



Voices and Choices

A proposed right for children to appeal to the Special Educational Needs Tribunal for Wales



Consultation

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Voices and Choices

Audience	Children and Young People; Children's Commissioner for Wales; Local Authorities; Diocesan Authorities; Voluntary Organisations; Educational Psychologists; Children and Young People Partnerships; Public Services Ombudsman for Wales; Children's Services, The Law Society, Legal Services Commission, SENTW President, Social Services, Teaching Unions, Tribunals Service, WLGA; Partners concerned with Special Educational Needs, and a 10% sample of schools.
Overview	The Welsh Assembly Government is committed wherever possible to increasing the participation of children and young people in the processes and decisions that affect them. This consultation is to give information and seek views on how we can develop the necessary mechanisms that will enable children to appeal to the SEN Tribunal for Wales (SENTW).
Action required	Responses to SEN-Consultation@wales.gsi.gov.uk by 3 October 2008.
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Additional copies	Further information and additional copies may be obtained from Llion Hughes (see contact details above).
Related documents	One Wales (2007) National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008 The Education (Special Educational Needs) (Wales) Regulations 2002 The Special Educational Needs Code of Practice for Wales (2002) The Special Educational Needs and Disability Act 2001

Welsh Assembly Government

Consultation Paper

A Proposal to Give Children a Right of Appeal to the Special Educational Needs Tribunal for Wales

1 INTRODUCTION

The Welsh Assembly Government is committed wherever possible to increasing the participation of children and young people in the processes and decisions that affect them. We are now inviting your views on how we can develop the necessary mechanisms that will enable children to appeal to the Special Educational Needs Tribunal for Wales (SENTW).

The late Children's Commissioner for Wales, Peter Clarke, first proposed that children with special educational needs should have a right of appeal to the SENTW in situations where a parent, for whatever reason, decides not to exercise their own parental right of appeal.

The Welsh Assembly Government is now proposing that children with SEN should have a right of appeal to SENTW. This proposal accords with one of the Assembly Government's "Core Aims": to ensure that all children and young people are listened to and treated with respect. The Assembly Government is committed to ensure that there are increased opportunities in the appeals process for children's views to be taken into account irrespective of whether it is they or their parents that have made the appeal.

The Government of Wales Act 2006 gives the National Assembly for Wales the power to make Assembly Measures in relation to the "matters" listed in Field 5 of Part 1 of Schedule 5 to that Act. The recently made National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008 inserted "matter 5.17" into Field 5 of Part 1 of Schedule 5, detailed as follows:

Matter 5.17

Education and training for –

- (a) persons who have greater difficulty in learning than the majority of persons of the same age as those persons;
- (b) persons who have, or have had –
 - (i) a physical or mental impairment, or
 - (ii) a progressive health condition (such as cancer, multiple sclerosis or HIV infection) where it is at stage involving no physical or mental impairment.

The matter does not include arrangements for persons to travel to and from the places where they receive education or training.

The National Assembly for Wales therefore now has the power to legislate in relation to Additional Learning Needs. The purpose of this consultation paper is to consult on how such a proposal may work.

The Welsh Assembly Government considers that there are three main reasons to develop legislation that provides for the rights of children to appeal to the SENTW:

Firstly, to give practical expression to the United Nations Convention on Rights of the Child (“the UN Convention”) and in particular Article 12, which states:

- 1. Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Secondly, to provide an additional safeguard to ensure that the needs of children can be considered by the SENTW. Current arrangements rely on the presumption that statutory agencies will be competent in their practice and administration and that parents will act to promote the best interests of their children. There may be potential hazards for some children when one or both of these essential ingredients are missing.

Thirdly, to reduce concerns that there might be some parents who, even with support, simply do not feel willing or either confident or competent enough to pursue an appeal themselves. In these situations there is a risk that the educational needs of the child might not be fully addressed.

