

The Advisory Centre for Education

Evidence for the Education and Skills Select Committee

Inquiry into Special Educational Needs

September 2005

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ACE's background

The Advisory Centre for Education (ACE) is an independent national charity which provides advice and/or information to over 60,000 parents/carers a year who are experiencing problems with their children's education. We give advice on education law and how parents/carers can act as advocates for their children. Two of our advice lines are dedicated to exclusions. We refer to other agencies, e.g. Step-by-Step advice workers (see below), where parents/carers need more support.

Minority ethnic parents are well represented in users of the advice line (11 per cent African Caribbean in 2003).

We train and support advice workers in local organisations that work with disadvantaged, minority ethnic and refugee parents/carers through the Education Step-by-Step programme. We keep their details on a database that enables ACE advisers to refer parents/carers to them. There are 160 Education Step-by-Step advisers in London, and 200 across England. In 2003/4 we trained 90 new advisers and gave 373 on-going support. Our surveys show that on average each adviser helps 200 families a year.

ACE trains LEA officers, parent partnership officers, professionals and staff of voluntary organizations in special educational needs (SEN), as well as other aspects of the state educational system. ACE has a reputation for the width and depth of its knowledge of law and guidance as well as its ability to apply this to the day-to-day problems faced by parents.

The examples from advice line calls used in this document are nearly all from the last three months' advice work, as we wanted to sample very current concerns.

Recommendations

- 1 Support and outreach services need to be maintained as LEA/LA provision, and expanded to include consistent support for emotional and behavioural needs.**
- 2 LEAs and schools need to adopt better monitoring and accountability of resource use for delegated funding, so that the use of resource for individuals and the outcomes of that use can be tracked. We see the continuation of Individual Education Plans as essential to this.**
- 3 Statutory assessment and Statements should be retained and expanded to include all the child's needs in line with the Every Child Matters programme. Parents' rights to initiate, contribute to and challenge processes and decisions should be retained.**
- 4 Reductions in statutory assessments should cease: children who need extra support should receive their entitlement. LEAs' administration of the legal framework needs to be policed to remove unlawful barriers to assessment. Assessment reports should give honest and detailed advice as to the provision needed. The contents of Statements should be scrutinised by Ofsted during LEA inspection to ensure their adherence to legal requirements.**
- 5 Parents of children with SEN/disabilities, especially those who are themselves disadvantaged, deserve more and better support and advocacy, freely available and independent of both central and local government.**
- 6 Reliable estimates of the number of disabled children who need additional aids and services to access education should be obtained in order to inform policy. We do not believe these are available at the moment, and without them claims that Statements can be reduced or SEN expenditure capped or redistributed are unfounded.**
- 7 Children with SEN/disabilities whose behaviour is related to their SEN/disability should be removed from the exclusion process. At the very least it should be mandatory that a multi-agency review of needs, provision and reasonable adjustments is held before exclusion is used.**
- 8 In view of the mismatch between SEN and disability estimates, schools' exemption from the obligation to provide aids and services should be reconsidered.**
- 9 If children whose behaviour arises from their SEN/disability remain within the exclusion process, their appeals against exclusion should go to the Special Educational Needs and Disability Tribunal.**

Concerns

- 1 ACE does not wish to add to the debate around special versus mainstream schools: it advises parents on both choices. We are concerned, however, with the evidence of a decreasing ability of mainstream schools to cope with children's difficulties, not least in the resulting demand from parents for our advice and information.
- 2 ACE's view is that where schools are properly supported by central and local government policies, support services, funding and proper training for staff, inclusion works and benefits the whole community. The evidence of our exclusion advice lines tells us that the opposite is happening in some schools. Around three-quarters of our callers on those lines have children with special educational needs, and one in six raise issues which call for advice on disability discrimination.
- 3 ACE strongly disagrees that the problem for parents is bureaucracy. In this area, the word 'bureaucracy' is frequently used by providers as an excuse to reduce information, accountability and legal duties owed to parents.
- 4 The parents ACE speaks to every day on our advice lines may be worn down with trying to get support for their child and do complain of bureaucracy. But they are not complaining that their child is being assessed or that the help is being written on a Statement or that they are asked to meetings to review an IEP. When you dig below the surface you discover that parents' complaints are largely about failures of the system rather than the system itself: backlogs in assessments, hold ups in getting provision, difficulties with school placements, and Statements which are so unclear about the help which is to be provided that they are not worth the paper they are written on, let alone the expense of the assessment that preceded them. These failures may actually be unlawful (see, for example, the non-provision of therapies for children whose Statements specified them documented in the 2002 Audit Commission report on special needs¹). An advantage of the current statutory system is that parents can exert pressure via the system of complaints and appeals which leads to better outcomes for the child.
- 5 In ACE's view the system itself, with its guiding principle of matching help to needs, could not be more compelling. The problem is that local authorities are having to square the circle between the law, conflicting national policies, their own local policies and funding. The law says that a child's education is so important that extra help to give children with SEN/disabilities the same learning opportunities as other children must not be rationed, delayed or subject to blanket refusals to provide. But where resources are not available to match this legal duty, local authorities respond with policies which impose a form of rationing.
- 6 Many parents of children with SEN/disabilities, whatever their backgrounds, become extremely well-informed and active in their children's education. It makes sense to build on the positive aspects of the SEN framework to increase that informed active participation, which must lead to far better outcomes for their children.
- 7 For parents, the system offers, in both law and guidance, a truly participative role in the education of their child, an acknowledgement that the parents of a child with SEN/disabilities are the experts on their child, and that their involvement is vital in ensuring the educational progress of that child. Their role

¹ Audit Commission (2002) *Special Educational Needs: a mainstream issue*, p. 32

is also that of watchdog over their child's right to support. To reduce this role by changing or reducing Statements because of concern over parents' struggles with the system would be to adopt an out-dated welfarist view that parents need protection more than they need equal, active and informed participation in the decisions over their child's education. As parents are acting for the child in many of these decisions, a reduction in their rights to participate in and challenge decisions would be deleterious to the child's rights.

