the siblings of a disabled pupil against any discrimination as a result of a case being taken by the parents against the school.

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<sup>191</sup> *ibid* cc 666-8

<sup>192</sup> DfEE 2000 [www.dfes.gov.uk/consultations](http://www.dfes.gov.uk/consultations)

<sup>193</sup> Section 19(5)(a) to (ab) and 6 repealed by Section 42(6) and Schedule 9 of this Bill

<sup>194</sup> Clause 11(6)

<sup>195</sup> s.55

The Secretary of State is enabled to make regulations for England, Wales and Scotland<sup>196</sup> prescribing what should be covered by the duties. The Explanatory Notes<sup>197</sup> make it clear that after school clubs and trips will be covered. Matters to be excluded are those such as adult education provided by schools which is covered later in the Bill<sup>198</sup> and services to parents which are already covered by Part III of the DDA.

Amendments raised in Grand Committee sought to exempt independent schools from the provisions; to allow them to make an extra charge; and to limit the planning duty to part of the buildings.<sup>199</sup> The Government reply made it clear that all provisions would apply to independent schools with capital grants available only in very exceptional cases.<sup>200</sup>

On Report Baroness Blatch returned to points she had made in Committee seeking to clarify the nature of discrimination in the Bill i.e. that it was discrimination on the grounds of a person's disability. She withdrew her amendment accepting the clarification by Lord Davies of Oldham for the Government, that that was the case.<sup>201</sup> She felt his statement could be relied upon in *Pepper v Hart* terms.<sup>202</sup>

A further amendment raised on behalf of Lord Northbourne was also withdrawn following clarification by Lord Davies that it was not the intention of the Government that every school in the land should be able to provide for every type of disability or need, however profound.<sup>203</sup>

This statement is in line with a local government ombudsman's finding that it was not unreasonable for an LEA to have only some of its secondary schools adapted for wheelchair access.<sup>204</sup>

Lord Davies in another exchange, also stressed again the anticipatory nature of the duties both in Clause 11 and Clause 26 relating to further and higher education i.e. plans must be made in order not to discriminate against potential pupils or students.

## 2. Definitions: Clause 12

Clause 12 defines discrimination as, without justification, treating a disabled person, for a reason relating to his disability, less favourably than someone else to whom the reason does not or would not apply. It is also discrimination not to take the reasonable steps set out in Clause 13<sup>205</sup>. This part of the definition is in line with section 5 of the DDA<sup>206</sup> except for the

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<sup>196</sup> HL Deb 30 January 2000 CWH 166

<sup>197</sup> paragraph 75

<sup>198</sup> Clause 29

<sup>199</sup> HL Deb 30 January 2001 CWH 156-161

<sup>200</sup> HL Deb 30 January 2001 CWH 161

<sup>201</sup> HL Deb 20 February 2001 cc 732-4

<sup>202</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 If primary legislation is ambiguous or obscure, the decision in this case allows the courts in certain circumstances to take account of statements made in Parliament by Ministers

<sup>203</sup> HL Deb 20 February 2001 cc 734-5

<sup>204</sup> Complaint against Nottinghamshire County Council (No 97/C/1649)(1998) 13 October (CLA)

<sup>205</sup> Clause 12 (1) and (2)

inclusion of the phrase “to his detriment” in section 28B(2). It requires parents bringing proceedings to show not only that the general duty was breached but also that this breach was to the pupil’s detriment.

The rest of the clause covers the other departure from the DDA definition; a defence of not knowing of the pupil’s or prospective pupil’s disability.

The Bill does not define ‘disability’. The Explanatory Notes<sup>207</sup> refer to the definition in section 1 of the DDA of a disabled person as someone who has “a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.” Baroness Blackstone in Committee cited this definition as the one used for the purpose of the Bill and referred to the expansion and clarification of that definition in Schedule 1 of the DDA regulations and the statutory guidance.<sup>208</sup>

The recent Government response to the Disability Rights Task Force (DRTF) report, *Towards Inclusion – civil rights for disabled people*<sup>209</sup> has accepted the extension of the definition of disability to HIV infection from the time of diagnosis and cancer from the point of its diagnosis as a condition likely to require substantial treatment. The changes are to be made as soon as legislative time allows.<sup>210</sup>

The current very wide definition of disability was summarised in the report:

It covers people with obvious disabilities, including people with mental illness, arthritis, epilepsy, diabetes, heart conditions and so on. Overall, some 8.5 million people are covered by the definition in the UK.<sup>211</sup>

The question of the overlapping definitions of disability and special educational needs arose in Grand Committee on an amendment from Lord Lucas to regard every child with a statement of special educational needs as disabled. Baroness Blackstone’s response sets out the position for schools:

**Baroness Blackstone:** To include all children with statements within the definition of disabled persons under the 1995 Act would not be consistent with the intentions of the learning disability provisions in the Bill. Although many children with statements are disabled, some are not, and will make sufficient progress with extra help, after a time, not to require a statement.

A person has a disability if he has a mental or physical impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. A special educational need is not necessarily long-term, and it may be remediable with the right help. SEN legislation and disability legislation serve different purposes. The first is about provision to meet special educational needs, and the second is about preventing discrimination on the grounds of disability.

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<sup>206</sup> Bill 55-EN para 30

<sup>207</sup> Bill 55-EN Glossary p 30 and para 35

<sup>208</sup> *Disability Discrimination (Meaning of Disability) Regulations 1996* SI 1996/1455; DDA 1995: *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability*

<sup>209</sup> DfEE March 2001

<sup>210</sup> para 3.7.-3.12

<sup>211</sup> para 3.4

In the past, a person who has had a disability is entitled to protection under the DDA, even if that person is no longer disabled. If this amendment were accepted, a child who had been statemented, even for a brief period, would be protected by the DDA for the rest of his or her life.

Furthermore, schools are already very familiar with the SEN framework in applying the new disability duties. It is more consistent and practical to work alongside that framework rather than to try to shift the boundaries. We want to avoid a school having to spend time deciding which piece of legislation applies to a child's needs before taking action. Similarly, the purposes of the disability provisions in the Bill and the SEN provisions in the Education Act are different. The former seek to ensure that disabled people are not discriminated against throughout their life, as children and as adults, while the latter seek to provide additional help to enable children with learning difficulties to learn and progress while they are at school.

The Disability Rights Commission is charged with producing codes of practice on the new disability duties. We will invite the DRC, in drawing up the codes, to set the new schools duties in the context of the SEN framework, where that is appropriate.

The present definitions of SEN and disability are different but complementary frameworks. They underpin and allow a consistency of approach both to providing support for children with learning difficulties and preventing discrimination on grounds of ability.<sup>212</sup>

Amendments proposed in Committee related to the duty on schools (and colleges) to inform themselves about the disabilities and special needs of pupils and prospective pupils and the child's right to confidentiality. They were rejected by the Government on the grounds that there was already an anticipatory duty and, as in previous exchanges earlier in the Bill, that the parent's voice must be paramount.<sup>213</sup>

### **Reasonable Steps**

Clause 13 sets out the duty on responsible bodies to take reasonable steps to ensure that disabled pupils are not substantially disadvantaged in comparison to pupils who are not disabled. The duty extends to disabled prospective pupils in relation to a school's admission arrangements. The duty does not require the removal or alteration of a physical feature or the provision of auxiliary aids or services.<sup>214</sup> The Explanatory Notes and Government statements in the Lords<sup>215</sup> make it clear that the statement of special educational needs (in Scotland, the record of needs) provides for aids and adaptations for pupils in schools. The Earl of Mar and Kellie, however, on behalf of the consortium Children in Scotland, asserted that the record of needs in Scotland did not provide for adaptations.

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<sup>212</sup> HL Deb 30 January 2001 CWH 169-170

<sup>213</sup> HL Deb 30 January 2001 CWH 170-176

<sup>214</sup> Clause 13 Section 28C (2)

<sup>215</sup> HL Deb 30 January 2001 CWH 185

The clause also requires schools, in making decisions on reasonable adjustments, to take into account the wishes of the parent or the child to have the nature or the existence of the disability treated as confidential.<sup>216</sup>

As originally drafted, this clause allowed only the parent to make a “confidentiality request.”<sup>217</sup> It was amended by the Government on Third Reading following a commitment made on Report.<sup>218</sup> Amendments moved by Baroness Blatch in Committee and on Report had sought this extension.<sup>219</sup>

Regulations made under this section will set out the circumstances in which it is either reasonable or not reasonable for the school to take certain prescribed steps. They will also identify steps which it will always be reasonable for a school to take and those which it will never be reasonable. These regulations will be made by the Secretary of State for England, Wales and Scotland. In response to Conservative amendments to remove the regulatory powers, Baroness Blackstone told their Lordships that the Government had no plans to take up the powers upon commencement. They wished to have the flexibility to deal with any particular problem while keeping the reasonable adjustment duty under review.<sup>220</sup> The DfEE memorandum to the Delegated Powers and Deregulation Committee set out examples of the sorts of matters the Department envisages being covered by the regulations:<sup>221</sup>

The Department considers that, where a child’s disability requires him to self-medicate while at school, it is reasonable for a school to have to provide him with a private facility for him to administer the medication. Where full compliance with the school uniform policy would place a disabled child at a substantial disadvantage (in comparison with non-disabled children), the Department considers it would be reasonable for the school to have to adapt the school uniform policy in respect of that child. In the case of a very young diabetic child whose disability meant he had to receive injections with a hypodermic needle during the course of the school day, the Department is of the view that it would be reasonable for a school to have to provide him with a secure place within the school where the needle could be stored while not being used (instead of requiring him to carry it around with him all day). On the other hand, the Department considers that it would never be reasonable for a school to have to alter its class size policy to reduce class sizes, or to reduce the length of the school day.

The Clause originally set out the factors which a school had to have regard to in order to decide whether it was reasonable to take a particular step.<sup>222</sup> Following arguments put forward at all stages by Baroness Sharp for the Liberal Democrats, an amendment from her was accepted on Third Reading.<sup>223</sup> It transferred the detailed listing to the code of practice to be made by the Disability Rights Commission.<sup>224</sup> Baroness Sharp had objected to the wording of

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<sup>216</sup> Clause 13 Section 28C (5)- (7)

<sup>217</sup> HL Bill 3 2000-01 Clause 12(7)

<sup>218</sup> HL Deb 1 March 2001 cc 1329-30

<sup>219</sup> HL Deb 30 January 2001 CWH 202-3; 20 February 2001 cc 760-1

<sup>220</sup> HL Deb 20 February 2001 c 745

<sup>221</sup> HL Paper 9 2000-01 Annex 2 para.18

<sup>222</sup> HL Bill 18 Clause 12 Section 28C (4) (a)-(g)

<sup>223</sup> HL Deb 1 March 2001 cc 1326-8

<sup>224</sup> Clause 36 (2)



the list of factors, particularly the reference to the need to maintain academic, musical, sporting and other standards, and its presence on the face of the Bill. Baroness Blackstone accepted the amendment because of the strength of feeling expressed and the fact that the DRC had confirmed that all the factors would be covered in the code of practice.