The Welsh Assembly Government supports the principle to give children the right of appeal in relation to the existing grounds on which a parent can appeal under the Education Act 1996. In this consultation paper, we explore the issues around such a right of appeal and the key questions that arise from it. This document forms the basis of a consultation with parents, professionals and other interested stakeholders. A shortened version of this document has been published for children and young people so that we may be able to seek their views. We will also be consulting with children and young people through a series of facilitated workshops. Details of these will be available on the Assembly Government’s website: <http://www.assemblywales.org> and at CLIC, <http://www.cliconline.co.uk>

We begin with a description of the nature and extent of special educational needs (“SEN”) in Wales, and provide a summary of the current assessment and statementing process for special educational needs, and a description of the function and appeals activity of the SENTW. We then define the proposed right of appeal and the grounds to which it will apply. The remainder of the document comprises two sections which consider the following: the competency of children and young people to be involved with and to make decisions concerning their lives; and what are the main practical implications for this right of appeal.

Each of these last two sections contains a summary of the main issues, and questions on which we are asking for views. There is also an opportunity to add any further comments or observations at the end of the consultation response form.

Throughout this document the term 'child' is used to mean a child or young person who has not reached the age of nineteen, and the term 'parent' to mean the adult or agency that holds "parental responsibility" for a child.

2 BACKGROUND

2.1 What are special educational needs? What the law says

We refer throughout this document to special educational needs, not to "Additional Learning Needs" (of which SEN is a type). The reason is that at present the law provides for an SEN Tribunal, not an Additional Learning Needs Tribunal, and a right to appeal about a child's SEN.

The Education Act 1996 (s312) says children will have special educational needs if they have a learning difficulty which calls for special educational provision to be made for them. Children have a learning difficulty if they:

- (a) have a significantly greater difficulty in learning than the majority of children of the same age,
- (b) have a disability which either prevents or hinders them from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the local education authority, or
- (c) are under the age of five and fall within the definition at (a) or (b) above, or would do so if special educational provision was not made for them.

Special educational provision means:

- in the case of a child aged two or over, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of their age in schools maintained by the local education authority (other than special schools) or grant-maintained schools in their area, and
- in the case of a child under the age of two, educational provision of any kind.

Details of how the law is translated into practice are contained within the Special Educational Needs Code of Practice for Wales 2002. The Code of Practice makes it clear that it cannot be assumed that there are hard and fast categories of special educational need. It emphasises that each child is unique and that the response by any local education authority (LEA) should reflect the particular circumstances of that child.

According to the Code of Practice, children have needs and requirements which may fall into at least one of four areas outlined below, and many children will have inter-related needs. The impact of these on the child's ability to function, learn and succeed should be taken into account. The areas of need are:

- Communication and interaction needs.
- Cognition and learning needs.
- Behaviour, emotional and social development needs.
- Sensory and/or physical needs.

There are approximately 650,000 children in Wales of whom around one in five (130,000) will have some sort of special educational need. Of these, around 12.5%, that is an estimated 16,250 children - or 2.5% of all children living in Wales - will at any time have a statement of special educational needs. The majority of these children are educated within mainstream schools.

2.2 The assessment and Statementing of Special Educational Needs

While the special educational needs of the great majority of children are met in mainstream settings through Early Years Action and Early Years Action Plus or School Action and School Action Plus, local education authorities have a legal duty to identify and make a statutory assessment of those children for whom they are responsible who have special educational needs. If, in light of that assessment, it is necessary for the LEA to determine the special educational provision for a child, the LEA must make and maintain a Statement of the child's special educational needs.

A request for assessment can be made by a child's school, a parent or another agency. Having received a request, the LEA must first consider whether or not to undertake an assessment. If an LEA in Wales refuses to agree to a parent's, school's or other agency's request for assessment, then the child's parents have the right of appeal to the SENTW.

Statutory assessment itself, however, will not always lead to a statement. The critical factor in determining whether a statement should be made is whether the special educational provision necessary to meet the child's needs can reasonably be provided within the resources normally available to mainstream schools and early education settings in the area. If an LEA, having reviewed the evidence from assessment decides that a statement is not required, the child's parents have a right of appeal to the SENTW. The LEA must tell the parents of their right to appeal and the appropriate timescale for making an appeal: two months from receiving the decision.