- 8 □ Since 2001, the statementing system has also become a part of the delivery of one of the positive requirements of disability discrimination legislation in schools, as it is what should provide disabled children with the aids and services they need to access education. It is therefore essential that it is maintained and improved.

Campaigns for children's rights to educational support

- 9 □ In recent years, ACE has joined with many other organizations which offer direct support to parents in campaigning to retain parents' rights in the statementing system's statute law, regulation and guidance. There have been major campaigns over the 1997 Green Paper on SEN which suggested rationing of Statements, and over draft Regulations and guidance on writing Statements in 2000–2001. Both apparently resulted in success for the campaigners with reassuring words from the Government: Estelle Morris, then Minister for Schools, offered a pledge at the launch of the SEN Action Programme on 5 November 1998 that although the Government wanted the proportion of Statements to fall 'over time', this would be done by strengthening school-based support. Baroness Ashton promised in introducing the Special Educational Needs and Disability Bill:

The whole of this Bill is about the best interests of the child and meeting them. It is about making special educational needs provision better. It is about improving the tribunal system. It is about ensuring that more resources are available in our schools for children with disabilities or special educational needs. ²

- 10 ACE is therefore looking for better provision and more resources for these children, and for those to be guaranteed where children need them to access education on a par with their peers.

Provision for SEN pupils in 'mainstream' schools: availability of resources and expertise; different models of provision

- 11 □ In spite of the Ministers' desire to reassure parents, ACE receives many calls where support on the 'school-based' stages of School Action and School Action Plus is not clear to parents. We want to be able to say to parents that all maintained mainstream schools have support available, either in-house or via their LEA, e.g. for a child's behavioural difficulties so as to prevent exclusion. But this is not the case. Even within one LEA, and within one category of schools in one LEA, schools can vary markedly in their attitude to and willingness to provide support themselves or to purchase it from outside.

Have special needs and inclusion fallen off the agenda?

- 12 Overall, maintained mainstream schools do not seem to be increasing their capacity to support children with SEN – in fact, they seem to be reducing it. Ofsted's October 2004 report³ found:

² House of Lords Hansard, 1 March 2001, Column 1295

³ Ofsted (2004) *Special Educational Needs and Disability: towards inclusive schools*

- no increase in the proportion or range of needs of pupils with special needs attending mainstream, and that ‘progress towards inclusion in mainstream schools has slowed’;
 - only a minority of the mainstream schools it surveyed were offering children with difficulties high quality support, and few evaluated the effectiveness of their support;
 - even the more committed schools did not think they could cope with children with high levels of need;
 - a 10 per cent increase in the number of pupils placed in independent special schools and a 25 per cent increase in the numbers of pupils in pupil referral units between 2001 and 2003⁴, indicating less ability to meet needs in state schools, whether ordinary or special;
 - although the Special Educational Needs and Disability Act 2001 (SENDA) requires schools to draw up disability access plans covering curriculum as well as buildings, ‘over half of the schools had no disability access plans and, of those that did exist, the majority focused only on accommodation’.
- 13 Problems of mainstream support are also prevalent in early years. Ofsted says about education and care providers, ‘we also found, too commonly, that inconsistency and lack of joined-up support created unnecessary barriers to the inclusion of children with special needs’⁵. Further, Ofsted indicates policy conflicts:
- The government’s agenda, together with a plethora of initiatives around inclusion of children with special needs, has moved on since the national standards were written. Even those who receive a judgement of good against National Standard 10 may experience difficulty in keeping pace and promoting the best possible outcomes for children with special educational needs.⁶
- 14 The Qualifications and Curriculum Authority’s 2004 annual report on inclusion included the observations that:
- there was a perception that SEN had fallen off the agenda in all mainstream high-profile initiatives;
 - all respondents expressed strong views that performance tables militated against the inclusion of pupils with SEN in many popular schools.

Resources: variation and insecurity

- 15 In the National Union of Teachers’ survey of special educational needs co-ordinators (SENCOs⁷) in March 2004, ‘a common theme in all the responses was that pupils with SEN at the first two stages of assessment [i.e. without Statements] received insufficient support’. SENCOs debating their funding online recently have revealed remarkable differences in the resources available

⁴ Note that this finding is wrong: the increase in the population of PRUs is 55 per cent, based on actual numbers of 9,300 in 2001 and 14,470 in 2004 (DfES, 2005, *Special Educational Needs in England, January 2005*, SFR 24/2005, Table 1a).

⁵ Ofsted (2005) *Removing barriers: a ‘can-do’ attitude: a report on developing good practice for children with special needs in early years childcare and education in the private and voluntary sectors*

⁶ National Standard 10 sets out *minimum* requirements as to what providers must do to support children with special needs. Ofsted (2005) *Removing barriers: a ‘can-do’ attitude: a report on developing good practice for children with special needs in early years childcare and education in the private and voluntary sectors*, p. 3.

⁷ The special educational needs co-ordinator is the key SEN teacher/manager in the school.

for non-statemented pupils (note that School Action Plus is the highest level of resourcing for non-statemented SEN, and has replaced Statements in many authorities).

- 16 SENCO A says that in her LEA, children on School Action Plus get two hours with a teaching assistant, or half an hour with an SEN teacher per week, or a combination of these times. The SEN audit is supposed to pay for this. Children on School Action do not get a particular amount of time.
- 17 SENCO B is shocked by this luxury and replies that her school 'certainly couldn't afford this!' It has 31 children on School Action Plus and 60 on School Action plus 14 with Statements. To match SENCO A's level of resourcing, they would need to allocate 60 hours of teaching assistant time for School Action Plus plus 80 hours for statemented children. She says her 'statements' always get their support but children on School Action Plus sometimes do not. They may get ten minutes a week one-to-one.
- 18 NFER research⁸ done for the DfES also reported insecurity and lack of accountability of resourcing for the school-based stages:

In one of the secondary schools, the resourcing issues related to the fact that the funding for pupils at *School Action* and *School Action Plus* was not ring-fenced. The SENCO explained that the school SEN department would not receive the money: '*it disappears into the school, into the ether*'. This SENCO had tried to resolve the issue with both the headteacher and the finance department, but without progress. This was estimated to be funding equivalent to five additional classroom assistants ...