Attempts by Conservative peers to amend the Clause to remove ‘substantial’ in relation to admissions, on the ground that no disadvantage which related to disabled applicants alone should apply, were not accepted. Baroness Blackstone told the House that the Disability Rights Task Force (DRTF) had recommended “substantial disadvantage” as the trigger for the reasonable adjustment duty and the Government, having accepted that, did not wish to consider any other trigger for even part of the duty.<sup>225</sup>

Amendments by Lord Ashley, the Earl of Mar and Kellie and Baroness Blatch to extend the scope of the Bill to provide aids and services in certain circumstances were also rejected by the Government. Baroness Blackstone maintained that the SEN framework and the planning duty would ensure that disabled children were not disadvantaged.<sup>226</sup>

### **3. Accessibility strategies and plans: Clauses 14-15 - England and Wales only**

Clauses 14 and 15 place duties on LEAs and schools in England and Wales to plan strategically and make progress in increasing physical accessibility to schools’ premises and to the curriculum. The *Explanatory Notes* set out the Government’s expectations.<sup>227</sup> The duties do not extend to Scotland. The DfEE memorandum to the Select Committee on Delegated Powers and Deregulation explains why this is the only part of the disability provisions not to apply to Scotland:<sup>228</sup>

The exception is the duty to plan for accessibility, which, although intended to help disabled pupils, primarily relates to the organisation and administration of schools and hence is a devolved matter. This aspect of the Bill will therefore not apply to Scotland.

Baroness Blackstone has made it clear in her references to the planning duty that “it is entirely up to the Scottish Executive to bring forward legislation for a planning duty, if it feels fit to do so.”<sup>229</sup>

Scottish Ministers are currently considering how best to introduce similar duties in Scotland.

Clause 14 requires LEAs and schools to plan to increase disabled pupils’ participation in the curriculum; to improve the physical accessibility of school premises; to provide information which is normally provided in writing in other appropriate forms. The plans (“accessibility strategies” for the LEAs”; “accessibility plans” for schools) must be in writing, must be kept under review and revised if necessary, and must be implemented, in the case of maintained schools by the governing body. All these functions may be inspected by OFSTED. The

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<sup>225</sup> HL Deb 20 February 2001 cc 737-740

<sup>226</sup> HL Deb 20 February 2001 cc 740-743

<sup>227</sup> Bill 55-EN para 80-85

<sup>228</sup> HL Paper 9 2000-01 Annex 2 para 4

<sup>229</sup> HL Deb 20 February 2001 c 743

school plan must be published in the governors' annual report. The section inserted in the DDA by this clause, section 28D, amends the requirement in the *Education Act 1996* to include information about disabled pupils in the governors' annual report to cover the accessibility plan.

The DfEE is currently consulting on proposals to change the law so that schools no longer have to produce both school prospectuses and the governors' annual report to parents. Instead schools will be required to produce a single document the *Governors' Report & School Prospectus*, and the amount of information which has to be published will be reduced.<sup>230</sup> Subject to the outcome of consultation, which closes on 8 June 2001, the proposed changes will come into force from the 2001-02 school year. The consultation paper refers to this Bill although in its list of requirements to be kept it seems to assume a shorter list than the provisions in the inserted Section 28D (2):

Information about the school's policy on providing for children with SEN and any changes to the policy in the last year.

Details of facilities to assist access to the school by pupils with disabilities.

A description of the arrangements for the admission of pupils with disabilities.

Details of steps to prevent disabled pupils being treated less favourably than other pupils.

Note: We propose that the last two items of information should no longer be required once the provisions of the current SEN and Disability Bill have come into force. In practice, this would mean that they would be required for another year or so.<sup>231</sup>

The *Explanatory Notes* on the Bill state that a school's accessibility plan will be on a far smaller scale than that of the LEA.

Regulations made under this section by the Secretary of State for England and the National Assembly for Wales will prescribe the period to be covered by the strategy or plan and may prescribe further strategies or plans. There is also a regulatory power to define education and associated services for the purposes of this section. The DfEE memorandum to the Select Committee on delegated Powers and Deregulation states the Department's intention to consult with representative organisations as to what constitutes realistic and workable periods. The defining power is necessary in order to exclude from the planning duty increasing accessibility to services provided by the school which take place away from the school.<sup>232</sup>

The Clause as originally drafted did not include the power to prescribe further strategies or plans or the inclusion of the new school and LEA functions in OFSTED inspections. These were added by the Government in Committee in order to 'make the planning duty more rigorous' and to reflect discussions about the issues on Second Reading.<sup>233</sup> Baroness Sharp had described the clauses at that stage as 'very weak'.<sup>234</sup> Government amendments agreed in

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<sup>230</sup> *School Prospectuses and Governors' Annual Reports* [www2.dfee.gov.uk/consultations/consult-doc.cfm](http://www2.dfee.gov.uk/consultations/consult-doc.cfm)

<sup>231</sup> *ibid* Annex B

<sup>232</sup> HL Paper 9 2000-01 Annex 2 para 20 and 21

<sup>233</sup> HL Deb 6 February 2001 CWH 217-220

<sup>234</sup> HL Deb 19 December 2000 cc 647-8

Committee had also clarified the power of the National Assembly to make regulations in this area.<sup>235</sup>

The Clause was further amended by the Government on Third Reading to insert the requirement for accessibility strategies and plans to cover participation in the curriculum and alternative methods of providing information. A commitment had been made on Report in response to amendments tabled by Lord Rix to ensure that planning for access to the curriculum was on the face of the Bill.<sup>236</sup> The amendment on providing information in accessible formats was in response to amendments tabled by Baroness Wilkins and Lord Ashley who had raised on Report and in Committee the problems faced by blind and partially sighted pupils. The amendments had had the support of the RNIB.<sup>237</sup>

Issues which were raised during the Lords stages but made no headway included the Conservative concern over the funding available to implement LEA strategies. Baroness Blatch wanted a costed strategy with funding underwritten by capital grant.<sup>238</sup> She questioned the financial appraisal assertion that the Bill would have very few manpower implications in relation to SEN.<sup>239</sup> On Report, she drew attention to the Schools Access Initiative funding as representing about £70 million a year spread over 25,000 schools.<sup>240</sup> The Government's response has been that the proposed amendments would offer an excuse to LEAs and schools not to act and to blame their inaction on the lack of a direct payment from Government. There had been no complaint about the sum of £220 million to be made available over three years from "schools, LEAs, the lobby or their representatives".<sup>241</sup>

Another amendment which was withdrawn came from Lord Morris of Manchester with the support of the Centre for Studies on Inclusive Education (CSIE). He sought to include in the Bill a set period within which all mainstream schools would be able to provide for all disabled children in their area. In response Lord Davies of Oldham for the Government had referred to the practical difficulties but assured Lord Morris that the Government would "seek to hit those objectives by a slightly different route".<sup>242</sup> Baroness Blatch sought to have the planning duty extended to settings providing pre-school education recognised by an early years development partnership. This was rejected by Government on the grounds that most early years providers had been covered by Part III of the DDA since December 1996 and the Bill would bring all of them under the DDA. Part III included anticipatory duties for making changes to physical features and providing aids and the Government did not wish to place an additional duty on those settings to plan.<sup>243</sup>

Clause 15 requires LEAs and governing bodies to have regard in preparing their plans to the need to allocate adequate resources and to any guidance that may be issued by the Secretary of State or the National Assembly. Independent schools, who are not covered by the duty of

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<sup>235</sup> HL Deb 23 January 2001 CWH 62

<sup>236</sup> HL Deb 20 February 2001 cc 763-765

<sup>237</sup> HL Deb 6 February 2001 CWH 233-237; 20 February 2001 cc778-781

<sup>238</sup> HL Deb 1 March 2001 cc 1333-1337

<sup>239</sup> HL Bill 3 Explanatory Notes para 141

<sup>240</sup> HL Deb 20 February 2001 cc768-773

<sup>241</sup> HL Deb 1 March 2001 cc 1334-7

<sup>242</sup> HL Deb 20 February 2001 cc 765-8

<sup>243</sup> HL Deb 20 February 2001 cc 773-4

publication in Clause 14, must make their plans available for inspection by anyone who wants to see it.

The Clause was amended by the Government on Report to remove a subsection confirming that accessibility strategies and plans had the same meaning as in the previous Clause.<sup>244</sup>

Lord Northbourne moved and then withdrew amendments in Committee in relation to independent schools. He told the House that the Independent Schools Council was not entirely happy about the aspects of the Bill which related to accessibility. He wanted to know whether an independent school could charge for extra services e.g. extra teachers for dyslexic pupils. He also asked who would pay for expensive alterations and what sanctions would be imposed if independent schools fell behind with carrying out their accessibility plan. Lord Davies, responding for the Government, said that independent schools must plan within their anticipated financial resources. In some specific circumstances they could charge for extra services. The Bill empowered the Secretary of State to direct the proprietor to take appropriate action.<sup>245</sup>

Baroness Blatch sought confirmation that before issuing guidance the Secretary of State and the National Assembly would consult the Disability Rights Commission and was assured that that would happen.<sup>246</sup>

#### **4. Residual duty of education authorities: Clause 16**

Clause 16 makes it unlawful for LEAs in England and Wales and education authorities in Scotland to discriminate against a disabled pupil or prospective pupil in carrying out any of their functions under the Education Acts. This covers functions other than those relating to schools in Clause 11 which will take precedence. There is a power to make regulations to prescribe exceptions to the scope of the duty.

The Clause was amended by the Government in Committee to include 28K(1) relating to admissions decisions in 28G (5) and thus making it covered by this Clause.

#### **5. Enforcement procedures in England and Wales and Scotland**

Clauses 17 - 25 cover the procedures for the enforcement in England, Wales and Scotland of the duties placed on schools and education authorities in Clauses 11-16. Clauses 17-22 relate to England and Wales and Clause 23 to Scotland. Clauses 24-25 cover contracts and interpretation and relate to England, Wales and Scotland.