A statement of special educational needs includes the following:

- A description of all the child's learning difficulties and assessed needs identified during the statutory assessment together with a description of the child's current functioning – what the child can and cannot do.
- The special educational provision identified to specifically meet the assessed needs.
- The type of school and any particular school which the LEA considers appropriate for the child, or the LEA's arrangements for the provision for education other than at school which the LEA considers appropriate.

There are set time limits in which the different parts of the process of making statutory assessments and statements must normally be concluded. For instance, the period from the receipt of a request for a statutory assessment or the issue of a notice to parents that an assessment is to be undertaken to the issue of the final copy of the statement should normally be no more than 26 weeks.

The principle of child involvement in all processes concerned with assessment and decision-making prior to an appeal is well established. Chapter 3 of the Code of Practice makes it clear that evidence from the child's perspective is essential through all stages of the special educational needs assessment process up to and including submissions to the Tribunal.

Within the existing appeals process, the SEN Tribunal Regulations 2001 (as amended) require LEAs to seek and present the child's views – or to submit a reason why they could not – although there is no similar requirement on the parents to state their understanding of the child's views.

2.3 The role of the Special Educational Needs Tribunal for Wales and appeals activity

The SEN Tribunal was established in 1994 as an independent body to arbitrate appeals arising from disputes between parents of children with special educational needs and LEAs in Wales and England. The Education Act 1996 established a parental right of appeal to the Tribunal. Implementation of Part II of the Special Educational Needs and Disability Act in September 2002 saw an extension of the Tribunal's remit to consider certain claims of disability discrimination made by parents. In 2003 arrangements were devolved in Wales and the SENTW was established as a distinct jurisdiction.

The Tribunal can receive appeals about SENs and/or claims of disability discrimination in relation to "responsible bodies" (typically governing bodies of schools). The Disability Discrimination Act 1995 (as amended) defines a disabled person as someone who has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Schools must not treat disabled pupils less favourably because of their disability, without justification. They must also make reasonable adjustments so that disabled pupils are not disadvantaged compared with pupils who are not disabled. Schools must not discriminate against disabled pupils in their admissions arrangements, in the education and associated services they provide, or in relation to exclusions from the school. Local education appeals panels will consider claims of discrimination in relation to admissions to, and permanent exclusions from, local education authority (LEA) maintained schools. The Tribunal will hear all other claims about schools under the Disability Discrimination Act (DDA).

This consultation paper does not address a child's right to make claims of disability discrimination to the SENTW. We are, though, minded to consider if these claims should form part of our proposals.

Question 1: Do you think we should consider extending the right so that children can make claims of disability discrimination themselves?

Within the existing appeals process, the SEN Tribunal Regulations 2001 (as amended) require LEAs to seek and present the child's views – or to submit a reason why they have not. There is no similar requirement on parents to state their understanding of their child's views.

The same regulations also allow for a child to attend private hearings. In addition, the SENTW has the discretion to:

"Permit the child to give evidence and to address the Tribunal on the subject matter of the claim."

The number of appeals to the SENTW is relatively small. Most appeals to the SENTW arise from (i) a refusal by an LEA to carry out an assessment of special educational needs (ii) a refusal by an LEA to provide a statement following an assessment of special educational needs, or (iii) parental disagreement about the contents of a statement. In 2006/07, there were 50 registered appeals based on the refusal to assess or to provide a statement, equivalent to around 0.04% of all children with

special education needs. There were also 65 registered appeals based on the contents of a statement in 2006/07, equivalent to around 0.4% of all children with statements. In the same period, there were 7 claims of disability discrimination.

Since 2003, more than half of all registered appeals have not reached a hearing; they have been either withdrawn by parents or conceded by the LEA before going forward to a SENTW hearing. Of those appeals that did reach a hearing, about 80% have been decided in favour of the parents, either totally or in part.

About two-thirds of all appeals have related to children of 11 years of age or younger. This proportion has remained more or less consistent since the SENTW came into existence. These include a significant number of appeals concerned with provision for transition into secondary education.

