



**Proposed Additional Learning Needs LCO Committee  
– The National Assembly for Wales (Legislative  
Competence) Order 2007**

**Response to consultation**

**Her Majesty's Chief Inspector for Education and  
Training in Wales**

## Introduction

1. This advice is based on the evidence of Estyn inspections and surveys of current provision for learners with additional learning needs and disabilities. It builds on Estyn's evidence to the former Education Lifelong Learning and Skills Committee's three policy reviews of special educational needs, and to the Equality of Opportunity Committee's review of service provision for disabled young people.
2. The most recent developments in the statutory framework for special educational needs (SEN) are the SEN and Disability Act 2001 and the SEN Code of Practice for Wales 2002. The Code is a comprehensive document setting out legislation, definitions, principles, roles and procedures. However, in many respects this framework is no longer fit for purpose, because it uses concepts and procedures that were first introduced in 1981, when the educational landscape was very different.
3. The statutory framework for disability equality has developed more recently. The guidance for schools and post-16 providers on the Disability Equality Duty, underpinned by the Disability Discrimination Act 2005, provides a robust framework for promoting disability equality in education and training.
4. The decision to seek a legislative competence order with the scope to include 'persons with learning difficulties' and 'persons who have a disability' provides a timely opportunity to harmonise existing legislation and guidance in order to overcome key weaknesses of the statutory framework for special educational needs.
5. In particular, the proposed order has the potential to help to improve:
  - equality of access to services for learners of all ages and with diverse types of additional learning needs and disabilities;
  - the quality of provision in all sectors of education and training;
  - partnership working across agencies; and
  - the accountability of all providers for the quality of provision and value for money.

## Equality of access

6. Inspection evidence confirms that the current SEN framework does not give learners equal access to the services that they need to overcome barriers to learning and full participation in education and training. Instead, access to services varies markedly, according to the age, type of need and home area of learners. As a result, some learners are placed at a significant disadvantage and do not achieve as well as they could.

## **Age-related inequalities**

7. Where learners choose to stay at school, possibly until 19 years of age, the SEN Code of Practice still applies, and schools and local education authorities (LEAs) retain the responsibility for meeting their needs, in accordance with the statutory framework for SEN. In contrast, post-16 providers other than schools do not have to adhere to the SEN Code of Practice, and LEAs cease to maintain statements of SEN when pupils leave school.

8. Learners with statements who transfer from school to college or work-based learning have the benefit of a thorough assessment of their training needs by a careers adviser. However, this is not the case for the majority of learners with SEN whose needs were met at school action or action plus<sup>1</sup>. As a result, the quality of provision for learners with additional learning needs and disabilities in much of the post-16 sector is more variable and generally less well-developed than in schools.

9. By extending the scope of legislation to all persons, without age restriction, the order should provide an excellent opportunity to tackle these issues.

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<sup>1</sup> The SEN Code of Practice defines support at school action as intervention that is additional to, or different from, that provided as part of a school's usual differentiated curriculum offer and strategies. At school action plus, external support services will provide more specialised advice to the school and, in some cases, may provide direct support to the pupil. Pupils with statements of SEN receive a combination of support from schools, LEAs and sometimes also from other agencies.

## Needs-related inequalities

10. The SEN Code of Practice recognises that there are many different types of SEN and that the severity and persistence of needs may range across a wide spectrum. In addition, needs are often inter-related and many learners can have needs which span two or more areas.

11. In January 2006, the proportion of pupils with each type of need on the SEN registers in maintained schools in Wales was:

Type of need	Sub-type of need	Percentage of all pupils with SEN
<b>Cognition and learning</b>		<b>55%</b>
	Specific learning difficulties	12.5%
	Moderate learning difficulties	39.2%
	Severe learning difficulties	2.5%
	Profound and multiple learning difficulties	0.8%
<b>Behaviour, emotional and social development</b>		<b>11.6%</b>
<b>Communication and interaction</b>		<b>11%</b>
	Speech, language and communication difficulties	8.9%
	Autistic spectrum disorder	2.1%
<b>Sensory and/or physical</b>		<b>5%</b>
	Hearing impairment	1.3%
	Visual impairment	0.7%
	Multi-sensory impairment	0.1%
	Physical and medical difficulties	2.9%
<b>Other (unclassified)</b>		<b>17.4%</b>

*(Local Government Data Unit for Wales, October 2006)*

12. Although the current statutory framework makes it clear that all needs must be met, in practice some types of need have a higher profile and receive better quality provision than others. For example, pupils with moderate learning difficulties and/or behavioural, emotional and social needs make up over half of all pupils on schools' SEN registers and yet they do not always have enough access to specialised teaching and support. In contrast, pupils

with specific learning difficulties, autistic spectrum disorder, hearing and vision difficulties and the more severe and profound learning needs are more likely to benefit from provision that is tailored to their needs.

13. The proposal to include 'learning needs' and 'disability' within the same order provides a timely opportunity to tackle these issues.