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<sup>244</sup> HL Deb 20 February 2001 CWH 778

<sup>245</sup> HL Deb 6 February 2001 CWH 228-231

<sup>246</sup> HL Deb 6 February 2001 CWH 231-2

## 6. Special Educational Needs and Disability Tribunal: Clauses 17 - 19 and Schedule 3 para 1

Clauses 17-19 provide for the extension of the name, jurisdiction and powers of the Special Educational Needs Tribunal (SENT) to become the Special Educational Needs and Disability Tribunal (SENDIST) and make certain procedural provisions.<sup>247</sup>

Clause 17 inserts a new section in the DDA which changes the name of the SENT to the SENDIST from commencement date and extends its jurisdiction to hear cases of disability discrimination in schools. It also provides that there is no requirement to consult disability organisations on appointments to the lay panel.

The SENT consists of a chairman and two members selected from a lay panel. The requirements for members of the lay panel are set out in Regulations.<sup>248</sup> The Secretary of State or the National Assembly respectively must be satisfied that members have knowledge and experience of children with special educational needs and are not eligible for appointment to the chairmen's panel i.e. not legally qualified. The members of the chairmen's panel are appointed by the Lord Chancellor.<sup>249</sup>

Clause 18 sets out the circumstances in which a parent can make an appeal to SENDIST. Claims of discrimination in relation to admissions or permanent exclusions may not be taken to SENDIST since other procedures apply (see Clauses 19 and 20). All other claims of discrimination against a child in a way made unlawful by this Chapter (relating to schools) may be made to the Tribunal by the child's parent. According to the *Explanatory Notes* this will include claims relating to temporary exclusions.<sup>250</sup> It is the responsible body (see Schedule 2) that such claims are made against and the Clause refers to section 58 of the DDA which makes employers and principals liable for the actions of employees and agents. If the Tribunal considers the claim well founded it may order any remedy it thinks appropriate with the exception of financial compensation. The *Explanatory Notes* give a list of examples of the types of order SENDIST might make.<sup>251</sup> This covers such possibilities as the provision of extra tuition or requiring an independent school to admit a disabled pupil.

There were unsuccessful attempts at all stages in the Lords to amend the Clause on two issues: to allow the child to take the claim to the Tribunal and to allow the Tribunal to award financial compensation.

Lord Lucas raised the question of the rights of the child on Second Reading suggesting that to give rights only to parents was indefensible.<sup>252</sup> Lord Ashley moved an amendment in Committee to let the Tribunal decide whether a child could bring a claim, Lord Lucas having

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<sup>247</sup> see Part 1 of this paper for the background to SENT and changes proposed in relation to SEN

<sup>248</sup> *Special Educational Needs Tribunal Regulations 2001* SI 2001/600 Laid 28 February 2001; coming into force 1 September 2001 Reg 3

<sup>249</sup> *Education Act 1996* s.333(3)

<sup>250</sup> Bill 55-EN para 90

<sup>251</sup> Bill 55-EN para 91

<sup>252</sup> HL Deb 19 December 2000 c 697

moved a similar one in relation to Part I of the Bill.<sup>253</sup> In rejecting Lord Ashley's amendment, which was supported by Baroness Blatch and Lord Beaumont, Baroness Blackstone referred to the Government's intention to change the procedure of the Tribunal to ensure that the child's views are heard.<sup>254</sup> Baroness Sharp returned to the issue on Report claiming that the right of the child to claim was necessary to give an effective remedy for the breach of the right to an education. She cited the Human Rights Act and Articles 13 and 14 of the European Convention on Human Rights. Baroness Blackstone responded that the Government believed that the parents' right to bring disability discrimination cases in relation to school education was the best way to secure effective determination of a child's rights.<sup>255</sup> Baroness Blackstone had cited her legal advice on Second Reading to the effect that educational rights for convention purposes were not civil rights but fell into the domain of public law.<sup>256</sup>

The issue of financial compensation ran from Second Reading to Report. Lord Ashley, Lord Morris and Lord Addington referred to it on Second Reading. Lord Morris said that many of the disability organisations wanted awards of damages, while Lord Ashley felt that financial sanctions had a deterrent effect.<sup>257</sup> He moved an amendment in Committee, supported by Baroness Wilkins and Lord Addington, to the effect that compensation should exist in addition to educational remedies. Baroness Blackstone accepted that there were precedents in sex and race discrimination legislation but felt that the introduction of such a remedy into the working of the tribunal would undermine its ability to be informal and user-friendly and might create a culture of litigation.<sup>258</sup> Similar amendments were moved on Report by Lord Addington and Baroness Wilkins on behalf of Lord Ashley, who limited the payment of compensation to "exceptional circumstances".<sup>259</sup> They were again rejected, as were their amendments on Third Reading.<sup>260</sup>

A final issue on this Clause was aimed at ensuring that discrimination resulting in personal hurt and loss of experience did not happen again. The amendment moved by Baroness Sharp originated with the Special Educational Consortium. In moving it on Third Reading, the baroness said that SEC had welcomed the Minister's assurance that, although the Tribunal had no powers to order alterations to accessibility plans and strategies, the Secretary of State or NAW could call them in and direct alterations. She asked how this would happen. In reply Baroness Blackstone outlined the mechanisms:<sup>261</sup>

There are three mechanisms that relate either to the enforcement or to the monitoring of the planning duty. I hope this answers the question of the noble Baroness. First, enforcement of the duty to plan will, in the first instance, be by the Secretary of State in relation to England, and the National Assembly for Wales in relation to Wales. The Secretary of State or the National Assembly will have the power to call in an LEA's strategy or a school's plan and will ultimately direct it to take the necessary action if it

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<sup>253</sup> HL Deb 30 January 2001 cc 144-7

<sup>254</sup> HL Deb 6 February 2001 CWH 239-242

<sup>255</sup> HL Deb 20 February 2001 cc 781-3

<sup>256</sup> HL Deb 19 December 2000 c 708

<sup>257</sup> Ibid cc 655-6;666;700

<sup>258</sup> HL Deb 6 February 2001 CWH 242-8

<sup>259</sup> HL Deb 21 February 2001 cc 783-7

<sup>260</sup> HL Deb 1 March 2001 cc 1337-1342

<sup>261</sup> HL Deb 1 March 2001 cc 1339-1342

is acting unreasonably or has not carried out its duties. If necessary, they will be able to apply to the court for a mandatory order to enforce their directions.

The noble Baroness wondered who might refer cases to the Secretary of State. Parents and others can look at the plan and complain directly to the Secretary of State. The DRC could decide to carry out an investigation. Plans will be monitored by the department. Therefore, the Secretary of State's attention could also be drawn to deficient plans by officials.

Secondly, the Ofsted and other relevant inspection frameworks for LEAs and schools will form another layer of monitoring the duty.

Thirdly, the DRC will have a role in monitoring the duty too. As I have just mentioned, it could, if it thought fit, conduct a general investigation into the operation of the duty which could lead to recommendations for change.

### ***Procedure***

Clause 19(1) enables procedural regulations to be made in relation to SENDIST. Clause 19(2) and Schedule 3 paragraph 1 insert a new Part III: *Discrimination in schools* into Schedule 3 of the DDA which deals with enforcement and procedure.

The provisions in relation to regulations in Clause 19(1) reflect those in Section 336 of the *Education Act 1996* relating to Tribunal procedure for special educational needs (SEN) appeals.<sup>262</sup> Subsection (8) of the inserted section allows the regulations to make provision for claims under this Chapter to be heard with SEN appeals under Part IV of the *Education Act 1996*. Regulations under this section are to be made by the Secretary of State with the agreement of the National Assembly for Wales.<sup>263</sup>

There are minor differences in the provisions in the two Acts:

24..... Section 28J(3) provides that hearings are to be in private unless regulations provide otherwise. The previous equivalent regulation making power, at section 336(2)(d) provided for regulations to prescribe circumstances in which hearings could be held in private, the presumption being that otherwise the hearings would be in public. In fact, the vast majority of SENT hearings have taken place in private, and this regulation making power now makes it clear that the starting point is that hearings should be private. The power will be exercised to provide that a parent can agree or the President of the Tribunal can order that hearings to be held in public, and that despite hearings being held in private various categories of people (for example clerks, trainee members of the tribunal, a parent of the child not party to the appeal) can attend. The regulations will deal with the consequential administrative arrangements.

25. There is reference to "disclosure" of documents in section 28J(2)(g). This reflects the changes in terminology introduced by the Civil Procedure Rules. The same

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<sup>262</sup> *Special Educational Needs Tribunal Regulations 1995* SI 1995/3113 to be replaced from 1 September 2001 by SI 2001/600

<sup>263</sup> (4) and (6)

change in wording is made in relation to section 336(2)(g) EA by paragraph 15(2) of Schedule 7.<sup>264</sup>

## **7. Admissions and Exclusions: Clauses 20-21: England and Wales only**

Clauses 20 and 21 deal with the two areas where a claim of discrimination on the grounds of disability cannot be taken to the SENDIST<sup>265</sup> but is dealt with by an existing procedure.

Clause 20 deals with appeals in relation to admissions to maintained schools or city academies. In the case of maintained schools, these are to be dealt with by the independent appeal panels set up by LEAs, foundation and voluntary aided schools under section 94 and schedule 24 of the *School Standards and Framework Act 1998*. The panels will have the same powers that they have at present i.e. to direct or refuse admission. For city academies, the appeal will be made under the appeal arrangements which formed part of the agreement between the responsible authority and the Secretary of State.<sup>266</sup> Claims of discrimination in relation to admissions to all other schools will go to the SENDIST, as will appeals by parents of children with SEN statements about the school named in the statement.

Clause 21 makes similar provision in relation to permanent exclusions from maintained schools and city academies. Claims in these circumstances go to the independent appeal panel set up by the LEA under section 67 and schedule 18 of the *School Standards and Framework Act 1998* or the body hearing appeals under the arrangement which set up the city academy. The 'responsible body' for a maintained school is extended to include the discipline committee of the governing body. It is the pupil discipline committee which discharges the functions of the governing body in relation to exclusions.<sup>267</sup> Claims of discrimination in relation to fixed term exclusions from maintained schools and city academies and in relation to all exclusions from other schools will go to the SENDIST.

These clauses did not attract scrutiny in the Lords.

## **8. Roles of the Secretary of State and the National Assembly in enforcement: Clause 22**

Clause 22 gives the Secretary of State or, as appropriate, the National Assembly the right to direct schools and LEAs if they have not complied with their duty to plan or have acted unreasonably in connection with their duties. There is an additional power in relation to city academies and non-maintained special schools in relation to the provision of copies of the plan and the inspection of the plan. The Secretary of State may also direct if a responsible body has failed to comply with an order made by the Tribunal or has acted or is proposing to act unreasonably in connection with the order.