3 THE PROPOSED RIGHT OF APPEAL FOR CHILDREN TO THE SPECIAL EDUCATIONAL NEEDS TRIBUNAL FOR WALES

It is proposed that children will have parity of rights of appeal to the SENTW when the three following conditions are met:

- A request for statutory assessment, at least, will already have been made by a parent, school or other agency.
- A child's parent has decided, for whatever reason, that they will not exercise their own parental right of appeal.
- The child is competent to make an appeal.

It is proposed that the fact that a child will have satisfied a competency test does not mean that s/he is required to prepare and represent their case themselves. We propose that a competent child may choose to have an advocate and/or representative to do this for them.

It is also proposed that the existing grounds on which a parent can appeal will be extended to children. These grounds are that the LEA:

1. Will not carry out a formal assessment of a child's special educational needs;
2. Refuses to issue a statement of a child's special education needs;

Or, where a statement has been issued or changed:

3. The needs identified within a statement, and the special help designed to meet those needs (parts 2 and 3 of the statement);
4. The name or description a school where the child will be placed (part 4 of the statement);
5. The LEA not naming a school;
6. An LEA refusal to change the maintained school named within a statement, where that statement is at least one year old;
7. A refusal by an LEA to reassess needs, provided a new assessment has not taken place within the preceding six months;
8. An LEA decision not to amend a statement following reassessment;
9. An LEA decision to cancel a statement

It is proposed that the rights of a parent or LEA to (i) request a review by the Tribunal of its decision, chiefly for technical reasons, and (ii) appeal to the High Court (and in the near future to the Upper Tribunal) on a point of law, will be extended to children.

We propose that children in Wales who have SEN will have access, from 2009, to Independent Specialist Advocacy Services (ISAS) which will have a role in providing advocacy support, where the child requests it or in other defined circumstances.

4 COMPETENCY AND CHILDREN'S RIGHTS

Children's rights of appeal, complaint or to representation tend to be qualified in one way or another. This qualification might simply be by age so that the older you are, the less qualified your rights become. For younger children, a competency test is a more common way in which rights are qualified. The test of Fraser Competency, for example, is one fairly well-known criterion. In this part of the paper, we look at the question of competency and how it might apply to the right of appeal to the SENTW.

4.1 What does competency mean?

Essentially, competency means the ability of a child to be aware of their circumstances and to be able to recognise the choices available to them. Depending on the nature and consequences of a decision, a test for competency might also depend on the ability of a child to weigh up the consequences of a decision to act in one way or another. Competency cannot usually be determined in isolation from a person's context, or without knowing what information has been made available to them.

Article 12 of the UN Convention establishes the principle to a right of expression for children. At the same time, however, it also qualifies this right by limiting the duties of responsible authorities to a "child capable of forming his or her own views". This suggests another form of competency test. In this case, providing a child is able to form views about the subject of a potential appeal, then they will be competent to exercise that right and must be afforded the opportunity to do so. The fact that Article 12 goes on to say that the weight to be given to a child's views will depend on the "age and maturity of the child" is not in itself a bar to making the appeal in the first place. Rather, this is a criterion on which the contents of the child's appeal will be assessed at a later stage in the process.

Within a UK context, the following examples provide a picture of the variation in what constitutes competency in children.

- The common law position on the rights of children is that they do not remain under the control of their parents up until a particular specified age. Instead, their right to make their own decisions will be upheld when they reach the stage where they have sufficient understanding and intelligence to be capable of making up their own mind in relation to the matter that requires a decision. Each case will depend on its particular circumstances and the child involved.
- Generally speaking, young people over the age of 16 years tend to be presumed as competent. Certainly, they tend to have a greater number of formal rights to appeal than children under sixteen years of age. These include Employment and Benefits Tribunals as a right of appeal to the Additional Support Needs Tribunal for Scotland.
- In Wales, children over compulsory school age, i.e. 16, can appeal in their own right against exclusion from a school maintained by an LEA. Children between 11 and 16 years can also appeal in their own right provided parental consent is given.

