

SPECIAL EDUCATIONAL NEEDS AND DISABILITY ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Special Educational Needs

Sections 1 to 10 and Schedules 1 & 8

Section 1: Education in mainstream schools of children with special educational needs

45. The section replaces the existing section 316 EA and strengthens the right to a mainstream place for children with SEN. This seeks to enable greater inclusion and safeguard the efficient education of all pupils.
46. *Section 316(2)* ensures that pupils with SEN but without a statement are educated in mainstream schools. *Section 316(3)* ensures that pupils with SEN and a statement are educated in mainstream schools unless this would be incompatible with parental choice or with the provision of efficient education for other children. This means an LEA does not have to provide a mainstream place where parents do not want one. In practice, incompatibility with the efficient education of others is likely to be where pupils present severe challenging behaviour that would significantly disrupt the learning of other pupils or place their safety at risk. *Section 316(4)* defines what constitutes a mainstream school. For the purposes of this section, City Technology Colleges (CTCs), City Colleges for the Technology of the Arts (CCTAs) and City Academies (CAs) (which are independent schools) are mainstream schools.
47. The section also inserts a new section 316A in the EA which ensures that the new provisions work alongside the existing provisions of the EA. *Section 316A(1)* allows a child with SEN to be educated at an independent school (whether or not it is a mainstream school), or a non-maintained special school where the LEA are not funding the placement. Without this sub-section parents of children with SEN but without statements would not be able to choose to send their child with SEN to an independent or non-maintained school special school at their own expense. This would be incompatible with the Human Rights Act 1998. *Section 316A(2)* sets out the exceptional circumstances in which a child with SEN but without a statement can be educated at a special school. The section reflects existing arrangements for maintained special schools i.e. children without statements can be placed in special schools if they are being assessed for a statement, or their circumstances have changed suddenly and the head teacher (or governing body in Wales), parents, LEA and (when the child is admitted for an assessment) those providing advice agree, or if a child is in hospital and so is attending a hospital special school. *Section 316A(2)(b)* provides that regulations can prescribe circumstances in which a child, admitted for the purpose of assessment, can remain in a special school after the assessment is carried out. It is envisaged that these regulations will deal with the child's position in the period after the assessment

is carried out but before any decision is taken about whether a statement is necessary, and once any decision about a statement is made.

48. *Sections 316A(3) and (4)* explain how the new section 316 interacts with Schedule 27 to the EA (making and maintenance of statements). *Section 316A(3)* ensures that section 316 does not affect the operation of paragraph 3 of Schedule 27 (parent's right to express a preference for a maintained school) or section 348 (provision of special education at non-maintained schools). LEAs will not be prevented from naming independent or non-maintained special schools in statements by the requirement to educate children with SEN in mainstream schools. Parents continue to have the right to make representations for a non-maintained school to be named in their child's statement and, where the LEA agree, they must fund the placement in a non-maintained school. *Section 316A(4)* makes it clear that if an LEA do not name the parent's choice of maintained school in a statement their choice of school is governed by the provisions of section 316. *Sections 316A(5) and (6)* further strengthen the right to a mainstream place by requiring schools and LEAs, when seeking to demonstrate that inclusion would be incompatible with the efficient education of other children, to show that there are no reasonable steps they could take to prevent the inclusion of a child with a statement from having that effect. *Section 316A(7)* means that if an LEA have named a maintained school in a statement (and so the child must be admitted in accordance with section 324) the school cannot subsequently rely on the exception in section 316(3), i.e. that the child's inclusion would be incompatible with the efficient education of other children. *Section 316A(8)* requires schools and LEAs to heed guidance about section 316 and section 316A to be provided by the Secretary of State in England and, in Wales, the NAW. *Section 316A(9)* provides that the guidance must in particular include advice on reasonable steps maintained schools and LEAs should consider to prevent inclusion being incompatible with the efficient education of other pupils. The effect of *Section 316A(10)* is that regulations for Wales made under section 316A will be made by the NAW. *Section 316A(11)* explains what "authority" means in the section.

Section 2: Advice and information for parents

49. This section amends the EA by inserting a new section 332A to place a duty on LEAs to make arrangements for providing information on SEN matters to parents of children in their area who have SEN. These are normally known as parent partnership services. Most LEAs already provide such services but there is no legal requirement on them to do so. The new duty does not mean that LEAs will have to provide the services themselves; they might, for example, decide to contract with a provider from the voluntary sector.
50. In making these arrangements LEAs must heed guidance issued by the Secretary of State or, in Wales, the NAW. The revised SEN Code of Practice will give guidance on parent partnership services. LEAs must publicise to parents and schools, in their area, the fact that the services are available and must inform other interested parties.

