

To all Chief Education Officers/Directors of Children's Services

15 November 2005

Dear Colleague

SPECIAL EDUCATIONAL NEEDS (SEN)

In recent months we have received enquiries and complaints on blanket policies in relation to statutory assessments and specifying and quantifying provision in children's statements, naming schools in statements, and amending statements of children transferring between phases of schooling. In the light of this, I thought it would be helpful to write explaining the statutory position as we see it.

I am conscious of the demands on your time and the energy and commitment you and your colleagues are putting into taking forward the Every Child Matters Change for Children Programme and developing your strategies for inclusion and special educational needs following on from Removing Barriers to Achievement. I hope, however, that you will find this letter useful as an aide memoire.

Blanket policies

The correspondence we have received is largely about blanket policies in:

- deciding whether it is necessary to carry out a statutory assessment
- specifying and quantifying provision in children's statements

Statutory assessments

Authorities have developed, or are developing or amending criteria for statutory assessments as a means of securing greater consistency in their decision making. It is, of course, open to authorities to develop criteria as guidelines to help them decide when it is necessary to carry out statutory assessments and they have a wide discretion to determine what criteria they will adopt. But authorities must be prepared to depart from those criteria, where there is a compelling reason to do so in any particular case and demonstrate their willingness to do so where individual circumstances warrant such a departure. In our view, for the avoidance of any doubt, any published criteria should make this very clear.

Although local authorities appear to be aware that they must not operate a blanket policy for all children, some appear to believe that blanket policies can be developed for particular groups of children or certain types of need. Yet having a policy that assessments will not be undertaken for particular groups of children or certain types of need, in our view, constitutes a blanket policy that prevents the consideration of children's needs individually and on their merits.

Specifying provision in statements

Authorities will know and understand the legislative background and the Court of Appeal judgment in the case of *The Queen (on the application of IPSEA Ltd)* and the Secretary of State for Education and Skills (enclosed for ease of reference). But it appears that some authorities are operating blanket policies of never quantifying educational provision for particular groups of children, types of need or particular types of placement.

In some cases, authorities set out the child's special educational needs in detail in Part 2 of their statement but leave provision open to the school to determine completely or in terms of options, for example a particular number of hours support from a support assistant or a pro-rata amount of time from a support teacher or some equipment, without specifying the provision to meet children's individual needs. Other authorities refer solely to a particular band of funding from their local system of calculating funding or a sum of money and do not always specify clearly the provision it is meant to fund.

In our view, any local authority policy which prohibits, deters or even discourages its officers from specifying educational provision clearly and in detail and/or from quantifying educational provision for particular groups of children is likely to result in breaches of:-

- section 324(2) and (3) of the Education Act 1996, which provide that the statement must contain such information as may be prescribed and must specify the educational provision to be made for the purpose of meeting the needs identified in the statement;
- regulation 16(b) of the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, which provides that the statement must contain the information specified in Schedule 2 to those Regulations, which requires educational provision to be specified in terms of "any appropriate facilities, equipment, staffing arrangements and curriculum..."; and
- section 313(2) of the Act, which imposes a duty on LEAs to have regard to the provisions of the Special Educational Needs Code of Practice (2001), paragraphs 8.36 and 8.37 of which make clear that statements should specify the special educational provision necessary to meet the needs of the child, detail appropriate provision to meet each identified need and normally quantify the provision.

In view of the recent cases we have had, I should be grateful if you would consider again the terms of the judgement referred to above, in particular paragraphs 14, 15 and 17 in which Lady Justice Hale notes that:

"...the statement clearly has to spell out the provision appropriate to meet the particular needs of, and objectives identified for, the individual child" (paragraph 14); and

"..., any flexibility built into the statement must be there to meet the needs of the child and not the needs of the system." (paragraph 15)

"It remains the case that vague statements, which do not specify provision appropriate to the identified special needs of the child, will not comply with the law." (paragraph 17)

Naming a school in a child's statement

Recent correspondence we have received has highlighted some misunderstandings about the processes to be followed prior to naming a school in Part 4 of a statement. I hope the following will clarify the position.

Where a local authority, having made a first statutory assessment of a child or at the time of amending a statement, sends a copy of a proposed statement or a proposed amended statement or a copy of the existing statement and an amendment notice to the parent, the written notice which must accompany these documents must contain the information as specified in Schedule 1 to the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, by virtue of regulations 14 and 15 respectively of those Regulations (a copy of which is to be found in the back of the SEN Code of Practice 2001).