- Children of “sufficient age and understanding” (perhaps as young as eleven or twelve years old) may bring an application for a residence order (who a child wants to live with) or for contact (who a child wants to see) under the Children Act 1989.
- Applications by children for Legal Aid are subject to a competency test: is the child old enough to give instructions and understand the nature of the work to be undertaken? Nonetheless, within civil litigation, all children under the age of 18 years require a litigation friend to act on their behalf unless the Court determines otherwise.
- Children who wish to appeal to the Mental Health Review Tribunal are presumed, through virtue of their detention, to be incompetent and are therefore guaranteed independent representation.

4.2 What should a test for competency consist of?

Children with special educational needs, even of the same chronological age, will vary widely in their ability to make competent decisions. Assessment of competency needs to be sensitive to the specific issues facing the child. A child, for example, might demonstrate competency in understanding and questioning the contents of a statutory assessment but that competency might not extend to an ability to represent their case at a Tribunal.

This indicates a potential requirement for having different tests for competency at different points in the process. For example, the threshold for determining competency as to whether a child should be advised of a right to appeal and may be able to appeal in the first place might be lower than the threshold set by the Legal Services Commission to assess competency in an application for public funding.

A test for competency could be determined by age alone. For example, children above a certain age would be presumed to be competent and therefore have a right of appeal. Alternatively, the test might involve a combination of age and other factors. For example, children above a certain age would be presumed to be competent, but children below that age would need to satisfy a test for competency based on other factors such as the ability to form and communicate views and/or to understand and recognise the consequences of actions. Finally, the test might be comprised of these factors alone and not be based on age at all.

Whatever form the test for competency takes it will need to recognise and accommodate a wide range of ways in which children may choose to express themselves. This will ensure consistency with Article 13 of the UN Convention which states that the child: *shall the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds... either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*

Question 2. In determining a child's ability to exercise their right of appeal,

- a) what should the competency test for children with special educational needs consist of?**
- b) should a test for competency be set at a lower threshold than that applied for Legal Aid (in short, that a child is able to give instructions)?
See also section 5.4**

4.3 Who should determine competency?

It may be difficult to identify a single test of competency that could apply to all children for all stages of the appeals process. To complement the factors involved in judging competency, who will actually determine competency will also be important.

Determining competency at key points in the process might ideally be a collaborative effort involving the child and other significant adults who know the child well, as well as any provider of specialist advocacy services. A consensus about competency is likely to be of value to the child and will help support the sequence of actions that follow from it. Certainly, we would envisage that where specialist advocates are involved, they will work from the beginning of their involvement to build that consensus.

However, there is also an issue as to what happens where a disagreement concerning competency is not resolved (for example before an appeal has even been registered). Such a disagreement may best be resolved by another identified individual, for example an Arbitrator, or an agency to resolve what may in practice be a small number of disagreements but which will nonetheless have important implications for the child.

Question 3 Are there other aspects of competency for children with special educational needs that we should consider?

Question 4 Who should determine competency, and at what stages of the appeals process?

Question 5 If there is disagreement before an appeal is submitted to the SENTW, about whether a child is competent, who should make the final decision?

5 ADDITIONAL IMPLICATIONS FOR THE RIGHT TO APPEAL IN PRACTICE

In this section we consider a range of practical implications (beyond questions of competency) for this right of appeal.

5.1 The parent/s' decision

The right to appeal is currently, and will remain under this proposal, a matter of choice for parents. The fact that the child's right would be conditional upon their parent's choice not to appeal would mean that the LEA would need to consider very carefully how it ensures that the child's right to appeal is then made available. We are aware that some LEAs already routinely talk to parents and explain the decisions that the Authority has made.

At any stage in the assessment and statementing process, where a parent must be notified by an LEA of their right of appeal, the LEA will need to establish whether the parent is intending to exercise that right and, if not, how best to engage with the child and his or her parents.

This might prove to be relatively straightforward in some situations. For instance, a parent could respond positively by saying "I confirm that I am not intending to exercise my right of appeal". The parent, when asked by the LEA, might then go on to say "...and I understand that my child can now choose whether they wish to use their right of appeal". The parent might also agree that it would be helpful to arrange a meeting with a specialist advocate and the process would move on.