Section 3: Resolution of disputes

51. This section amends the EA by inserting a new section 332B and provides an additional means of resolving disagreements between parents and the LEA and/or schools. It also introduces a new mechanism to seek to prevent such disputes. The new arrangements are intended to provide an informal forum for exploring differences, identifying points of agreement and disagreement and to find a way forward that all parties accept. *Section 332B(3)* requires LEAs to appoint an independent person (not part of the school or LEA decision-making process) to facilitate the avoidance or resolution of disputes. In practice, this will often be someone from the voluntary sector. *Section 332B(4)* requires LEAs to take heed of any guidance issued by the Secretary of State or, in Wales, the NAW when making the arrangements. It is intended that Chapter 2 of the revised SEN Code of Practice will provide this guidance.

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52. *Section 332B(5)* requires LEAs to ensure that parents and schools in their area are made aware of dispute prevention and resolution arrangements. LEAs must also inform such other interested parties as they deem appropriate. *Section 332B(6)* provides that parents who take advantage of these new arrangements will not lose any existing legal rights to lodge an appeal with the SENT.

Section 4: Compliance with orders

53. This section provides for regulations to be made to prescribe the period within which an LEA must comply with orders of the SENT.

Section 5: Unopposed appeals

54. This section amends the EA by inserting a new section 326A and applies where an LEA decide to concede to a parent who has appealed to the SENT.
55. Certain types of appeals are to be treated as determined in favour of the parent where the LEA has notified the SENT that they are conceding. Where an appeal is treated as determined in favour of the parent, the Tribunal need not make an order. LEAs will be required to meet the parents' wishes within a period to be set out in regulations. The appeals are those against a decision by an LEA:
- not to make a statement of SEN (under s.325 EA); or
 - not to make a reassessment of SEN where the child already has a statement (under s.328 EA); or
 - not to make an assessment of SEN (under s.329 or s.329A EA); or
 - not to substitute a school named in a statement for a different school named by the parents (under paragraph 8(3) of Schedule 27 EA).
56. Appeals against the contents of statements (under s.326 EA) and appeals against a decision to cease to maintain a statement (under paragraph 11 of Schedule 27 to the EA) have been excluded. This is because in these types of appeal, where the statement could be amended in a number of ways, deciding the appeal without a hearing is not always suitable. These types of appeal, even if the LEA does not contest them, will go to a hearing at which the parent, but not the LEA, will be able to be present.

Section 6: Maintenance of statement during appeal

57. One of the grounds on which parents can appeal to the SENT is where an LEA proposes to cease maintaining a statement of the child's SEN. This section amends the EA by adding a new sub-paragraph (5) to paragraph 11 of Schedule 27 obliging the LEA to continue to maintain the child's statement until the outcome of this type of appeal is known.

Section 7: Duty to inform parents where special educational provision made

58. This section amends the EA by inserting a new section 317A. This requires governing bodies in respect of community, foundation and voluntary schools, and the LEA (through the head teacher) in respect of Pupil Referral Units (PRUs), to inform parents of children without statements of SEN that special educational provision is being made for their child because it is considered that he has SEN.
59. The section also amends section 123 of the SSFA so that providers of relevant nursery education are under the same duty. Relevant nursery education is defined in section 123(4) of the SSFA so as to include nursery education provided by the LEA or by any other person who receives financial assistance from an LEA and whose nursery education is taken into account in the LEA's Early Years Development Plan.

60. Although they are not covered by this section, the Government intends that CAs will be required under their funding agreements to inform parents when they are making special educational provision for a child.

Section 8: Review or assessment of special educational needs at request of responsible body

61. This section amends the EA by inserting a new section 329A. This gives maintained schools, maintained nursery schools, nursery education providers (in receipt of financial assistance from LEAs and included in the proposals for providing nursery education in accordance with section 118 of the SSFA in Early Years Development Plans), PRUs, independent schools (including CAs, CTCs and CCTAs) and non-maintained special schools the formal right to ask the LEA to carry out a statutory assessment or re-assessment of a registered pupil at the school to determine whether that child needs a statement of SEN, in cases where no such assessment or re-assessment has taken place within the previous six months. At present only parents have that right.
62. It places a duty on the LEA to decide whether to make an assessment or re-assessment in response to a request from a school and it places a duty on the LEA, before deciding whether to comply with the request, to send a notice to the parent informing them that a request from the school has been made, of the procedure to be followed when making an assessment, the name of an officer at the LEA who can provide further information, and, of their right to make representations and provide written comments within a minimum of 29 days.
63. Should the LEA decide to assess the child's educational needs, section 329A requires them to notify the child's parent and the school which made the request. If they decide not to make an assessment, they are required to notify the parent and school of that decision, and the reasons for it. They also have to inform the parent of his right to appeal to the SENT, and give him any further information required by regulations (which might include details of the conciliation service available under section 332B).