The *Explanatory Notes* record that these are similar powers to those in sections 496 and 497 of the *Education Act 1996*: the Secretary of State's powers to prevent unreasonable exercise

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<sup>264</sup> <http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldselect/lddereg/9/905.htm>

<sup>265</sup> Clause 18 Section 28I (2)

<sup>266</sup> *Education Act 1996* s 82

<sup>267</sup> *Education (School Government) (England) Regulations 1999* SI 1999/2163 Reg 48



of functions and his general default powers in relation to the Education Acts. The major difference with the powers under Clause 21 appears to be that they can also be used to direct independent schools. Lord Lucas questioned in Committee whether independent schools would have a right of appeal against a direction. Lord Davies' reply was that they could go to judicial review and seek a judgement against the direction. He confirmed that the Independent Schools Joint Council was happy with the section. Lord Lucas felt that the dice were heavily weighted in favour of the Department.<sup>268</sup> He returned to the issue on Report and elicited an undertaking from Lord Davies that the powers to direct a school would not be used in a frivolous way. Directions would not be made without allowing the school to make representations first.<sup>269</sup>

Clause 22 was amended by the Government in Committee to insert the power in relation to city academies and non-maintained special schools and reserve the power in (6) to the Secretary of State.<sup>270</sup> It was further amended on Third Reading to remove an unnecessary reference to powers in (1), to which Lord Lucas had drawn attention on Report.<sup>271</sup>

## **9. Enforcement procedure: Scotland: Clause 23 and Schedule 3 para 1**

The jurisdiction of SENDIST does not extend to Scotland where rights of redress will be through the sheriff court. Clause 23 makes provision for this. It states that the remedies available will be those which are available in the Court of Session other than award of damages. Part 3 of schedule 3 which makes provision for time limits and evidence in relation to Tribunal proceedings is to apply to civil proceedings in Scotland, with references to the Tribunal being construed as references to the sheriff court.

During the Lords' stages the Earl of Mar and Kellie made repeated efforts to allow for financial compensation for discrimination at school level in Scotland. He said that he moved his amendment having been briefed by The Law Society of Scotland, the consortium Children in Scotland and RNIB Scotland. The sheriff court in Scotland had always had the power of financial remedy and he thought it odd to deny it when there were likely to be cases for which there was no educational remedy. He also felt that the provisions were discriminatory in that they did not treat school pupils as they did older students and they were out of line with other equal opportunities legislation. In response Baroness Blackstone said that the same arguments applied in Scotland as in England and Wales. Disabled children should have the same rights in all three countries.<sup>272</sup>

## **10. Contracts and agreements: Clause 24**

Clause 24 inserts a section into Part IV of the DDA to make void discriminatory terms in any contracts and agreements made by responsible bodies. A similar section, section 26, exists in Part III of the DDA relating to goods and services.

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<sup>268</sup> HL Deb 6 February 2001 CWH 217-220

<sup>269</sup> HL Deb 20 February 2000 cc 789-90

<sup>270</sup> HL Deb 23 January 2001 CWH 62 and 6 February 2001 CWH 253

<sup>271</sup> HL Deb 20 February 2001 c 789; 1 March 2001 c 1343

<sup>272</sup> HL Deb 6 February 2001 CWH 244 - 6

Clause 25 provides for the interpretation of Chapter 1 and defines words and expressions used in this Chapter.

## **11. Reactions**

Many of the organisations concerned with disability have been briefing peers for the debates in the Lords. Where an organisation has been specifically cited as providing the impetus for an amendment, it has been mentioned. This section covers only points which were not raised in the debates on the clauses described above.

The Special Educational Consortium would like to see a more specific duty placed on those private and voluntary providers of early years education who are to be covered by Part III of the DDA rather than the requirements of this Bill. They suggested an amendment to the *Nursery Education and Grant Maintained Schools Act 1996* to make it a statutory requirement of grant that providers should publish a special educational needs and disability policy.<sup>273</sup> Their proposed new clause was moved by Lord Rix in Committee as a clause to be inserted at the end of Part I as it referred to both SEN and disability. In response Baroness Blackstone pointed out that the Early Years Development and Childcare Planning Guidance required from 2000-01 an annex addressing special educational needs and disabilities. The 2001-02 revision of *Requirements of Nursery Education Grant* would make it a full condition of grant for settings to have an SEN policy. Specific guidance on the requirements of the legislation would be issued to partnerships and settings in due course.<sup>274</sup>

Diabetes UK welcomed the Bill as ending the discrimination against people with diabetes and others with chronic medical conditions. They did not feel that the DfEE and Department of Health guidance, *Supporting Pupils with Medical Needs in Schools*,<sup>275</sup> was being implemented consistently by schools in relation to such pupils. They drew attention to case they were taking, with the full backing of the Disability Rights Commission, against a school which banned a pupil with diabetes from going on a skiing trip after he suffered a hypoglycaemic attack on a previous trip.

The National Governors' Council welcomed the additional responsibilities the Bill placed on governors. However, they found it hard to reconcile the policy of increasing governors' responsibilities with the proposed removal of their responsibilities for finance and staffing. The Chair Chris Gale suggested that if the role of governors were to be reduced they would find it difficult to fulfil their obligations under this legislation.<sup>276</sup>

## **D. The Bill and Debates in the Lords: Further and Higher Education**

This part of the Bill mirrors the structure of Chapter I by inserting parallel provisions in relation to further and higher education into Part IV of the DDA.

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<sup>273</sup> SEC briefing for Committee Stage in the House of Lords

<sup>274</sup> HL Deb 30 January 2001 CWH 139-144

<sup>275</sup> DfEE circular 14/96

<sup>276</sup> "Government in two minds on education" National Governors' Council PN 11 December 2000

## 1. Duties on FE and HE institutions: Clauses 26-28 and Schedule 4

Clause 26 and Schedule 4 make it unlawful for institutions to discriminate against disabled students in their admission, exclusion or suspension arrangements and in the services they provide to students. The services are defined as “ student services” meaning services of any description which are provided wholly or mainly for students (subsection 11). Educational institutions covered are defined in subsections (6) and (7) and the responsible bodies in Schedule 4. As well as the range of publicly funded further and higher education institutions listed, there is provision for the Secretary of State to designate other institutions by order. The power is likely to be used in England and Wales to designate a small number of private specialist colleges which receive some public funds and are primarily concerned with educating disabled students.<sup>277</sup> The Secretary of State is required to consult Scottish Ministers before making an order naming a Scottish institution (10). The DfEE expect to use the power in Scotland to designate colleges within the publicly funded further education sector which have neither a board of management<sup>278</sup> nor are maintained by an education authority in exercise of their further education functions.<sup>279</sup>

There is provision for regulations to define which services are to be regarded as student services. The *Explanatory Notes* make it clear that that student services extend beyond those related to teaching and learning to include accommodation and leisure activities.

Lord Davies stated that it was the Government’s intention to use the regulation-making power under this clause to make clear that an institution’s role as regards work experience is a student service. DfEE officials would work with SKILL (the National Bureau for Students with Disabilities) on a statement of good practice in terms of the practical steps an institution should take to help disabled students gain access to suitable work experience placements and to gain successful experience in those placements. The statement will be made available to the Quality Assurance Agency to inform the further development of their guidance to higher education institutions. The DfEE will work with the Association of Colleges, the Learning and Skills Development Agency and the Learning and Skills Council to develop good practice guidance to further education institutions on work experience placements.<sup>280</sup>

The DfEE memorandum points to the need for regulations to clarify which services provided both to the general public and to students should be covered by these new duties rather than Part III of the DDA.<sup>281</sup>

### *Definition*

Clause 27 defines ‘discrimination’ as, without justification, treating a disabled person, for a reason relating to his disability, less favourably than someone else to whom the reason does not or would not apply. It is also discrimination not to take the reasonable steps set out in

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<sup>277</sup> HL Paper 9 2000-01 Annex 2 para 28

<sup>278</sup> within the meaning of section 36 of the *Further and Higher Education Act 1992*

<sup>279</sup> see footnote 133

<sup>280</sup> HL Deb 20 February 2001 cc 795-7

<sup>281</sup> HL Paper 9 2000-01 Annex 2 para 20

Clause 28. This part of the definition is in line with section 5 of the DDA<sup>282</sup> except for the inclusion of the phrase “to his detriment” in (2). This requires a student bringing an action to show not only that the general duty was breached but also that this breach was to their detriment.

Subsections (3) and (4) provide another departure from the DDA definition; a defence of not knowing of the person’s disability. Although the reasonable adjustment duty in Clause 28 would require the institution to have considered the general needs of students with different disabilities, it might need to know that a particular student was disabled in order to apply the policy to him.<sup>283</sup>

In the provisions above, Clause 27 mirrors Clause 12 relating to schools. A third difference from section 5 of the DDA in both clauses is the specific justification relating to the less favourable treatment duty. In this Clause, less favourable treatment will be justified if it is necessary to maintain academic standards or other prescribed standards. It will also be justified in certain cases to be set out in regulations.<sup>284</sup> The DfEE memorandum explains that the regulation making power to prescribe standards is needed to maintain non-academic standards in specialist colleges eg dramatic standards in drama colleges. The provision for regulations to prescribe certain cases where less favourable treatment would be justified will only be used in very limited circumstances. It is intended, for example to give the right to refuse entry to courses leading to professions where there were medical requirements on entry that could not be fulfilled. Entry requirements to the profession in question would need to be justified under Part II of the DDA.<sup>285</sup>

On Report, Baroness Darcy de Knayth moved, and then withdrew, what she described as a probing amendment on behalf of SKILL-the National Bureau for Students with Disabilities. The amendment sought to remove the defence of ignorance of an individual’s disability when treating disabled people less favourably. SKILL was concerned about the use of this defence in relation to potential students. Baroness Blackstone, in response, said that prospective students who were unknown to the institution would get a remedy through the anticipatory nature of the reasonable adjustments duty.<sup>286</sup>

On Third Reading, amendments, moved and subsequently withdrawn by Lord Addington, sought to provide that an institution must have allowed disclosure by the student, parent or guardian before it could use the defence of ignorance. Baroness Blackstone, in response, stated that the Government would expect current good practice in disclosure opportunities to become universal. They would like the Disability Rights Commission to include examples of good practice in the code. She made a commitment that the DfEE would commission good practice guidance to post-16 providers on what steps to take to ascertain the disabilities of their students.<sup>287</sup>

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<sup>282</sup> see Explanatory Notes para. 30

<sup>283</sup> Bill 55-EN para 106

<sup>284</sup> Clause 27 Section 28S (6) and (7)

<sup>285</sup> HL Paper 9 2000-01 Annex 2 para 30 and 31

<sup>286</sup> HL Deb 20 February 2001 cc 790-793

<sup>287</sup> HL Deb 1 March 2001 cc 1343-4

***Reasonable steps***

Clause 28 sets out the duty on responsible bodies for further and higher education institutions to take reasonable steps to ensure that disabled students or potential students are not substantially disadvantaged in comparison to students who are not disabled. There is a requirement to have regard to the code of practice to be published by the Disability Rights Commission and to take account of confidentiality requests. The provisions mirror those in section 6 of the DDA except that the duty under this section is owed at large to disabled students. The duty also mirrors that placed on schools in Clause 13 except that Clause 28 does not contain the specific reference to not having to make physical alterations or provide auxiliary aids.