### **Geographical inequalities**

14. The current statutory framework for SEN is not applied consistently across Wales. In 2004, Estyn produced a report on statutory assessment and statementing that highlighted the variation across Wales in the percentage of pupils with statements of SEN. Three years later, this variation persists. In January 2007, the percentage of pupils with statements ranged from 4.55% in Ceredigion to 1.5% in Bridgend.

15. This variation arises because LEAs interpret the current SEN framework differently. For example, some authorities make additional provision at school action plus whilst others do so only if a pupil has a statement of SEN. This practice has the merit of reducing the time taken to provide support, but without the additional security of a statement that is often so important to parents.

16. The proposed order will provide the opportunity for the revision of guidance to promote consistency and equality of access to provision across Wales.

## **Quality of provision**

### **Schools**

17. In 2006, almost all (96%) pupils with SEN, including 75% of all pupils with statements, were educated in mainstream schools. Inspection evidence shows that once pupils' needs have been identified, mainstream schools provide them with care, guidance and support that is almost always good, and often has outstanding features. Despite this, many parents remain concerned that mainstream schools are slow to recognise their children's additional needs in the first place.

18. The remaining 4% of pupils with SEN attend special schools (including independent special schools) and pupil referral units (PRUs). The Annual Report of Her Majesty's Chief Inspector of Education and Training in Wales (2006-2007) will report that special schools make good provision for pupils with severe, profound and multiple learning difficulties and autistic spectrum disorder. However, the provision that special schools make for pupils with behavioural, emotional and social difficulties is not as good overall. This year, one of the nine maintained special schools inspected in the period September 2006 - July 2007 requires special measures and one is in need of significant improvement.

## **Pupil referral units**

19. In 2005, Estyn found that in a Wales-wide survey of registered and unregistered PRUs, four-fifths of pupils in these units were boys, most of whom could be described as disaffected. A high proportion of these pupils had a poor level of attainment in basic skills and one-fifth of pupils had a statement of SEN. Some had been permanently excluded from schools and many of the rest were at risk of exclusion.

20. The most recent inspections of PRUs and LEAs indicate that little has changed since 2005. Overall, PRUs do not make suitable provision for pupils with any type of special educational need. There are some important shortcomings in the provision, leadership and management of PRUs across Wales that have an adverse impact on the standards of achievement of pupils with behavioural difficulties.

## **Post-16 providers**

21. The lack of a statutory framework and supporting guidance for post-16 learners with additional learning needs hinders the process of transition from school to further education, training or employment. Careers officers help pupils with SEN to gain access to post-16 provision that is appropriate for their needs. However, schools and LEAs do not normally pass on pupils' records, statutory assessments or statements to post-16 providers. As a result, post-16 providers often have to make a fresh start with assessments, leading to delays in providing the necessary support.

22. Estyn produced reports in 2004 and 2005<sup>2</sup> on provision for learners with additional learning needs in further education (FE) colleges and work based learning companies.

23. These two reports highlighted many ways in which going to FE college makes a positive difference to the lives of young people with additional learning needs. However, there were also some shortcomings, including the limited opportunities for progression within or from FE for learners with severe or profound learning difficulties, the lack of support for challenging behaviour and limited access to specialist mental health services.

24. Overall, the main focus in work-based learning is on immediate programme outcomes, such as securing employment or a qualification, with less attention paid to learners' other needs.

25. Few learners with additional learning needs progress from college to work-based learning or employment. Many of these learners need much more support to enable them to use public transport because they lack the skill and confidence to travel independently.

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<sup>2</sup> Choosing the next steps: preparing learners in Independent Living Skills in further education colleges for transition into employment, training or further education: Estyn, April 2004. Success for all: Support in further education colleges and work based learning companies for 16-19 year olds with additional learning needs: Estyn, 2005

26. By extending the scope of legislation to education and training for ‘all persons’, irrespective of age, the proposed order will open the way for improving transition arrangements from school to other providers.

27. It is, however, very important to recognise that lack of access to transport is a major barrier to equality of access to education and training for learners with additional learning needs and disabilities. The exclusion from the order of travel arrangements for persons receiving education or training to and from the places where they receive it has the potential to perpetuate current inequalities, unless specifically addressed within other legislation.

## **Partnership working**

28. Although local authorities are working hard to improve partnership arrangements, there are major barriers to overcome in order to provide the seamless services that learners, and their families, are entitled to expect. The lack of cohesion within the current system adds significantly to the stress and anxiety experienced by learners and their families, as they try to gain the necessary services.

29. The current statutory framework for SEN does not support effective partnership working because statutory duties are not evenly distributed across all partners. Instead, the statutory duties on LEAs to assess and meet the needs of pupils with SEN are more extensive than those on other agencies. This makes it very difficult, and sometimes impossible, for LEAs and schools to ensure that pupils with SEN have timely access to all the provision that they need.

30. Although LEAs are responsible for producing and maintaining statements of SEN, they rely on other agencies, such as Health and Social Services, to assess and provide for ‘non-educational’<sup>3</sup> needs. However, in the absence of effective partnership agreements, supported by secure joint funding arrangements, pupils’ non-educational needs are not always met. Instead, access to services such as occupational therapy, speech and language therapy, family support or treatment for child and adolescent mental health problems depends too much on local arrangements and is vulnerable to changes of policy and funding within the contributing agencies.