Section 9: Duty to specify named school

64. This section amends the EA by inserting a new section 324(4A) to allow an LEA not to name a particular school in a child's statement of SEN where the child's parents have made suitable arrangements (typically by paying for a place at an independent school). It avoids, in those circumstances, the LEA naming a school in the child's statement and having to keep open a place for him at that school, where they know that the child will not be attending that school, potentially allowing that place to be taken up by another child.

Section 10 & Schedule 1: Amendment of statement of special educational needs

65. This section amends schedule 27 to the EA to revise the procedures which must be followed by LEAs when making, maintaining and amending statements of special educational needs. It gives parents new rights to a meeting with the LEA when the LEA propose to amend their child's statement; and to express a preference for a maintained school when the LEA propose to amend their child's statement following a reassessment or when changes are proposed relating to the type or name of the school or non-school provision in the statement. It requires LEAs to send copies of proposed statements, proposed amended statements and proposed changes to statements to maintained schools which LEAs are considering naming in a child's statement, and to other LEAs if those schools are in their areas.

Schedule 8: Minor and consequential amendments

66. This Schedule makes a number of amendments to the EA which are minor or consequential, arising from this Act.

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67. Paragraphs 6, 7 and 8 amend sections 325, 328 and 329 respectively to provide for regulations to prescribe what information is to be included by the LEA in notices to parents informing them of their right of appeal against a decision:
- not to make a statement of SEN for their child (s.325);
 - not to comply with a request from a parent to make an assessment or re-assessment of a child with a statement (s.328); and
 - not to comply with a request from a parent to make an assessment of a child without a statement (s.329).

They also allow regulations to make provisions about time limits for serving notices under sections 325 and 328; time limits in relation to service of notices under section 329 will be dealt with by regulations under paragraph 3 of Schedule 26 to the EA as amended by paragraph 14 of Schedule 8.

68. Paragraphs 9 and 10 amend paragraphs 8 and 11 respectively of Schedule 27 to the EA to provide for regulations to be made prescribing the information to be provided by the LEA in notices to a parent when:
- informing a parent of his right to appeal against the refusal to substitute a maintained school named in a statement (paragraph 8); and
 - informing a parent of his right to appeal against a decision to cease to maintain a statement (paragraph 11).

69. Paragraph 11 amends section 323(1)(a) and paragraph 4(1) of Schedule 26 to the EA to require an LEA to inform parents when it is considering whether to make an assessment. LEAs are currently required to do this when they are proposing to make an assessment. Parents often assume this to mean that the LEA is definitely going ahead with an assessment when this may not be the case. The new wording clarifies the situation.

70. Paragraph 12 makes a technical change to clarify the law. It makes it clear that under section 347 of the EA an LEA does not have to obtain the Secretary of State's consent to a child being educated in an independent school, if the child's parents are themselves making the arrangements to send their child to that school.

71. Paragraph 13 makes a number of changes to section 336 of the EA, ensuring that the power to regulate SENDIST procedure for SEN appeals is the same as that in respect of DDA claims. In particular it provides for hearings before the Tribunal to be in private except in prescribed circumstances, and for an SEN appeal to be heard with a DDA claim.

72. Paragraph 14(2) makes changes to paragraph 3 of Schedule 26 to the EA as a result of the changes made to Schedule 27 by section 10 of and Schedule 1 to the Act.

73. Paragraph 14(3) replaces paragraphs 3(3) and (4) of Schedule 26 to the EA to provide for regulations to be made prescribing time limits within which an LEA must:

- inform parents that it is considering whether to make an assessment or re-assessment, whether in response to a request from a parent or school, or otherwise;
- reach its decision on whether or not to make such an assessment; and
- carry out an assessment or re-assessment where it has decided to do so.

At present, regulations on time limits only become effective when an LEA has made a decision to make an assessment or re-assessment.

74. Paragraph 15 amends section 441 of the EA so that an amendment to a statement required as a result of a school attendance order will be made following the new

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procedures for amendments made after periodic reviews set out in Schedule 27 to the EA as amended by section 10 of and Schedule 1 to the Act.