The clause as originally presented in HL Bill 3 contained a list of factors to which an institution should have regard in considering what were reasonable steps to take to ensure disabled students were not substantially disadvantaged. Following arguments put forward at all stages by Baroness Sharp for the Liberal Democrats, amendments from her were accepted on Third Reading.<sup>288</sup> They removed the detailed listings, which also existed in Clause 13 in relation to schools, and replaced them with a requirement to have regard to the codes of practice to be made by the Disability Rights Commission. In accepting the amendments, Baroness Blackstone confirmed that the Disability Rights Commission would cover the factors in the codes of practice.<sup>289</sup>

Baroness Sharp moved and withdrew an amendment in Committee to insert a provision into sub section (1b) to give protection against discrimination by professional and qualifying bodies. Such a move had been recommended by the Disability Rights Task Force (DRTF).<sup>290</sup> Baroness Blackstone in response agreed that the issue was a very grey area of law. She pointed out that the DRTF recommendation came in its employment, rather than its education, chapter. She felt the issue needed further consideration and consultation.<sup>291</sup>

Lord Rix, who had been pressed on this amendment by the Special Educational Consortium, sought to insert in the clause a similar regulation making power to that in Clause 13 governing the circumstances in which it might be reasonable or not reasonable to take certain steps. In reply, Baroness Blackstone said that, although the list of steps in the amendment were helpful and uncontroversial, these provisions should be in the code of practice, not on the face of the Bill.<sup>292</sup>

**2. Other types of non-school education: Clause 29 and Schedule 5**

Clause 29 and Schedule 5 insert another section 28U into Part IV of the DDA, together with a new schedule 4C which modifies the provisions of this Chapter in relation to a range of educational activities. Part 1 of the schedule covers in England and Wales higher education

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<sup>288</sup> HL Deb 1 March 2001 cc 1326-8 and c 1344

<sup>289</sup> Clause 36 (2)

<sup>290</sup> *From Exclusion to Inclusion : a report of the Disability Rights Task Force on Civil Rights for Disabled People* DfEE December 1999 Chapter 5 para 25

<sup>291</sup> HL Deb 6 February 2001 CWH 254-8

<sup>292</sup> HL Deb 6 February 2001 CWH 258-260

secured by LEAs, further education for adults secured by LEAs or provided by the governing bodies of maintained schools and recreational and training activities secured by the LEA, including the statutory youth service.<sup>293</sup> Part 2 of the schedule covers in Scotland community education facilities provided by local authorities or voluntary organisations, including youth work, adult education and informal education in a broad sense.

The modification to the Chapter is effected by substituting two separate versions of section 28R, inserted by Clause 26, together with modifications of section 28T (inserted by Clause 28) and section 28W (inserted by Clause 31) and omitting the interpretation section inserted by Clause 31. This is done in the two parts of the inserted schedule, one part applying to England and Wales in relation to certain types of education and the other to Scotland. The provisions in the substituted sections reflect the more informal nature of the activities.

### **3. Enforcement procedure: Clause 30 and Schedule 3 para 2**

Clause 30 and paragraph 2 of Schedule 3 cover enforcement remedies and procedure in England and Wales and Scotland. A disabled student has the right to sue through civil proceedings. Cases will be heard in county courts in England and Wales and sheriff courts in Scotland. The *Explanatory Notes* set out the interaction with other rights of redress under the DDA.<sup>294</sup> There is a regulatory power in paragraph 14 of Schedule 3 to prescribe the maximum amount of compensation payable for injury to feelings. A similar power exists in Schedule 3(7) of the DDA to set a limit in Part III cases. To date the power in relation to Part III has not been used but the DfEE continues to monitor the level of compensation awarded.<sup>295</sup>

The clause was amended on Report by the Government, in response to concerns raised by Baroness Sharp, to add sub section (6) to clarify the position of research students who might also be employed by the institution. They will have rights under both Part III and the new Part IV of the DDA.<sup>296</sup>

Baroness Sharp moved and withdrew amendments in Committee aimed at moving the enforcement of disability rights in further and higher education out of the courts and into tribunals. The amendments were supported by the RNIB who had been concerned about the barriers faced by disabled people in bringing discrimination cases before a county court. Baroness Sharp cited support from other quarters for a move to hear discrimination cases in tribunals: the Independent Review of Anti-Discrimination Legislation carried out by Professor Hepple and colleagues at Cambridge; concern expressed on the Disability Rights Task Force about the suitability of county courts for discrimination cases and similar concern from the Commission for Racial Equality and the Equal Opportunities Commission. The proposal was rejected by Lord Davies on the grounds that the relationship between students and their institutions was very different to that between pupils and schools. Institutions expected to meet any failure on their part in the courts and students might expect in some cases financial compensation.<sup>297</sup>

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<sup>293</sup> Schedule 5: schedule 4C section 28R (12)

<sup>294</sup> para 113 and 114

<sup>295</sup> HL Paper 9 2000-01 Annex 2 para 37

<sup>296</sup> HL Deb 20 February 2001 c 795

<sup>297</sup> HL Deb 6 February 2001 CWH 261-4

The Earl of Mar and Kellie moved in Committee and later withdrew amendments suggested by the Law Society of Scotland aimed at removing perceived ambiguities on the remedies available in Scotland. In response, Lord Davies said that the wording had been chosen with the aim of achieving consistency with the DDA across the whole of the UK except Northern Ireland.<sup>298</sup> The Earl returned with a series of redrafted amendments on Third Reading. He expressed his view that the Bill was “obscure as regards the legislative task that appears to await the Scottish Parliament” in that it was not clear that the planning duty did not apply to Scotland. He felt that the drafting of Clause 30 was similarly unclear to general readers. He was supported in this by Lord Renton and Baroness Blatch. In a full response, Lord Davies again supported the wording on grounds of consistency. He assured the Earl of Mar and Kellie that the lobby group, Children in Scotland, had met with the Minister for Disabled People to discuss the code that the Disability Rights Commission would draw up and the possibility of having Scottish chapters in it. Although it was currently felt that the codes would be for the whole of Great Britain, the possibility of a separate code for Scotland or separate chapters had not been ruled out. There would definitely be experts in Scotland on the drafting groups for both codes.<sup>299</sup>

Baroness Blatch returned on Report to an issue she had raised in Committee, namely to replace the phrase ‘injury to feelings’ with ‘any personal offence caused’ on the grounds that made it a more measurable concept and easier for a court to assess. It was rejected by the Government on the grounds that it introduced a difference in wording with the rest of the DDA and other discrimination legislation.<sup>300</sup>

#### **4. Alteration of premises: Clause 31 and Schedule 6**

Clause 31 and Schedule 6 set out how further and higher education institutions should comply with the duty to make reasonable adjustments to physical features of their premises where they occupy those premises under a lease. If the lease forbids the necessary alterations, the occupier can still make alterations required under the Bill if he has the written consent of the owner/lessor. Consent cannot be refused unreasonably, although reasonable conditions can be attached (sub section (2) (c) and (d)).

Schedule 6, which amends Schedule 4 of the DDA, inserts provisions for circumstances when parties fail to obtain consent and reasonable adjustments are not made. It provides for the owner/lessor to be joined in any action against the educational institution. There is a regulatory power in paragraph 13 of the Schedule. According to the DfEE memorandum, this power is essential to make the following points clear:

- It is always unreasonable to fail to reply to an application by the occupier;
- It is always unreasonable to refuse consent where the terms of the lease provide that it will be given to alterations of that type; and

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<sup>298</sup> HL Deb 6 February 2001 CWH 265-7

<sup>299</sup> HL Deb 1 March 2001 cc1345-9

<sup>300</sup> HL Deb 20 February 2001 cc 794-5

- It is always unreasonable to refuse consent if the landlord has himself a legally binding obligation to get consent to those types of alterations; but only if the landlord has himself tried and failed to get the consent he needs.

The regulation power in paragraph 14 serves the same purpose for premises occupied under a sub-lease or sub-tenancy. Equivalent powers already exist in the earlier paragraphs of Schedule 4 and have been used.<sup>301</sup>

The clause itself mirrors provisions in sections 16 and 27 of the DDA.

Amendments were moved at each stage by Baroness Blatch to remove this clause from the Bill. She maintained that it should not be within the purposes of the Bill to impose alterations to the terms of a lease or tenancy. She considered the provisions to be, from the point of view of a land owner, draconian and extreme. In response in Committee, Baroness Blackstone drew attention to the existing provisions within the DDA.<sup>302</sup> On Report, Baroness Blatch declared herself even more opposed to the clause than previously. She outlined her concern at the possible destruction of the character of a building and was unconvinced by the argument that such provisions existed in earlier legislation. Baroness Blackstone sought to put the argument for an equitable treatment of disabled people studying in owned and leased buildings.<sup>303</sup> On Third Reading Baroness Blatch professed her continuing concern with the clause despite a letter from Baroness Blackstone citing the existing DDA code of practice as making it clear that a landlord could withhold consent if the alteration was likely to result in a substantial permanent reduction in value.<sup>304</sup>

## **5. Contracts and agreements: Clause 32**

Clause 32 applies, with alterations, the section inserted in the DDA by Clause 24 to this Chapter. The amendments reflect the different methods of enforcement in each chapter.

## **6. Interpretation and repeals: Clauses 33-34**

Clause 33 defines the terms used in Chapter 2. The definition of student was amended by the Government on Report to remove the original qualification that would have excluded a research student employed by the institution. This was in response to concerns raised by Baroness Sharp in Committee about the position of those students.<sup>305</sup>

Clause 34 removes the powers of the Learning and Skills Council, the CETW in Wales and the Higher Education Funding Councils to require institutions to publish disability statements. The duty on LEAs to publish disability statements is also removed.<sup>306</sup> The *Explanatory Notes* state that these duties are superseded by the duties in the Bill.