This information must include a list of all primary or secondary schools, as appropriate. This list should include all maintained schools (including special schools) within the area and all non-maintained special schools approved by the Secretary of State under section 342 of the Education Act 1996 and all independent schools approved by the Secretary of State under section 347 of the Act.

Maintained schools

Parents must be invited to name the maintained school they would like their child to attend. Where a parent expresses a preference for a particular maintained school (mainstream or special school), the local authority must consult the school concerned, and in the case of a school maintained by another authority that local authority as well. When consulting, the Authority must send a copy of the proposed statement, amended statement, or existing statement and an amendment notice. In all cases the appendices to the statement must be included. As part of the consultation process the Authority should write to the school and other authority to ask them whether, in their opinion:

- the school is unsuitable to the child's age, ability or aptitude or to his special educational needs;
- the child's attendance would be incompatible with the efficient education of the children with whom he would be educated, or
- the child's attendance would be incompatible with the efficient use of resources.

These criteria are set out in paragraph 3(3) of Schedule 27 to the Education Act 1996.

If the school or local authority opposes the naming of the parent's preferred school on any of the grounds specified above, the "home" authority should consider very carefully their reasons for doing so, before deciding whether or not

to name the school, not least because once a local authority names a particular maintained school in a child's statement, that school must admit the child,

If a parent does not express a preference

If a parent does not express a preference for a particular maintained school or the local authority decide not to name the parent's preferred school in the statement, the authority must nevertheless specify a school or other institution in the statement which the authority consider would be appropriate for the child and should be specified.

When considering possible schools for the child, they must bear in mind that the child must be educated in a mainstream school, unless this would be incompatible with the parent's wishes or the efficient education of the other children and there are no reasonable steps that could be taken to prevent that incompatibility (section 316 of the Act).

The local authority must consult the school and, in the case of a school maintained by another authority, that local authority as well. As part of the consultation the Authority should write to the school and the other authority to ask them whether, in their opinion, the child's attendance at the school would be incompatible with the efficient education of the other children and to consider whether there are any reasonable steps that they or another authority could take to prevent any such incompatibility.

If the school or local authority opposes the naming of the school on this ground the authority should consider very carefully their reasons for doing so before deciding whether or not to name the school.

Academies

Since Academies are independent schools the admission arrangements are different.

Parents do not have a statutory right to express a preference for an Academy, though they can make representations as to the particular Academy they would like their child to attend. Where they do, the authority should consult the Academy and as part of that consultation ask them whether the child's attendance would be incompatible with the efficient education of the other children and to consider whether there are any reasonable steps that could be taken by the Academy or by the local authority to prevent that incompatibility.

Where the Academy is of the opinion that the child's attendance at the school would be incompatible with the efficient education of the other children and there are no reasonable steps that could be taken to prevent that incompatibility, and, consequently, does not consent to being named in the child's statement, the local authority should not name the Academy.

Where there is disagreement between an Academy and a local authority the matter may be referred to the Academies SEN Dispute Resolution Service set up by the Department specifically for this purpose. Ultimately, the Academy,

may ask the Secretary of State to make a final determination as to whether or not it should be named. Once named in this way the Academy must admit the child in accordance with the terms of its Funding Agreement with the Secretary of State.

Phase transfers

We have had some cases where children with statements have been out of school at the beginning of term. All statements of children transferring phases, including infant to junior school, primary to secondary, first to middle and middle to upper school must be amended to name a school by 15 February at the latest. This is to ensure that parents, where they are unhappy with the provision in their child's statement, have time to take an appeal to the Special Educational Needs Tribunal and to allow any school placement issues to be settled well before the start of the school year, including any complaints to the Secretary of State under sections 496 and 497 of the Education Act 1996.

It is essential to start the process early to avoid children with statements being without a school place at the start of the school year. It is also important to ensure that schools know that their views have been considered and that, in the case of maintained schools, once they are named in a child's statement they have a statutory duty to admit that child.

Making Decisions

Where a local authority has established a panel to assist in deciding whether to assess, to make a statement and/or in relation to provision, the local authority retains its responsibilities and therefore the formal decisions must not be delegated but remain with an officer of the local authority.

I should be grateful if you would bring this letter to the attention of staff within your authority with responsibilities for these matters, so that compliance with the relevant statutory provisions can be assured.

Yours faithfully

IAN COATES

Head of Special Educational Needs and Disability Division