However, what should happen in situations where a parent does not appeal and then does not respond to efforts by an LEA to confirm their decision or to establish a dialogue about their child? Should LEAs be required to seek parental permission to allow their child to appeal or would a non appeal by parents, by default, be situation enough? How could the LEA be sure that the child is aware of their right or in any position to exercise it? There are no easy solutions here. The LEA in partnership with professionals who know the parents well (for example a school teacher) may need to make considerable efforts to engage with the parents. This may take more time but will at least ensure that the best possible chance has been given to the child to exercise their right. Where this approach fails or where this is an outright refusal by the parents to cooperate, then the LEA itself will need to consider whether or not the essential needs of the child are being adequately safeguarded by the parent.

Question 6. How might LEAs best ensure a child with special educational needs is made properly aware of their right to appeal?

5.2 A culture of participation within special educational needs provision

The right of children to appeal to the SENTW forms part of a broader commitment to promote the participation of children with special educational needs in decisions that affect their lives. These ambitions are set out, in particular, in chapter three - Pupil Participation - of the Code of Practice. Realising these ambitions will require greater participation of children in the special educational needs process, not least because many children may choose not to appeal - or may not be able to appeal.

The current requirement for local education authorities to 'have regard' to the Code of Practice is seen by many people as inadequate. Its status as guidance may allow for non-compliance and thereby entail risks to the safeguarding of children's rights, views and wishes. This matter will be considered by key stakeholders as part of the review of the statutory assessment and statementing framework currently being undertaken by the Welsh Assembly Government. Strengthening the content and status of the Code of Practice could include a review of chapter three. Aside from language and status, a revision could include more extensive evidence of best practice approaches to promoting participation of children, and guidance on the quality of reports concerning children's wishes and feelings.

LEAs must currently advise parents of arrangements they have made for Parent Partnership and Disagreement Resolution Services.

Parent Partnership Services are expected to provide neutral information for parents on all SEN procedures set out in the legislation and the Code of Practice. They must also use their best endeavours to provide access to an "Independent Parental Supporter" for all parents who want one.

Dispute Resolution Services exist to resolve differences of opinion either before an appeal is made or in parallel with the appeals process.

At all points in the appeals process where LEAs are required to notify parents of their right of appeal, LEAs are also required to notify parents of their entitlement to access these arrangements. It is proposed that this requirement should extend to children under the proposed right of appeal. There is evidence that the involvement of children in mediation efforts can be highly productive.

Question 7. What else could be done to ensure the greater participation of children with special educational needs in decisions that affect their lives?

Question 8. What do you see as the main obstacles to the involvement of children in dispute resolution, and how do you think these could be resolved?

Question 9. What are the implications for extending to children access to Partnership Services and Independent Supporters? How can we ensure the provision of effective services for children?

5.3 Supporting children – the need for independent advocacy

Making the right of appeal effective for children will require the provision of independent and specialist advocacy services as well as appropriate and child friendly information, ethos and systems. Parents can experience stress when challenging the special educational needs process and/or taking a case to the a tribunal. This suggests that children will need to be supported before, during and after an appeal. By definition an appeal is the result of conflict between families and LEAs or schools. Children may be placed in a position of conflict with professionals as well as their parents. There are potentially difficult assessments children might need to make in balancing interests within their family and school lives.

At the moment there is no entitlement to advocacy in appeals proceedings for children with special educational needs. This group of children has, however, been identified as a priority group to have an entitlement to access the Integrated Specialist Advocacy Service in Wales (ISAS). ISAS are to be commissioned by the Children and Young People Partnerships from 2009. It is proposed that guidance on the new ISAS arrangements will be issued from the Assembly Government later this summer. We recognise that making provision for advocacy and enabling full access to it, will be essential to effective implementation of the right of appeal for children.