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<sup>301</sup> SI 1996/1333 and SI 1996/1456 HL Paper 9 2000-01 para 39-43

<sup>302</sup> HL Deb 6 February 2001 CWH 267-270

<sup>303</sup> HL Deb 20 February 2001 cc 797-780

<sup>304</sup> HL Deb 1 March 2001 cc 1349-1351

<sup>305</sup> HL Deb 6 February 2001 CWH 270-1; 20 February 2001 c 795 and 800

<sup>306</sup> see background section



## 7. Reaction

As with Chapter 1, the disability organisations produced detailed briefings and suggested amendments for this part of the Bill. Many of their points were raised, often successfully, in debate. Issues raised by SKILL which did not feature in debate included the desire to have work based training covered by this Bill rather than remaining under Part III of the DDA; the extension of the Disabled Students' Allowance (DSA) to groups not currently covered; and tighter guidelines on access to education buildings than the draft guidelines issued on Part III access.<sup>307</sup>

### E. Miscellaneous: Clauses 35-40 and Schedule 7

Clauses 35-37 and Schedule 7 extend the role of the Disability Rights Commission (DRC) to take account of the provisions of the Bill.

Clause 35 provides for Schedule 7 to amend the *Disability Rights Commission Act 1999*. The *Explanatory Notes* to the Bill state that the role of the DRC in connection with the provisions of the Bill will be extended, to issue non-discrimination notices and make agreements in lieu of enforcement action; to apply for an injunction or interdict in respect of persistent discrimination; and, to give assistance in relation to proceedings under the Bill at the Special Educational Needs and Disability Tribunal, the county court, or the sheriff court.

Clause 36 amends section 53A of the *Disability Discrimination Act 1995* (DDA) to extend the powers of the DRC to prepare codes of practice containing guidance on how to avoid discrimination against disabled people in the provision of education, or on good practice by education providers. The *Explanatory Notes* to the Bill state that it is intended that there will be two codes of practice – one for schools and one for higher and further education.

In Grand Committee, the Earl of Mar and Kellie argued that the DRC should issue a separate code of practice for Scotland. Lord Addington wanted to ensure that the codes would be drawn up in consultation with disabled people and relevant organisations. Lord Davies of Oldham said that there would be two codes (one for schools and one for post 16) to cover Britain as a whole, and indicated that there would be consultation with experts from Scotland on the Scottish dimension. He emphasised that when preparing codes, the DRC is under a statutory duty to carry out such consultations as it feels appropriate, and that it would be inconceivable that the DRC could carry out a consultation process without including disabled people and the organisations that represent them.<sup>308</sup>

Clause 37 amends the DDA, by inserting a new section 31B, to extend the DRC's power to make arrangements for the provision of conciliation services for disputes arising from the new Part IV provisions. The DRC already has powers to make conciliation arrangements in disputes covered by Part III (goods and services) of the DDA. Disputes under Part II (employment) are dealt with by ACAS.

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<sup>307</sup> [www.skill.org.uk/Disability in Education-printable.htm](http://www.skill.org.uk/Disability%20in%20Education-printable.htm)

<sup>308</sup> HL Deb 6 February 2001 CWH 272-4

Clause 38 amends the DDA to establish the relationship of the new Part IV duties with other sections of the Act.

Clause 39 amends the DDA by inserting a new section to ensure that the Council of the Isles of Scilly is treated as a LEA for the purposes of Part IV of the DDA. The Secretary of State is empowered to make an order prescribing modifications of the application of Part IV to the Isles of Scilly.

Clause 40 makes no substantive changes to the law, but re-enacts the duty on the Teacher Training Agency, in exercising their functions, to have regard to the requirements of persons who are disabled for the purposes of the DDA.

## **F. Supplementary: Clauses 41-43 and Schedules 8-9**

The remaining clauses of the Bill make supplementary provision including commencement and extent of the Bill. Clause 42 provides that where a power to make regulations is conferred by any of the amendments made by Schedule 8, the power is exercisable so far as it relates to Wales, by the National Assembly for Wales. The only exception is in relation to regulations dealing with the Special Educational Needs and Disability Tribunal procedure, which will be made by the Secretary of State with the agreement of the NAW. The clause also provides for the repeals in Schedule 9 to have effect. These include the repeal of section 19(5)(a) to (ab) and (6) of the DDA which removes from Part III the exemption relating to education. The effect of this is that any provider of education previously exempted from Part III and not covered by the new Part IV duties becomes subject to the duties in Part III of the DDA.

Clause 43(3) to (10) provide for commencement. Sub-section (6) lists those provisions as respects Wales which will be brought into force by order of the National Assembly for Wales.

As far as Parts 2 and 3 of the Act are concerned no date for commencement appears on the face of the Bill. In the *Explanatory Notes*, however, it is stated that all of the schools and LEA provisions will come into force by September 2002.<sup>309</sup> Of post-16 provisions, it states:

133. Providers of post-16 education and training in England, Wales and Scotland will be required to make adjustments to arrangements, including physical features, which place disabled students at a substantial disadvantage. Implementation will be staged. We intend to implement the new duties on the post-16 sector in September 2002 in respect of the duties not to treat less favourably and to make reasonable adjustments to non-physical arrangements such as policies, practices and procedures; in September 2003 in respect of auxiliary aids and services other than those that require physical adjustments to buildings; and in September 2005 in respect of physical adjustments to buildings.

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<sup>309</sup> para 133

The original version of the *Explanatory Notes*<sup>310</sup> published in December 2000 gave a later start date of 2002 for both phases. Lord Davies gave the reasons for the changes in Grand Committee.<sup>311</sup>

We have listened carefully to the points on post-16 implementation which were made at Second Reading and in Committee. We believe that it is reasonable for implementation of the post-16 duties to be so staged that those which can be brought in sooner should be, but institutions and LEAs have a reasonable but not excessive period to plan and implement those which take a little longer.

We said in the Explanatory Notes to the Bill that the duties not to discriminate and to make reasonable adjustments to non-physical arrangements such as policies, practices and procedures would be implemented by September 2003. We want to do better than that and we have looked again at the timetable. Subject to the Disability Rights Commission being able to get the necessary codes in place in time, we hope to bring these provisions into force a year earlier, in September 2002.

We also said in the Explanatory Notes that the duties to make reasonable adjustments to physical features and provide auxiliary aids and services would be implemented later, by September 2005.

At Second Reading, a number of noble Lords proposed that the physical features duties should be brought forward to 2004, to bring the date into line with the long-planned implementation date for physical features adjustments for service providers under Part III of the DDA. We are not in a position to accede to that, but we believe that having reviewed the timetable we can identify one important area where there is scope to accelerate this timetable. I refer to the area of auxiliary aids and services, which includes equipment such as IT and braille printers and services such as note takers, signs for deaf people, and so on.

A great deal of that is provided in post-16 learning. The additional costs are likely to be less than those of adjustments to buildings, and the lead times required for implementing them are self-evidently shorter. We believe that by September 2003 sufficient of the additional government resources will have come on stream to make it reasonable to expect LEAs and institutions to meet their duties in respect of auxiliary aids and services.

We therefore propose to bring forward the proposed date of implementation to September 2003 while retaining September 2005 as the implementation date in respect of adjustments to buildings. I hope that noble Lords will feel able to welcome this change and accept that the other amendments are technical ones. That was conveyed to the noble Baroness, Lady Blatch, and the noble Baroness, Lady Sharp of Guildford, by my noble friend in a letter of 15th January.

He confirmed that the dates would be included in the orders needed to implement the legislation.

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<sup>310</sup> HL Bill-EN

<sup>311</sup> HL Deb 6 February 2001 CWH238-9

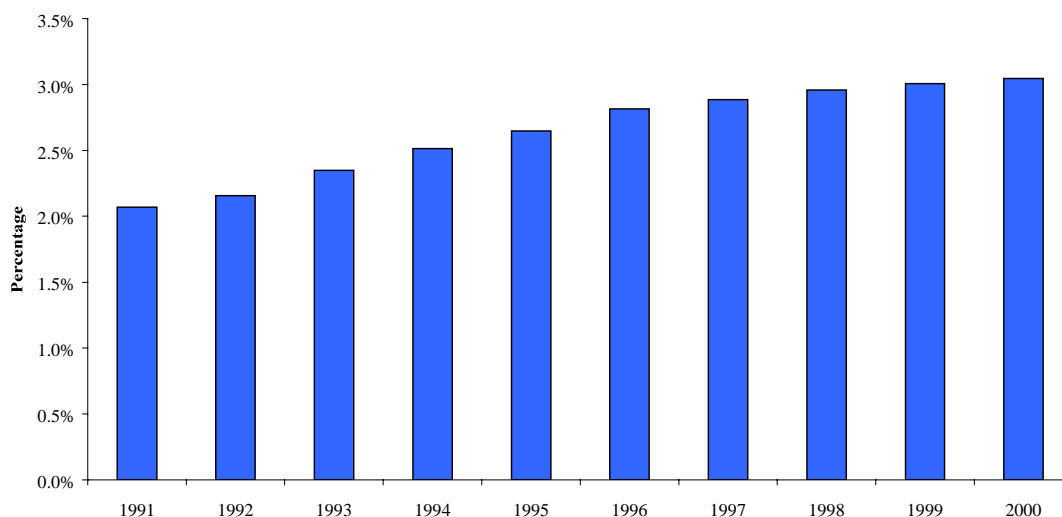
## IV Statistical Appendix – Paul Bolton, Social and General Statistics Section

### A. Trends in the number of pupils with SEN

#### 1. Numbers and incidence of statemented pupils

Information on the number of pupils with statements in all schools in England was first collected in 1991.<sup>312</sup> The following chart and the appended Table 1 give trends in the number and incidence of pupils with statements of SEN since 1991.

**Pupils with statements of SEN as a percentage of all pupils, England and Wales 1991-2000**



The number of pupils with statements has increased in each year from 1991 to 2000 and by over 100,000 in total. The incidence –the number of pupils with statements expressed as a proportion of the number of pupils on roll- has also increased in each year.