Resourcing SEN was certainly an issue for some of the case-study schools, and it could have implications for the admission of pupils with identified special needs. It was clearly an area where some schools would appreciate some more guidance.

Delegated funding and support for children

- 19 In 2005, Ofsted reported on the state of outreach and support services which (before so much SEN funding was delegated to schools) were provided to schools by LEAs.⁹
- 20 The TES summed up the report thus:

Support for vulnerable pupils in mainstream schools has been damaged by the Government's determination to take money from local education authorities and give it direct to schools, Ofsted said this week.

Special needs pupils have been denied specialist help because schools used the money for other purposes, according to a highly critical report by inspectors.
- 21 The report said:

Where the funds were delegated, schools had the option to buy services or to use the money in other ways. Positively, this increased the flexibility for schools; negatively, it disadvantaged groups of pupils with complex special educational needs who did not have access to specialist support because funds had been used for other purposes. In addition, delegation of funding to schools reduced the LEA's capacity to provide targeted support for school improvement where the standards achieved by pupils with SEN were too low.
- 22 There are, of course, many other purposes and incentives to use funds for those purposes.

⁸ Wilkin, A., Archer, T., Ridley, K., Fletcher-Campbell, F. and Kinder, K. (2005) *Admissions and Exclusions of Pupils with Special Educational Needs*, NFER, DfES Research Report RR608

⁹ Ofsted (2005) *Inclusion: the impact of LEA support and outreach services*

- 23 Current policy is to encourage authorities to delegate nearly all the funds for special educational needs to schools. This is despite the recognition in *Removing Barriers to Achievement*, the Government's strategy for SEN (2004) that the majority of local authorities have yet to develop adequate arrangements for monitoring outcomes for pupils with SEN, especially in relation to delegated funding. The aim, according to the strategy, is to encourage early identification and inclusion; but again from ACE's experience on the advice lines we know that the opposite is often the case.
- 24 The national model of provision for SEN and disability should not allow wild variation from school to school and from LEA to LEA. Diversity of standards of provision and autonomy of schools is not currently providing for individual pupils' diverse needs, and far from inspiring parents with confidence, has led to increasing battles for appropriate support.
- 25 **We therefore recommend that support and outreach services need to be maintained as LEA/LA provision, and expanded to include consistent support for emotional and behavioural needs.**
- 26 **LEAs and schools need to adopt better monitoring and accountability of resource use for delegated funding, so that the use of resource for individuals and outcomes can be tracked. We see the continuation of Individual Education Plans as essential to this.**

The system of Statements of need for SEN pupils ('the statementing process')

- 27 ACE finds the extension of delegated funding arrangements to children with significant and complex needs very worrying. Schools often struggle to identify difficulties and their causes and it is known that many young people have behaviour problems which stem from undiagnosed special educational needs.
- 28 To make matters worse, many local authorities are coupling delegation with a policy of no more Statements except for special school placements, leaving schools to decide whether to buy in expertise. Again, we refer to the Government's principle that reductions in Statements were only to be made when children's needs were securely met by schools.
- 29 This is plainly not the case, but the issue of new Statements has fallen from 36,200 p.a. in 1998 to 26,000 in 2004¹⁰. It is fair to conjecture that that means that last year, more than ten thousand children who previously would have received Statements were left without them and are relying on the uncertain capacities of schools to identify and deliver the help they need.
- 30 The downward pressure on Statements is against the professional judgements of many teachers, especially SENCOs. One SENCO said, on hearing of the Select Committee's inquiry by accident from an LEA officer:

If only LEAs are contributing [to the Committee's investigation], this is worrying. Like most LEAs, mine is doing its utmost to follow the government line regarding the reduction of statements even though this policy directly contravenes the Code of Practice.

On this issue alone I want input from teachers. I know my LEA's view is at total variance with my own.

¹⁰ DfES (2005) *Special Educational Needs in England, January 2005*, SFR 24/2005, p. 2

Statutory assessment under attack

- 31 When reductions in statementing were discussed with the campaigning organizations in 1997–8 and again in 2000–1, it seemed that assessments of need would still occur. Many children need the multi-agency scrutiny of what is causing the difficulty that is holding them back, and sometimes it is not until this occurs that the real problem is identified: for instance, what was perceived by teachers to be a literacy difficulty to be addressed with extra phonics is discovered to be an auditory processing disorder, which needed visual strategies. The child must have felt he was being shouted at in a completely unknowable language rather than being helped.
- 32 Indeed, this statutory requirement for a thorough multi-agency assessment (with the full involvement of the parent) might be regarded as an exemplary model, offering a guarantee of provision for vulnerable children that could easily be expanded to include non-educational needs and provision in keeping with the Every Child Matters programme.
- 33 Appeals against statementing decisions go the Special Educational Needs and Disability Tribunal. The Tribunal's annual reports show that appeals against refusals to assess have risen from 30 per cent of all appeals in 1997/8 to over 40 per cent in 2002/3.
- 34 However, it is only a minority of parents who appeal against decisions, and the Independent Panel for Special Education Advice believes that local authorities are routinely refusing to assess and are largely getting away with it.
- 35 Many parents who ring us tell us that SENCOs are quoting local criteria for assessment (that children have to be a certain number of years or stages behind compared with their chronological age, for instance) to explain why their needy children, plainly not progressing, cannot access assessment. One adviser for another national charity recently wrote:
- I understand that X LEA will only use the term 'dyslexic' for a pupil whose reading AND spelling AND writing are all 5 years below chronological age. And will only statement if there is also ADHD, Asperger's etc.
- So a girl aged 12 with Reading Age/Spelling 8 years and writing 7 years (and ability of a 17 year old on a private EP assessment) is not deemed 'dyslexic'.
- 36 Such blanket rules may well be unlawful, but are trusted by teachers and LEA officers who are shocked when they are overturned by the Tribunal. We are sure that the Independent Panel for Special Education Advice will offer the Committee its experience here.
- 37 As we have said above, we believe these rules are the results of pressure to ration Statements, and take little account of actual need. This is borne out by what parents tell us of what schools and LEA officers tell them.
- 38 One recent call to our advice line concerned an eight-year-old child whose school stated that he needed 1:1 adult support to prevent incidents which had led to frequent exclusions, the most recent one lasting two weeks. She told us that her authority was arguing (in writing to the Tribunal) that assessment of her son would set an 'inappropriate precedent' and would be an 'inappropriate use of public funds', both unlawfully irrelevant considerations in a decision on assessment. The child had long-standing problems and was diagnosed and being treated for ADHD and ODD by the NHS. His mother said:
- It seems so unjust on him. With the right support he's a lovely lad. So-called professionals should listen to parents and teachers – my child has been having these problems since nursery. The education system doesn't want to help you. But