31. The proposed order provides a timely and much-needed opportunity to remedy these difficulties and to ensure that legislation promotes effective multi-agency working.

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<sup>3</sup> Non-educational needs are those that the LEA either propose to meet or are satisfied will be met by the health services, social services department or some other body. They are set out in Part 5 of a statement of SEN; the provision to meet those needs is identified in Part 6. Unlike Parts 2, 3 and 4, Parts 5 and 6 of statements are not legally binding on the LEA.

## Accountability and value for money

32. Earlier this year, Estyn published a report<sup>4</sup> on evaluating outcomes for learners with additional learning needs. This report was closely linked with a report by Wales Audit Office<sup>5</sup> about the distribution, use and impact of SEN funding in Wales.

33. Estyn found that although there are examples of emerging good practice, much remains to be done to create a unified system to support the evaluation of outcomes for learners with SEN across Wales.

34. Similarly, Wales Audit Office reported that there is no clear link between the level of expenditure reported by local authorities and the quality of special educational needs provision. Councils are not yet able to tell whether or not their special educational needs provision is cost effective but there are good examples of initiatives that have the potential to improve the understanding of this.

35. Currently, although funding and responsibility for SEN provision is shared between schools and LEAs, only LEAs can be held to account through the SEN Tribunal for Wales, or through the courts, for the provision that they make for individual learners with SEN. There are no statutory arrangements for holding governing bodies of schools, non-educational agencies or learning providers other than schools to account for the provision that they make, even though these providers are responsible for the use of a significant proportion of the total SEN budget. It is of particular concern that mainstream schools do not evaluate learning outcomes, or consider value for money, for pupils with SEN.

36. In contrast, disability equality legislation extends to a broad range of providers and therefore provides disabled learners with access to redress when provision falls short of requirements.

37. The lack of any mechanism to hold the governing bodies of maintained schools to account for the quality and value for money of provision for pupils with SEN is a serious flaw in the current system. It leads to disputes between schools and LEAs about the provision and funding of specialised support. At the same time, learners and their families experience delays and distress as they try to obtain assessments and appropriate support.

38. The proposed order creates a good opportunity to establish appropriate mechanisms for holding all providers accountable for the quality of provision and value for money.

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<sup>4</sup> Evaluating Outcomes for Children and Young People with Additional Learning Needs: Estyn, 2007

<sup>5</sup> Good Practice in Special Educational needs Funding: Wales Audit Office 2007

## Summary responses to consultation questions

**Q1: Would the terms of the proposed Order allow for the implementation of the policy agenda on additional learning needs by means of Measures? If not, how would the proposed Order need to be re-drafted, and why?**

39. The terms of the proposed order will enable the National Assembly for Wales to implement key policies that improve provision for people with disabilities and promote principles of equality of opportunity and social justice.

**Q2: Is it appropriate for the proposed Order to cover all persons? If not, how should the proposed Order be re-drafted, and why?**

40. It is appropriate for the proposed Order to cover all persons. This will provide a framework for improving the learning outcomes and quality of provision and support for all learners with additional needs and disabilities, irrespective of age.

**Q3: Is the definition of disability in the proposed Order appropriate? If not, how should the definition be re-drafted and why?**

41. The proposed definition of disability is not quite broad enough. The current wording of the order does not make it clear that the term covers a broad spectrum of impairments, including long-term health conditions such as cancer, diabetes and multiple sclerosis.

42. The full range of impairments is well captured by the definition that was included in the Equality of Opportunity Committee's report<sup>6</sup> into services for disabled young people earlier this year:

*A disabled person is one who has a physical or mental impairment or a long-term health condition that has an impact on their day to day lives.*

**Q4: Are the terms of the proposed Order drafted appropriately, too narrowly or too broadly? If necessary, how should the proposed Order be re-drafted and why?**

43. The application of the proposed order to education and training for 'persons who have a greater difficulty in learning than the majority of persons of the same age' and to 'persons who have a disability' is appropriate. However, it will be important to support any new legislation with clear guidance to enable all providers to apply these terms consistently and fairly.

44. The specific exclusion of travel arrangements from the terms of the order is of concern, as all the evidence shows that for post-16 learners, lack of access to transport is one of the key barriers to equality of access to education, training and employment.

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<sup>6</sup> Service Provision for Disabled Young People: NAFW, 2007

## **Conclusion**

45. The proposed legislative competence order will provide the National Assembly for Wales with an opportunity to make legislation clearer and fairer for learners of all ages with additional learning needs and disabilities in order to improve outcomes for these learners, and for their families. The proposed order will pave the way for much-needed reform of the current statutory framework for special educational needs.

46. The wording of the proposed order is appropriate in almost all respects. However, it may be appropriate to revise the definition of 'disability' and to review the decision to exclude transport arrangements from the scope of the order.