Specialist advocates are people with experience in talking to and communicating with children who have special educational needs. They will also understand the law, how the appeal process works and what the SENTW can and cannot do. We think specialist advocates will be important in meeting the needs of children for several reasons:

- Children may want to talk to someone who is independent and has no direct, formal interest in the decision whether to make an appeal or not. They may need advice on the possible outcomes of an appeal or its potential consequences. Children might, for example, have worries about upsetting their parents or their teachers at school if they make an appeal.
- Understanding how the appeals system works is not straightforward. Many parents and professionals find the whole process difficult and it is unlikely that children will find it any easier.
- Preparing all the papers for an appeal is something that nearly everyone needs help with.
- Some children might feel comfortable with the idea of going to a SENTW hearing on their own but we think most children will want an advocate and/or representative to be there as well. Some children might want to go to a hearing but ask their advocate and/or representative do most or all of the talking.
- After the appeal hearing is finished, children may need help and support to understand the decision made by the SENTW and what it will mean for them.

Question 10. How should the right of appeal be promoted by LEAs and the SENTW so that children *in general* are aware of the right?

Question 11. How could children with special educational needs best be supported before, during and after an appeal?

Question 12. What should we consider in ensuring advocacy provision is available for children making an appeal to the SENTW?

Question 13. What do you consider to be the main training and resource requirements to support children's full access to and use of their right of appeal?

5.4 Legal aid

Legal aid is available from the Legal Services Commission (LSC) to support a child's right to appeal to the Special Educational Needs Tribunal. Legal Help is available to all applicants applying to the tribunal subject to certain criteria being satisfied (see below). Legal Help will fund a solicitor to provide legal advice, prepare a case, and obtain expert reports, but will not cover representation before the tribunal.

There is nothing to stop a child applying for Legal Help in their own right, providing that they are competent to do so. The test for competency here is that the child is able to give instructions, and that they understand what the funded work will entail. Children who do not satisfy the LSC two-stage test will need someone to apply on their behalf. Independent specialist advocates acting as a "next friend" for the child meet the requirements of the legal aid rules and would be entitled to make the application for legal aid.

All applications for Legal Help are subject to financial assessment of a client's means. Entitlement to funding is usually based on an assessment of household means, not those of the child unless a conflict of interest is established.

It is clear that the overwhelming majority of children assessed on their means alone would be entitled to legal aid support. This does raise the potential prospect of "proxy appeals" – parental appeals made in the name of the child and with which the child may or may not agree. It is difficult to gauge how significant a prospect this might be. A parent might feel that an appeal made by their child would stand more chance of success in securing the decision that they (the parent) seek. It is difficult to identify a solution that would eliminate all risks of abuses of proxy appeals without further restricting the entitlement of children to seek independent representation.

As mentioned, public funds are not usually made available to fund representation before a tribunal. This is the case regardless of whether the client is an adult or a child. However, an application for "Exceptional Funding" can be made to the LSC. These will not normally be granted unless the decision not to provide funding would contravene a child's human right to a fair hearing.

Question 14. What could be done to ensure that children know about, and are able to access, Legal Aid where this is needed?

Question 15. If a child cannot be represented through Legal Aid, how should the child be represented and what, if any, funding issues should be taken into account?

Question 16. Are there additional steps that should be taken to reduce the prospect of “proxy appeals”?

5.5 How will we know if this change is making a difference?

Children have told us that they want to be listened to, and value being more involved in the decisions that affect their lives. They also tell us that sometimes being listened to and involved doesn't seem to change anything. As with any new initiative, we will want to gauge its impact by listening to children, their families and all professionals who are directly involved in providing services to children with special educational needs. We have identified three particular areas of review which we feel might provide a reliable picture as to how this right for children is actually working in practice. The three areas are:

- Whether the right of appeal and the SEN Tribunal regulations are actively promoting children's access to decision-making within the appeals process?
- Whether the provisions for specialist advocacy are ensuring full access for children to the appeals process?
- What is the impact of a child's right of appeal on decision-making across the special educational needs assessment, statementing and appeals process?

Question 17. What information would need to be collected, how and from whom, to assess these three areas of review?

Question 18. Are there any other areas that should be assessed to determine the impact of the right of appeal?