the Government wouldn't have all these problem teenagers if the help was there in primary schools.

Vague and unenforceable Statements

- 39 Another common problem that parents meet with Statements is LEAs' non-compliance with the law on specification of provision in drafting Statements. The law says that Statements must normally describe the kind, amount and frequency of the help to be provided. In spite of this requirement, vague words such as 'access to a literacy programme' or 'opportunities for small group work' or 'up to one hour a week' seem to be so common as to be the *de facto* norm. This spells trouble for any parent trying to insist on the support owed to their child.
- 40 The Local Government Ombudsman reports frequently on SEN complaints. In a ruling in November 2004, the Ombudsman found that Suffolk County Council had a long-standing practice of not quantifying hours of special educational provision in Statements. We know from our advice work that this is not unusual in LEAs. More needs to be done to protect vulnerable children from this evasion of what Parliament has repeatedly confirmed as the intention of the statute, regulations and statutory guidance on how provision should be set out in Statements.
- 41 A parent of a three-year-old child with Down's syndrome with recognised speech delay said (September 2005):
- A's proposed Statement has just arrived. In part 3 the reference to speech and language goes as follows: 'A requires opportunities to follow a structured speech and language programme planned in conjunction with advice from a speech and language therapist.'
- Well now that I've scraped myself off the ceiling I could say that I require opportunities to go to the cinema more than once a year – doesn't always happen though.
- 42 A is just starting in nursery, at a crucial age for developing speech and communication abilities, and with them relationships with her peers and teachers. But her ability to access the speech therapy she needs will depend on her mother's action on her behalf, not on the LEA's fulfillment of its duty to identify need and provide for it when children have significant and/or complex difficulties (see 'Therapies' below).
- 43 We believe that Ofsted needs as a rule to inspect the content of Statements for this crucial adherence to statutory obligations. All too frequently, inspection reports merely observe whether LEAs write Statements within the legal time limits rather than judging whether they do this vital job of specifying and guaranteeing the help the child needs. Timeliness is not what matters – rather, it is whether the Statement does the job the law intends.
- 44 Here, accurate and detailed advice from professionals as to provision is essential, but many suspect that teachers and educational psychologists are 'leant on' to keep their advice vague so that Statements do not commit the LEA to an inescapable obligation to that child. A's mother will probably need to spend a considerable amount to obtain reliable professional advice on her child, as the advice the LEA has obtained is not specific enough on provision. Another parent who knows the educational psychologists in her LEA said:
- The EP [educational psychologist] told us that she was not allowed to write 1:1 tuition with a specialist teacher and was really stretching a point to record that that is what we wanted on the final report.

I called the EP section for my daughter's school area to ask if my request for 1:1 tuition with a specialist teacher with AMBDA (to differentiate it from non-teaching qualifications such as a Masters in SEN) was unreasonable. I did not want to ask for something unreasonable or something my daughter wasn't entitled to. The question was shouted across the room and the distant reply was along the lines of 'Of course it is suitable what the hell are the LEA playing at?'

Parents' rights in the process

- 45 Parents challenge decisions within the process at the moment, as they have statutory rights to request assessment, to appeal against a refusal to assess, to contribute their own views and evidence to the assessment, to appeal against a refusal to produce a Statement following assessment, to be properly consulted during the drafting of the Statement, and to appeal against the final version, on the grounds of its description of needs and provision and/or the school named by the authority. All appeals since the implementation of the 1993 Education Act have gone to an independent national expert tribunal, and any parent who has experienced appeals before and after this Act will tell you what a difference this has made to obtaining proper support for their child.

Therapies

- 46 Therapies (for example, speech therapy) are frequently contested, and for good reason, as the Audit Commission found health and social services were not provided for children whose Statements specified them:

Children with statements often do not get the support they are meant to from health and social services.

We ... recommend that Government ensures that health and social services be held to account for their part in meeting children's SEN. This may require a change to primary legislation: under the 1996 Education Act, health and social services are only required to provide support to children with statements in so far as their overall resources and priorities allow ... Unless children with SEN feature more prominently in the targets set for these services, it seems unlikely that this situation will improve.¹¹

- 47 What the Audit Commission could have pointed out, but did not, is that the law makes clear that if therapies specified in the Statement are not provided by other agents, the duty to arrange the provision falls back on to the LEA. The 41 out of 49 LEAs who said that children with Statements were not getting the help they needed even though their Statements specified that help were admitting to being in breach of the duty owed to those children.

Blame maladministration, not the system

- 48 We reiterate that problems with Statements arise from maladministration of the system rather than the system itself, which we believe was ahead of its time in demanding multi-agency views of the child, involving parents in deciding what the child's difficulties are and how and where to support them, in taking children's views into account, and in time-limiting the process in the interests of the child. The maladministration arises not from incompetence, but from deliberate evasion of legal duties to individual children because of resource constraints.
- 49 This view is supported by the many Local Government Ombudsman's rulings against LEAs' administration of the system. Within the category of education, after admissions, SEN gives rise to the most complaints and investigation

¹¹ Audit Commission (2002) *Special Educational Needs: a mainstream issue*, p. 32

reports, and most of those are about Statements. Given that only 3 per cent of children nationally receive Statements, this is an alarming figure.