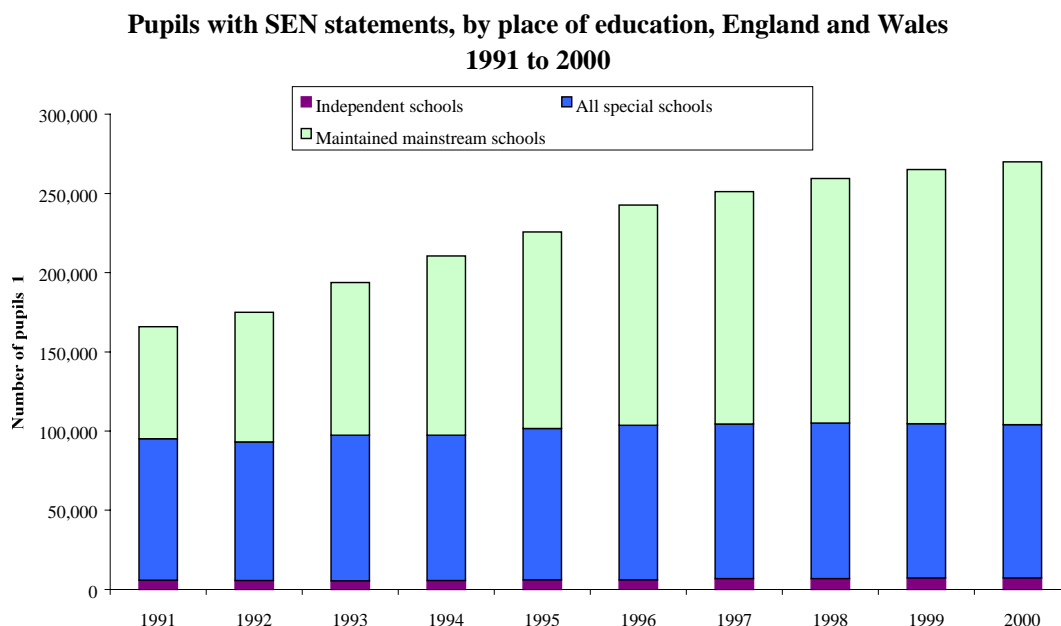
At January 2000 90.4% of children with statements were aged between 5 and 15. There were just over 10,000 (3.7%) aged under 5 and nearly 16,500 (5.9%) aged between 16 and 19. Since 1995 there has been a slight increase in the proportion of statemented children who are under 5.<sup>313</sup>

<sup>312</sup> HC Deb 5 December 1997 c391w

<sup>313</sup> DfEE statistical bulletin 09/00 *Special educational needs in England: January 2000*; NAW statistical report SDB 113/2000 *Pupils with statements of special educational needs: January 2000*

## 2. Placement of statemented pupils

The next chart and Table 1 give trends in the placement of pupils with statements of SEN since 1991.



The number of statemented pupils in independent and special schools has increased over this time, but by much less than the overall increase. The number of statemented pupils in maintained mainstream schools has increased by over 95,000 since 1991. This represents over 90% of the total increase. The number of statemented pupils in maintained mainstream schools now outnumbers those in special schools by over 70%. In 1991 there were 20% fewer.

The number of special schools<sup>314</sup> in England has fallen in each year since 1979. The number of full-time pupils in special schools has also fallen consistently, from around 131,000 in 1979 to 95,400 in 1991 and 94,100<sup>315</sup> in 2000.<sup>316</sup>

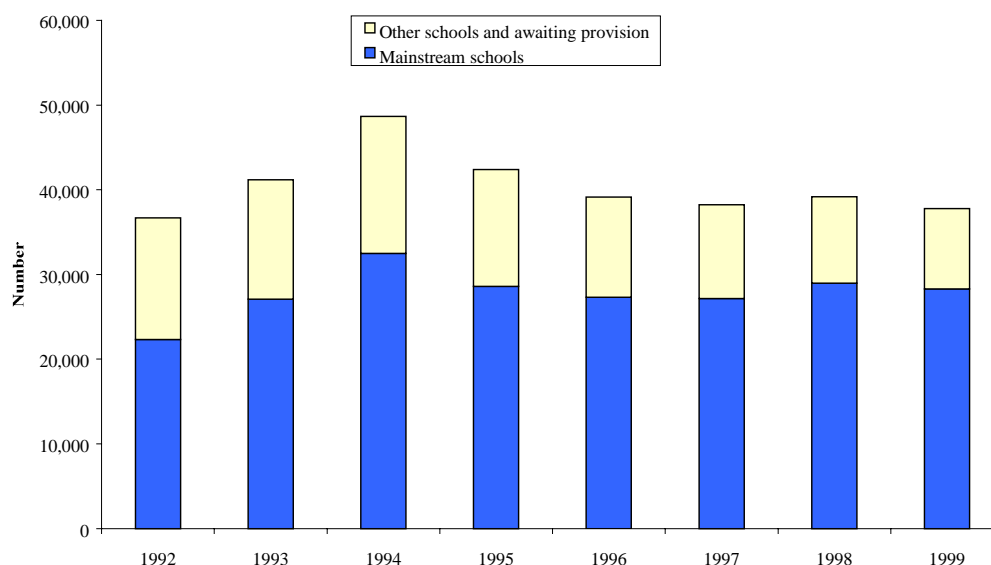
## 3. New statements

The appended Table 2 and the next chart show information on the number of new statements made since 1992. These cover all statements and include children who are not in school and those awaiting provision.

<sup>314</sup> Maintained and non-maintained special schools

<sup>315</sup> Excludes dually registered pupils.

<sup>316</sup> *Schools in England, 2000* and earlier editions, DfEE

**New statements made, England and Wales 1992 to 1999**

The number of new statements increased rapidly to a peak of nearly 49,000 in 1994. They then fell back to below 40,000 by 1996 and have remained around this level since. The proportion of statemented children who were placed in mainstream schools has increased in each year from 61% in 1992 to 75% in 1999.

In 1999 4,700 children who had previously been statemented transferred from maintained mainstream schools to special or independent schools. 1,260 children transferred schools in the opposite direction.<sup>317</sup>

#### 4. Pupils without statements

Statistics on pupils with SEN but without statements was collected for the first time for maintained primary and secondary schools in England in 1995 and independent schools from 1996. Figures are given in the appended Table 3. The number of such pupils increased by nearly one third from 1.1 million in 1996 to 1.5 million in 2000. In 2000 the incidence<sup>318</sup> was over 50% in Pupil Referral Units (PRUs) and 20%, 17% and 5% in primary, secondary and independent schools respectively.

<sup>317</sup> DfEE statistical bulletin 09/00 *Special educational needs in England: January 2000*; NAW statistical report SDB 113/2000 *Pupils with statements of special educational needs: January 2000*

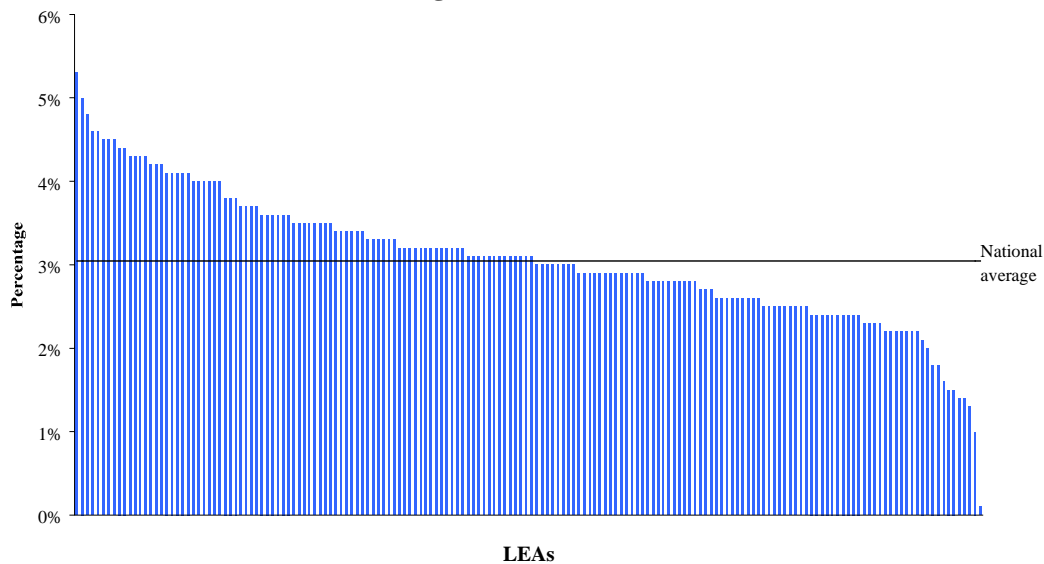
<sup>318</sup> Excluding maintained and non-maintained special schools

## B. Patterns of SEN in 2000

### 1. Geographical variations

Differences in the incidence of SEN by region are given in the enclosed Table 4. At a regional level there are some, fairly small variations. There are much greater differences between LEAs. The following series of charts illustrate the variation in the incidence of SEN, with and without statements, in each LEA. The proportion of pupils with statements ranges from 5% or above in Wrexham and Blaenau Gwent to 1% in Nottinghamshire<sup>319</sup>. The proportion of primary pupils with SEN but without statements was around 30% in Medway, Kent and Southampton<sup>320</sup> and around 12% in Staffordshire and Barnsley. There were similar variations in secondary schools from over 30% in Wandsworth and Sandwell to less than 10% in Staffordshire and Sutton.

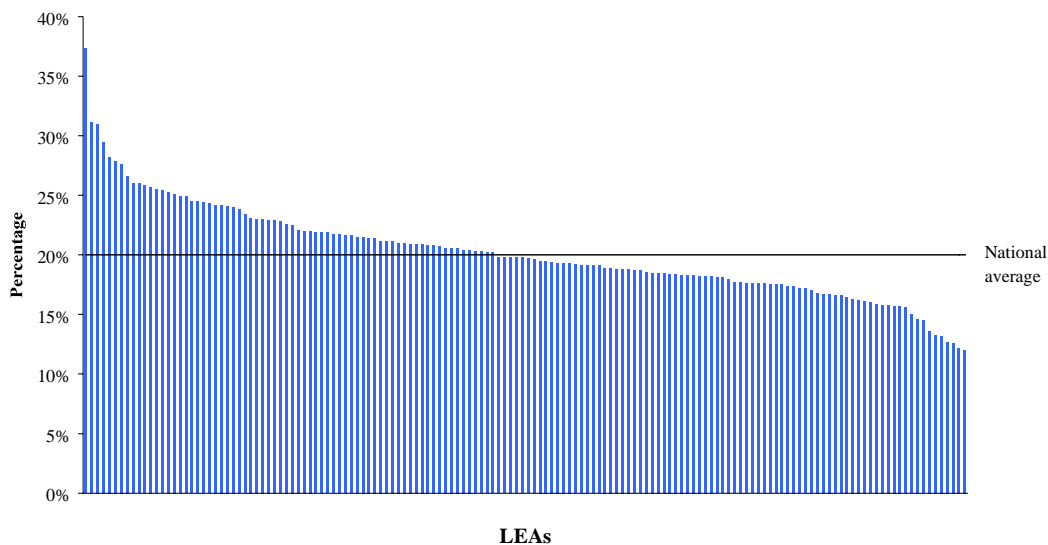
**Pupils with statements of SEN as a percentage of all pupils, LEAs in England and Wales 2000**