- 50 We recommend that statutory assessment and Statements should be retained and expanded to include all the child's needs in line with the Every Child Matters programme. Parents' rights to initiate, contribute to and challenge processes and decisions should be retained.**
- 51 Reductions in statutory assessments should cease: children who need extra support should receive their entitlement. LEAs' administration of the legal framework needs to be policed to remove unlawful barriers to assessment. Assessment reports from employees of the LEA should give honest and detailed advice as to the provision needed. The contents of Statements should be scrutinised by Ofsted during LEA inspection to ensure their adherence to legal requirements.**

The role of parents in decisions about their children's education.

- 52 Parents therefore often need to exert their rights, and we have many calls for advice where we can offer not merely information but steps parents can take which help them to be effective in working with schools and LEAs¹². It is difficult to see how parents will be able to claim as of right a similar active role in the Common Assessment Framework currently being piloted, and easy to envisage a return to the pre-1993 Act system where professionals know best and the child is all too readily fitted into the resources perceived to be available.
- 53 In ACE's view children have a much greater chance of doing well at school if their parents are actively involved. We believe this because we can see that where parents' rights are less detailed or clear cut, parents are either passive, expecting the education service to deal with any problems, or they become frustrated at their lack of a say about crucial aspects of their children's education.
- 54 We are concerned that some parents have difficulties because of:
- poor or misleading information including lack of clarity about their rights and where responsibilities lie
 - difficulty in accessing information
 - lack of good quality advice, support and advocacy.

Information and advice

- 55 ACE believes that provision of information can be improved by better policing of the system. Our campaign for legal compliance with information regulations (The SEN (Provision of Information by LEAs) (England) Regulations 2001) resulted in Ofsted agreeing to highlight the requirement to provide SEN information on LEA websites in its inspections of authorities. Recently we checked six LEAs which have been inspected this year and found that all were complying with the law. Previously few of these LEAs had met the legal requirements introduced in 2001. At least one of the six had had no website at all covering SEN issues.

¹² ACE publishes the comprehensive and authoritative *Special Education Handbook*, and also short accessible booklets on getting extra help from schools and early years providers, asking for an assessment, getting the Statement right, and annual reviews.

- 56 The information is important to parents because it should tell them who is responsible for their children's extra help; what kind of provision they can expect and the procedures for accessing further support.
- 57 There still remain difficulties in accessing information. For example, websites are often poorly designed and not parent-friendly. Understanding the information on websites often implies knowledge of education jargon, tenacity in exploring different links on a site and ownership of expensive up to date equipment to download huge files.

'Bureaucracy' versus information for parents

- 58 The pressure on SEN resources and the general dismissal of documentation as 'bureaucratic' are threatening the Individual Education Plan (IEP). If IEPs are not maintained and shared with staff who teach the child and with parents, are prepared for groups rather than individuals, and not kept up-to-date and reviewed frequently, then they become worthless both as support for the child and in tracking resource use and outcomes.
- 59 ACE is concerned that the campaign against bureaucracy appears to have targeted special educational needs information which parents need to have¹³ We believe that the system is not bureaucratic unless you regard professional assessments as bureaucratic, listing (on paper) provision to match needs as bureaucratic, or progress checks with parents as bureaucratic.
- 60 In ACE's view, the campaign against bureaucracy is a threat to accountability and parental involvement, particularly the sustained attack on IEPs. IEPs are meant to track strategies put in place to help the child, based on that child's difficulties, and assess how successful they are. If strategies fail, then the IEP records adaptations or new strategies. If those fail, then provision should be escalated (e.g. from School Action to School Action Plus and from School Action Plus to statementing).
- 61 With fewer Statements, these documents are the main evidence of a child's progress or lack of it, and since many LEAs demand written records of a child's lack of progress before agreeing to assess parents can be caught in a situation where they know their child is not making progress, but they have no paper evidence because there is no IEP and therefore the LEA refuses to assess.
- 62 Even the Audit Commission in its SEN Policy Focus Paper of 2002 recognised the value of IEPs and saw them as a safeguard for children who would have had Statements but might no longer if its recommendations were to be adopted. It recommended that:

If fewer statements are issued as a result of increased delegation, schools should continue to use IEPs and regular reviews for all children with SEN and to plan carefully for key transitions; and LEAs should put in place systems to monitor the progress made by children who would previously have had a statement.¹⁴
- 63 The IEP is valuable for parents because it involves them in planning for the child's support and in monitoring the that support. In addition, for those children with Statements, there are legal requirements about target setting and checks on the child's progress within the National Curriculum and in relation to

¹³ DfES Implementation Review Unit (2005) *Annual Report 2004-5* (<http://publications.teachernet.gov.uk/eOrderingDownload/1593-2005CDO-EN.pdf>) and Cabinet Office/DfES (2005) *Special Educational Needs – Bureaucracy Project* (<http://www.cabinetoffice.gov.uk/regulation/documents/pst/pdf/sen.pdf>)

¹⁴ Audit Commission (2002) *Statutory Assessment and Statements of SEN: in need of review?* p. 68

the objectives set out in the Statement. There has to be a mechanism for making these short-term checks and the IEP would seem to be the most sensible one.

- 64 Parents are able to see whether their child is making progress, whether the extra help their child should get is indeed being provided, and can make informed decisions about whether to request changes to the child's provision.
- 65 The *Annual Report 2004–5* of the Implementation Review Unit fails to say why alternative planning arrangements it promotes are less bureaucratic. It also fails to mention how parents will be involved. In ACE's view the description of alternative approaches suggest much greater bureaucracy and hints of the professional knowing best. In contrast most parents can easily understand the process of drawing up and reviewing an IEP and where they fit into the process. It is unclear where parents would be involved in 'provision mapping' which seems to focus on the provider and the support rather than the learner and his or her needs.
- 66 The attack on IEPs is also at odds with much other government guidance including the statutory SEN Code of Practice and the *Key Stage 3 National Strategy Maximising Progress: ensuring the attainment of pupils with SEN*.

Support and advocacy

- 67 Certain groups of parents have difficulty accessing information, for example, those who have English as an additional language; those who are not in settled housing (e.g. mothers sheltering from domestic violence and Traveller families), foster parents unaware of the SEN framework, and parents who have special needs and/or disabilities.
- 68 Children with SEN are more likely to have parents belonging to these groups.
- 69 These parents need a range of alternative service including telephone advice, face-to-face advice and advocacy. ACE supports some families via its telephone advice service, and while many parents are able to use information and advice to go on and take effective action for their children, other parents need more or different support. ACE's Education Step-by-Step programme aims to provide greater face-to-face support via groups such as women's refuges, law centres, and community organisations who come into contact with the groups of parents listed above. Training in basic education advice is provided along with a comprehensive education manual kept up-to-date by ACE staff. Funding for this programme has been hard to achieve, however, and it is currently operating under capacity.
- 70 Parent partnership officers (employed by LEAs) are supposed to be the frontline service providing support to parents, and are the only advice service that many disadvantaged parents access. However, it has to be pointed out that *at best* this is 'impartial' support, with PPOs aiming to be even handed rather than champions for parents. Many admit that their LEA funding prevents them undertaking certain types of work such as representing parents at exclusion hearings or at the SEN and Disability Tribunal (SENDIST).
- 71 In an ACE survey of 20 LEAs covering different sized authorities in both rural and urban areas, we found that only a quarter were able to carry out limited representation of this type (four supporting parents at SENDIST but only one representing parents at independent appeal panel hearings dealing with exclusion).
- 72 A representative of the National Parent Partnership Network has told us that less than half of LEAs have 'independent parental supporters' and at least half of

parent partnership officers have been told by their LEAs that they are not allowed to support parents at SENDIST.

- 73 The service is also patchy and inadequately staffed in some areas: our survey discovered that some LEAs provide as few as one part-timer which, even in a small authority, cannot be adequate.
- 74 As stated above, some parents face immense barriers in supporting their children and acting as advocates for them. Access to SENDIST is clearly unequal with free legal representation not being available and little support otherwise available. IPSEA's free tribunal support and representation service, to which we refer many of our callers, is overstretched.
- 75 There is an inequality of access/take up among ethnic groups as shown by SENDIST ethnic monitoring of who appeals. Lack of Statements in community languages is also striking, not to mention SEN policies and translating support at reviews.
- 76 The charity PACE which supports parents of children with autistic spectrum disorders pointed out in their Tribunal Report 2003 that only 4 per cent of parents received legal aid for pre-hearing advice and appealing to Tribunal was something that only a minority of parents could take on. 'Appealing to the Tribunal is an undertaking which consumes major emotional, financial and time resources', they point out. They call for legal aid support to be extended to support more parents.
- 77 If parents succeed at the tribunal, they can still face problems which demand support and advocacy. PACE suggests the setting up of an independent monitoring body to monitor the implementation of Tribunal decisions, quoting a parent saying:
- A year later we are still fighting with our LEA to provide the provision the Tribunal decided.
- 78 **ACE believes that parents of children with SEN/disabilities deserve more and better support and advocacy, freely available and independent of both central and local government.**

How special educational needs are defined

Numbers

- 79 The Audit Commission noted in 2002 that 'despite the significant number of children with SEN, little is known about the overall pattern of their needs'¹⁵. They also noted increases in need:

Our national survey of LEAs indicates, over the last five years:

- significant increases in the number of children with autistic spectrum disorders (perceived by four-fifths of respondents), with speech and communication difficulties (two-thirds of respondents), and with profound and multiple learning difficulties (one-third of respondents); and
- significant decreases in few categories of need, except moderate learning difficulties (one-quarter of respondents) and specific learning difficulties (one-fifth of respondents).¹⁶

¹⁵ Audit Commission (2002) *Special Educational Needs – a mainstream issue*, p. 5.

¹⁶ Audit Commission (2002) p. 7

- 80 However, there has been a recent radical re-estimate of the numbers of children regarded as disabled (a category which must necessarily overlap with those regarded as having SEN, especially if they require additional aids and services to access education). The Prime Minister's Strategy Unit reported this year that:

Since 1975, the fastest growth in numbers [of disabled people] has been for children – from 476,000 disabled children under the age of 16 in 1975, to 772,000 in 2002. This represents an increase of 62%. Possible explanations include increasing prevalence of impairment among children, children with complex conditions surviving longer, increased diagnosis, increased reporting and/or overall increases in the population. ...¹⁷

- 81 The growth is also attributable to a change in the statistics used:

The 2001 General Household Survey (GHS), carried out by the Office for National Statistics (ONS), estimated there were 789,000 children under the age of 16 with an 'estimated longstanding illness, disability or infirmity that limits their activity'.

Analysis of DWP survey data (the 2002 Families and Children Study) by researchers at the University of Lancaster used a broader definition of disability. The results suggested that a staggering 10% of all children are disabled. This equates to just under 1.2 million children under the age of 17 in Britain.

Before these estimates were issued, policymakers and charities commonly used a figure of 320,000 disabled children (up to age 16). This comes from a 1984 survey by the Office of Population Censuses and Surveys (OPCS) which was reanalysed in 2000. Despite the availability of annually updated GHS data, policy-makers continued to use this out-of-date underestimate, which suggests a lack of serious political commitment to the issue.¹⁸

- 82 These figures must call into question any policy to reduce expenditure and legal entitlement to disabled children in schools, and may be another explanation for the persistence of enormous tensions in the system.