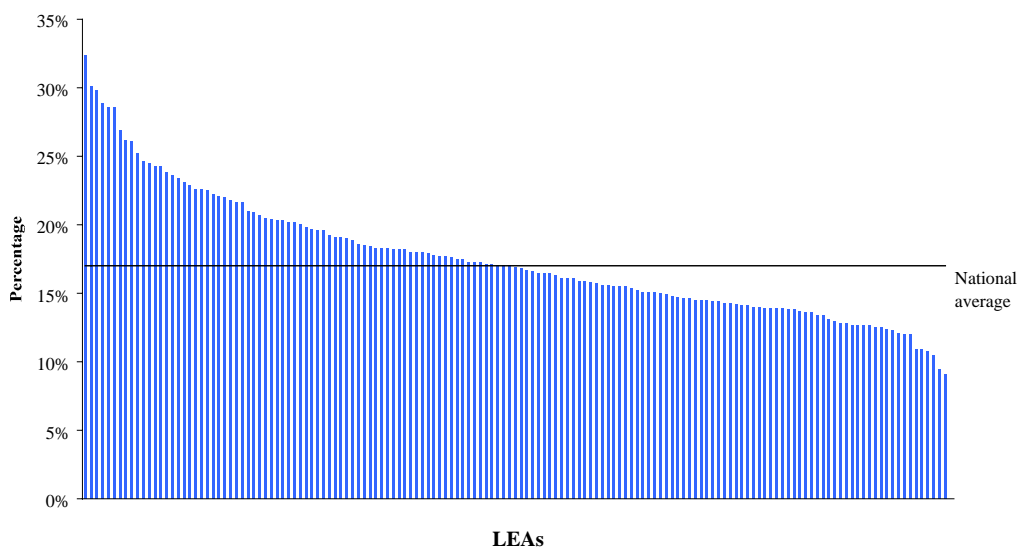
<sup>319</sup> The proportion for the City of London was 0.1%

<sup>320</sup> The proportion for the City of London was 37.3%

**SEN pupils without statements as a percentage of all pupils in primary schools, LEAs in England 2000**



**SEN pupils without statements as a percentage of all pupils in secondary schools, LEAs in England 2000**



Information on pupils with statements in individual LEAs may include pupils placed in their schools by other LEAs and, likewise, exclude pupils they place in schools outside their area. However, the Audit Commission has stated that the variation in the incidence of children with statements has increased. Some of the variations in this and in the incidence of all children with SEN can be explained by differences in the socio-economic background of each



area. This does not explain all the variation and LEA statementing and identification practices may also have an effect.<sup>321</sup>

## **2. Individual schools**

It is also possible to look at the differences between mainstream schools in proportion of pupils with SEN. The majority (over 70%) of primary schools in England have less than 2% of pupils with statements. 65% of secondary schools have fewer than 3% of pupils with statements. In January 2000 there were 121 primary and 25 secondary schools which had more than 1 in 10 pupils with statements. The majority of schools have between 10% and 25% of pupils with SEN (both statemented and unstatemented). There are around 250 primary schools and 72 secondary schools where over half the pupils have SEN.<sup>322</sup>

## **C. Expenditure on special needs**

Expenditure is, very broadly, separated into that carried out directly by LEAs on things like statementing, specialist support and PRUs, and spending by schools from their delegated budgets and direct funding. In 2000-01 LEAs in England and Wales planned to spend over £1.2 billion on centrally managed special education/provision of a specialised nature. This is just over one third of direct expenditure by LEAs.<sup>323</sup> A breakdown of this expenditure is given below.

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<sup>321</sup> *Getting in on the act. A review of progress on special educational needs*, Audit Commission 1998

<sup>322</sup> DfEE statistical bulletin 09/00 *Special educational needs in England: January 2000*

<sup>323</sup> Education statistics 2000-1 estimates, CIPFA

**LEAs budgeted expenditure on special education <sup>(a)</sup>,  
England and Wales 2000-01**

£ million

Educational psychology service/assessments and statementing	155.1
Provision for pupils with statements	381.9
Specialist support	
Pupils with statements	89.5
Pupils without statements	95.8
Fees for pupils at non-maintained schools	293.4
Pupil referral units <sup>(b)</sup>	107.2
Other	133.7
<b>Total</b>	<b>1,256.5</b>

(a) Provision of a specialised nature in Wales which includes music tuition, peripatetic Welsh language tuition, travelling theatres and outdoor education

(b) Includes expenditure on behaviour support plans in Wales

Source: *Education statistics 2000-1 estimates, CIPFA*

There is less information on the amount spent by schools on SEN from their delegated budgets. According to the Audit Commission in 1996/97 total spending on special needs by LEAs and schools represented 15% of the General Schools Budget.<sup>324</sup> If this proportion has remained at the same level then it would represent around £3.3 billion across England and Wales in 2000-01.<sup>325</sup>

<sup>324</sup> *Getting in on the act. A review of progress on special educational needs*, Audit Commission 1998

<sup>325</sup> 15% of the Local Schools Budget; *Education statistics 2000-01 estimates, CIPFA*

Table 1

**Pupils with statements of SEN by type of schools in England and Wales 1991-2000**

At January each year

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Pupils with statements	165,875	174,946	193,742	210,663	225,672	242,694	251,183	259,476	265,260	269,852
Maintained mainstream schools <sup>(a)</sup>	70,833	81,782	96,421	113,252	124,037	139,006	146,708	154,474	160,662	165,872
Special schools and PRUs <sup>(b)</sup>	89,252	87,603	91,955	91,817	95,587	97,677	97,695	98,189	97,357	96,827
Independent schools	5,790	5,561	5,366	5,594	6,048	6,011	6,780	6,813	7,241	7,153
Incidence <sup>(c)</sup>	2.1%	2.2%	2.4%	2.5%	2.6%	2.8%	2.9%	3.0%	3.0%	3.0%
Placement <sup>(d)</sup>										
Maintained mainstream schools <sup>(a)</sup>	42.7%	46.7%	49.8%	53.8%	55.0%	57.3%	58.4%	59.5%	60.6%	61.5%
Special schools and PRUs <sup>(b)</sup>	53.8%	50.1%	47.5%	43.6%	42.4%	40.2%	38.9%	37.8%	36.7%	35.9%
Independent schools	3.5%	3.2%	2.8%	2.7%	2.7%	2.5%	2.7%	2.6%	2.7%	2.7%

(a) Maintained nursery, primary and secondary schools and special classes/units within ordinary schools in Wales

(b) Includes maintained and non-maintained special schools. Figures for 1991 include special units in Wales

(c) The number of pupils with statements expressed as a proportion of the number of pupils on roll

(d) The number of pupils with statements expressed as a proportion of the number of pupils with statements in all schools

Sources: DFEE statistical bulletin 09/00 *Special educational needs in England: January 2000, and earlier*

NAW statistical report SDB 113/2000 *Pupils with statements of special educational needs: January 2000*

*Schools in Wales: General statistics 2000, and earlier, NAW/WO*

Table 2

**New statements of SEN made in England and Wales 1992 to 1999**

	1992	1993	1994	1995	1996	1997	1998	1999
England	34,037	38,292	45,792	39,541	36,636	35,648	36,178	35,421
Wales	2,650	2,881	2,872	2,837	2,510	2,570	2,989	2,350
Total	36,687	41,173	48,664	42,378	39,146	38,218	39,167	37,771
Of whom were placed in maintained mainstream schools								
Number	22,307	27,071	32,491	28,608	27,294	27,142	28,981	28,280
Percentage	60.8%	65.7%	66.8%	67.5%	69.7%	71.0%	74.0%	74.9%

Note: This includes children who are not placed in schools at the end of each year and those awaiting provision

Sources: DFEE statistical bulletin 09/00 *Special educational needs in England: January 2000, and earlier*

*NAW statistical report SDB 113/2000 Pupils with statements of special educational needs: January 2000*

*Schools in Wales: General statistics 2000, and earlier, NAW/WO*

Table 3

**Pupils with SEN without statements, England 1995 to 2000**

At January each year

	1995	1996	1997	1998	1999	2000
Total in all schools	..	1,103,426	1,222,973	1,331,219	1,409,811	1,465,106
<i>Incidence</i> <sup>(a)</sup>	..	13.8%	15.1%	16.3%	17.2%	17.8%
Numbers by school type:						
Nursery	3,264	4,753	5,020	5,243	5,236	5,277
Primary	500,269	691,414	759,449	821,342	859,742	885,952
Secondary	287,753	392,996	442,024	479,675	514,386	541,406
Pupil Referral Units	..	3,227	3,915	4,270	4,906	4,425
Independent schools	..	11,036	12,565	20,689	25,541	28,046

Note: Excludes maintained and non-maintained special schools

(a) The number of pupils with statements expressed as a proportion of the number of pupils on roll

Source: DFEE statistical bulletin 09/00 *Special educational needs in England: January 2000*

Table 4

**Pupils with SEN, by region England and Wales 2000**

At January

	Pupils with statements as a percentage of all pupils	All pupils with SEN as a percentage of pupils in maintained schools	
		Primary	Secondary
North East	3.1%	19.6%	18.6%
North West	3.3%	20.1%	18.0%
Yorkshire and the Humber	3.1%	19.6%	19.3%
East Midlands	2.7%	20.1%	18.8%
West Midlands	3.0%	20.7%	19.6%
Eastern	2.8%	20.7%	17.9%
London	2.9%	23.4%	22.0%
Inner London	3.1%	24.2%	25.7%
Outer London	2.7%	22.9%	20.3%
South East	3.1%	25.2%	21.5%
South West	3.2%	22.6%	18.8%
England	3.0%	21.6%	19.5%
Wales	3.3%	..	..

Sources: DFEE statistical bulletin 09/00 *Special educational needs in England: January 2000*NAW statistical report SDB 113/2000 *Pupils with statements of special educational needs: January 2000*

## **D. Numbers of disabled students**

### *Higher Education*

Self-assessed disability, all students 1998/99

England	4.47%
Scotland	4.17%
Wales	4.04%
UK	4.42%

68,700 in total

*Higher education management statistics 1998/99, HESA*

### *Further education*

England 1996/97      4.5%    (2% registered disabled, 2.5% not registered)

*Final student statistics 1996-97, FEFCE*

Disabled FE students are not identified in Scotland or Wales.