Better estimates are needed for policy formulation

- 83 The lower and less accurate figure of 320,000 is interestingly close to the number of children with Statements that was quoted as alarmingly high in the 1997 Green Paper on SEN:

[In 1993] it was envisaged that the needs of the great majority of children with SEN should be met effectively under its school-based stages, and that only in a minority of cases, perhaps the 2% of children envisaged by the Warnock Report in 1978, would the LEA need to carry out a statutory assessment of SEN and make a statement. But there has been a steep increase in recent years, so that 233,000 pupils (almost 3%) now have statements.¹⁹

- 84 ACE recommends that reliable estimates of the number of disabled children who need additional aids and services to access education are obtained in order to inform policy. We do not believe these are available at the moment, and without them claims that Statements can be reduced or SEN expenditure capped or redistributed are unfounded.**

¹⁷ Prime Minister's Strategy Unit (2005) *Improving the life chances of disabled people*, p. 34

¹⁸ New Philanthropy Capital (2005) *Ordinary Lives. Disabled children and their families*, pp. 7–8

¹⁹ DfEE (1997) *Excellence for All Children*, Green Paper, p. 35

Provision for different types and levels of SEN, including emotional, behavioural and social difficulties (EBSO)

- 85 In this section we are concentrating on difficulties that result in exclusions from school.
- 86 Two-thirds of permanent exclusions are of children with special needs, officially classed as needing extra support. ACE registers SEN as being involved in three-quarters of the calls to its exclusion advice lines. It is suspected that more children have unacknowledged special needs, a view borne out by research that found that 10 out of 11 pupils in a primary PRU had undiagnosed communication difficulties²⁰. It would obviously have been preferable to offer assessment and appropriate support to primary-aged children rather than excluding them to an environment where they were only diagnosed because of a therapist's personal research interest.
- 87 One example from our advice line in the last week of September 2005 is not untypical of exclusion of children with SEN because of unmet need/lack of support. The mother of a five-year-old boy rang us. Her LEA had refused her son statutory assessment in February despite severe developmental delay which had caused him to be held back a year in nursery. In his first few weeks in primary school, the school is only able to offer him support (shared) in the morning, so at lunchtimes and afternoons he is unsupported, becomes isolated, confused and frustrated, and (according to the school) is 'naughty and aggressive' and lashes out. He is in danger of permanent exclusion. If statutory assessment starts now, it may not bring resources in time to prevent the exclusion.
- 88 The 2004 annual statistical digest on schools revealed that while permanent exclusions of pupils *without* special needs had gone down by 579, permanent exclusions of children *with* special needs had risen by 334, a jump in one year of 6 per cent. Nearly two-thirds of the pupils in pupil referral units (PRUs) have special needs – ejected from mainstream schools but not placed in special schools²¹.
- 89 The NFER research already referred to indicates some of the problems of whether EBSO are seen as learning difficulties/disabilities and of teachers' confusion between a supportive versus a punitive regime:

In the secondary schools, [teachers] identified both learning difficulties and behavioural difficulties as common needs. In some cases, the pupils with learning difficulties were also thought to have behavioural difficulties whereas in other cases, the interviewees felt that these were different cohorts of pupils. One school felt that many of the pupils identified with learning difficulties would then develop behavioural difficulties because their learning needs were unmet, whereas others argued that behavioural difficulties alone did not constitute a special educational need as such (it should be noted that this represents interviewees' perceptions – regardless of DfES guidelines).²²

- 90 One school revealed extremely punitive attitudes:

In one case-study school, an interviewee's comment supported the view expressed in the authority (which was a 'high-excluding' one), that fixed-term exclusions were at a high level because of a lack of tolerance of persistent poor behaviour:

²⁰ Heneker, S. (2005) *British Journal for Special Education* vol. 32(2), pp. 86–91

²¹ DfES, 2005, *Special Educational Needs in England, January 2005*, SFR 24/2005, Tables 1a and 1b

²² Wilkin, A., Archer, T., Ridley, K., Fletcher-Campbell, F. and Kinder, K. (2005) *Admissions and Exclusions of Pupils with Special Educational Needs*, NFER, DfES Research Report RR608, p. 41

'[The school] has improved quite a lot and a lot of that is due to exclusion – we have rooted out quite a lot of the undesirable kids'.

This focus on removing undesirable behaviour was underlined in the comment from another interviewee in the same school, who reported 'pushing' a year 7 pupil with ongoing behavioural problems until a confrontation occurred and the pupil was eventually permanently excluded.

As far as I'm concerned if a kid is misbehaving in class then they should be removed ... I always make a point of challenging those pupils, and it's either black or white, they either conform to what I want or it results in a very serious incident where I challenge them to the point where they swear at me or do something. ... I challenge them to the point that neither of us will back down.

Head of year, secondary school²³

- 91 Here the teachers' motives are a desire for 'school improvement', which has overridden teachers' more usual commitment to helping and retaining pupils.
- 92 The following is from our July 2005 calls:
- A six year old with a Statement for ADHD was subjected to an escalating regime of exclusions from 1, to 2 to 4 to 8 to 16 days and so on. His mum called us when he was at 8 days – he'd just returned to school after being very anxious that he would fail again, and was sent home at lunch time.
- 93 A more appropriate response would have been to use the SEN framework, especially in reviewing the strategies and support used for him, with external help as required.
- 94 Currently, however, schools can ignore the strong advice in the exclusions guidance not to exclude children with special needs except as an absolute last resort. Parents are rarely able to overturn exclusion decisions even in such cases as the above.
- 95 ACE recommends therefore that children with SEN/disabilities whose behaviour is related to their SEN/disability should be removed from the exclusion process. At the very least it should be mandatory that a multi-agency review of needs, provision and reasonable adjustments is held before exclusion is used.**

The legislative framework for SEN provision and the effects of the Disability Act 2001, which extended the Disability Discrimination Act to education

- 96 Section 28C of the Disability Discrimination Act 1995 (DDA) as amended by the Special Educational Needs and Disability Act 2001 (SENDA) requires responsible bodies to refrain from placing disabled pupils at a substantial disadvantage compared to non-disabled pupils, but also exempts schools (but not early years providers which are not schools) from having to provide 'aids and services' (s28C, subsection (2)(b)), unlike FE and HE institutions which were so required by the Act. The reason for this (as is clear in Government statements about the Bill and from Hansard) is that such aids and services are meant to be provided by the pre-existing special needs law and guidance, especially through the statementing system. There are problems in the way these two elements of law work together, especially as
- not all pupils disabled within the meaning of the DDA will have special needs and not all pupils with special needs will be regarded as falling within the legal definition of disability (although most of them will);

²³ Wilkin *et al.* (2005), p. 50

- the prevailing climate against statementing means that disabled children will frequently not be able to insist on aids and services to access education in schools.
- 97 **In view of the mismatch between SEN and disability estimates, schools' exemption from the obligation to provide aids and services should be reconsidered.**
- 98 The DDA 1995 as amended sets out two main duties, which apply to all providers of services to disabled children. These are:
- a duty not to treat a disabled child 'less favourably' than other non-disabled children for a reason relating to his or her disability, and
 - a duty to make 'reasonable adjustments' to accommodate disabled children, so that they are not placed at a disadvantage for a reason relating to their disability.

Lack of awareness and use

- 99 The second of these duties (which levels the playing field for disabled children) is frequently misunderstood by schools, who believe that if they treat them the same as non-disabled children, all will be well. This misunderstanding comes up again and again on both our general advice and our exclusion lines, and together with the problem with definition of disability, implies that governors and staff still need training even four years after this much-heralded legislation.
- 100 Schools commonly are not aware of the legal definition of disability and often ask for a clinical diagnosis or label as 'proof', especially where children have cognitive impairments, even though case law has established that, e.g., moderate learning difficulties without a medical diagnosis can be a disability within the meaning of the Act.
- 101 The DDA 2005 further amends the DDA 1995. For the childcare and education sectors, the DDA 2005 places a duty on all public sector authorities to promote disability equality, to be implemented in late 2006.
- 102 In spite of the re-estimated and huge number of children considered to be disabled, and the many problems that arise for disabled people in day-to-day life outside school, the current DDA seems not to be used by parents to any great extent. Parents perceive (with good reason) that they may face the breakdown of good relations with schools if they raise it, even where their disabled child has faced an outrageous exclusion from a school play, or a teacher (or teachers) will not accept that they need to approach the child differently to other children to ensure they can, for instance, understand instructions and therefore comply with classroom expectations.
- 103 There has been a very low number of discrimination claims to the Special Educational Needs and Disability Tribunal (SENDIST) (at a peak of 81 in 2003/4), and a low success rate for the claims that were made. SENDIST's first President, Trevor Aldridge, was concerned that these results were probably not a true representation of life as it is lived in schools, that disability discrimination was indeed happening, but that parents and schools were ignorant of how to identify it and what to do about it. He suggested that governors described what it is and how to remedy it in their annual report to parents²⁴. Perhaps that is unrealistic considering how often advice workers hear of school policies and practices that have obviously not been reviewed in the light of SENDA.

²⁴ Special Educational Needs and Disability Tribunal (2003) *Annual Report 2002/3*, p. 3.

- 104 Even if more parents understood it, for many the process is too complex, the rewards are too little, and the threat of a total breach with the school their child attends is too great. Experts on this area point out that all successful cases have been taken against schools from which parents have already removed their children.
- 105 While cases remain so rare, there is little hope of this new legal remedy acting as an incentive to cultural change and the establishment of good practice. And David Wolfe, a leading education barrister who has argued some of the current leading cases in this area, thinks there is huge resistance to change:

My experience is that, despite clear Government guidance and the decision of the Court of Appeal in *H -v- Hounslow*, many schools, LEAs and even SENDIST chairs have still not realised that the law now says that, where a parent wants their child included in mainstream, mainstream cannot be refused on the grounds that it is 'not suitable' for the child – it must be made suitable. And there is clearly a long way to go before the full implications of the Disability Discrimination Act permeate into schools.

Disability discrimination and permanent exclusion

- 106 The most drastic result of discrimination in education must be permanent exclusion, and for this parents do not appeal to SENDIST but to local non-expert appeal panels. ACE recently raised with the DfES three major problems specific to disability discrimination and exclusion appeal panels (see Appendix), the chief of which is the lack of remedy if claims are upheld. We asked how many disability discrimination claims were made in cases of permanent exclusion. It appears that the Department does not know. We still hope that this Government which is determined to make their inclusion strategy work will establish that where schools are taking the most penal action they can against pupils, and where so many of the pupils being excluded have special needs, there is an effective remedy for disability discrimination.
- 107 In 2003, the Council on Tribunals reported to Parliament on the problems with hearings by local non-expert panels of appeals against permanent exclusion of children with SEN, and recommended that these appeals should be heard by SENDIST²⁵. The Government responded that they would not do this, giving these reasons (our comments in italics):
- the low number of pupils with Statements who are excluded (*in spite of a child with a Statement of SEN being nine times more likely to be excluded, and current figures showing that two-thirds of exclusions are of children with SEN*);
 - longer journeys, higher travel costs for parents and longer delays in determining the outcome (*the DfES did not consult parents' organisations before reaching this conclusion; in our view many parents would prefer waiting for an expert and fair hearing to a quick and convenient but unfair one. SENDIST in any case pays parents' travel*);
 - 'it could also transmit the misleading message that all bad behaviour was the result of some condition beyond the child's control' (*but to ignore the rights of pupils who have such conditions seems to be in itself discriminatory*).
- 108 Disabled children likely to fall into this trap are those with learning difficulties which are not supported properly (this has included children with cognitive

²⁵ Council on Tribunals (2003) *School Admission and Exclusion Appeal Panels: special report*, Recommendation 2, p. 27

impairment caused by Down's syndrome), those with social and communication difficulties such as autism, and those with mental health needs.

- 109 The Council on Tribunals did not include disability discrimination issues and the need for even more expertise in that area than is required for SEN, but relied on their own observations of panels at work with children with SEN. They did not believe that this system was fair on such pupils. We believe that there is even more of an imperative to change it now that such panels have to hear disability discrimination claims.
- 110 ACE recommends that if children whose behaviour arises from their SEN/disability remain within the exclusion process, their appeals against exclusion go to the Special Educational Needs and Disability Tribunal.**