

NEW WRITING

Bercow, plus six:

A critique of the Bercow Review of services for children and young people with speech, language and communication needs

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John wrote the Opinion piece for IQJ issue number 3 in October last year. It was entitled *A conflict of interest?*

Summary

The Bercow Review of services for children and young people with speech, language and communication needs (SLCN), published in July 2008, adopted a blunt tone to reveal a dire situation. But its forty recommendations, although far-reaching, lacked specificity with regard to action which the Government could take immediately to enforce the law as it stands and to close the loopholes which allow Local Authorities to evade their duties towards

children with SLCN. In this article John Wright examines the findings of the Bercow Review and suggests six additional recommendations for immediate government action.

In his introduction to the Review,¹ John Bercow (Conservative Member of Parliament for Buckingham) declares an *'intense interest'* in services for children with communication difficulties. In the summer of 2007, after fifteen months in which he raised in Parliament the issue of speech, language and communication over twenty times, the Secretary of State for Health, Alan Johnson, and the Secretary of State for Children, Schools and Families, Ed Balls, asked him if he would be willing to lead a review of provision and to suggest a way forward. John Bercow accepted the task as an unpaid volunteer and, heading up a team of experts, set to work: commissioning research by leading academics in the field, and seeking the views of parents, children, speech and language therapists, teachers, special needs co-ordinators, classroom assistants, staff of Primary Care Trusts (PCTs) and Local Authorities (LAs), via questionnaires, group meetings and visits.

The data gap

The researchers were given two tasks: to explore the relative efficiency and effectiveness in six Authority areas of provision for children and young people with SLCN; and to assess the feasibility of conducting a cost-benefit analysis of investment in services for these children. They could do neither.

First, *'the lack of agreement about terminology, the lack of effective data collection and analysis systems and the lack of targeted research...'* meant it was *'not possible to assess the efficiency and effectiveness of different arrangements for organising and providing services for children and young people with SLCN.'*

Second, there was *'a lack of evidence on cost-effectiveness from studies'*. To this conclusion they added the reproof *'Cost-effectiveness analyses should be undertaken rather than cost-benefit analyses: too often the term 'cost benefit' is used to describe studies in which the benefits are estimated as financial savings and have little to do with outcomes. Cost-effectiveness studies allow joint analysis of costs and outcomes to assess which option represents a better use of scarce resources.'*²

This nil-result is the most startling of the findings which the research element in John Bercow's Review could have come up with: that is, that the service providers (the LAs and PCTs) seem not to be recording what provision is being delivered to children with SLCN nor monitoring how effective or otherwise it might be. It led Bercow to recommend *'that the Government considers a programme of research to enhance the evidence base and inform delivery of better outcomes for children and young people'* (Recommendation 26) and *'that PCTs and local authorities work together to undertake surveillance and monitoring of children and young people to identify potential SLCN across the age range, and particularly at key transition points.'* (Recommendation 8)

Rather than just *'considering'* the issue, the Government should make an immediate start on correcting it, by reminding school governors of their legal duty (of ten years' standing) to forward to LAs and Trusts information on their provision for pupils with special educational needs (within which group children with SLCN fall), including, *'the kind of provision for special*

*educational needs in which the school specialises ... Facilities for pupils with special educational needs ... How resources are allocated ... How pupils with special educational needs are identified and their needs determined and reviewed ... Arrangements ... relating to in-service training for staff in relation to special educational needs ... Links with other schools, including special schools ... and links with child health services.'*³

Had school governors in the case study areas been returning information of this kind annually for the last ten years then LAs and Health Trusts may have been in possession of what the Bercow Review refers to as an *'evidence base'*. But notwithstanding governors' duties, LAs have a legal duty to be proactive in identifying children who have special educational needs.⁴ The first Code of Practice on Special Educational Needs contained guidance on how LAs might fulfil this duty,⁵ but the Government (for some reason) cut the guidance from the Code when it was revised in 2001.⁶

The author's first additional recommendation is that the Department for Children Schools and Families (DCSF) reminds school governors of their existing duties to provide LAs and Health Trusts with the information required by statutory regulations.

The author's second recommendation is that the DCSF re-issues the guidance (cut from the 2001 Code of Practice) to LAs on the procedures they should adopt to identify children with SEN who may need statutory assessment.

The provision gap

There is one source of hard data which definitely should have been available to the researchers with regard to children with SLCN who have Statements of Special Educational Needs: the Statements themselves, issued and kept on record by Local Authorities, and which must in law *'specify the special educational provision'* to

be made for the child concerned.⁷ Unfortunately for the children, this is one of those sections of SEN law which is honoured more often in the breach than in the observance. This, from the Review: *'Many parents felt that their children's statements were vague, in some cases because statements were considered to be resource led, with local authorities more concerned to manage resources rather than to identify how best to meet the needs of the child. Some parents reported having to "fight" to get statements that included SLT in Part Three of the statement and in a way that specified clearly what support would be provided.'*

Clearly, vague Statements give rise to data collection problems: how does a researcher define and compare what one child's Statement means by *'speech and language therapy as appropriate'* with another's *'regular speech therapy'*? More crucially, it is also a service provision issue, given that children are legally entitled only to the help as specified in their Statement. Who decides what is *'appropriate'* and on what basis? And Christmas is *'regular'*! This, from the Review: *'Our witnesses' verdict has been blunt ... They do not believe that their children are a priority for policy makers or providers of public services ... Accessing the right service sometimes just does not happen. When it does, maintaining continuity of support is an uphill struggle.'*

Although there are recommendations for amendments to the law amongst Bercow's forty recommendations, they relate to the need to clarify responsibilities between Education and Health Authorities/Trusts and to formalising and strengthening the status of Children's Trusts.⁸ There are no recommendations for amendments to the law which cover the degree of specificity required in Statements, or in the professionals' reports which Statements are meant to reflect.

At present, many LAs interpret their duty to *'specify the special educational provision'* a child is entitled to receive in a Statement as requiring them to specify only the kind but not the amount of provision a child should receive, contrary to guidance in the Code of Practice⁹ and despite case law.¹⁰ This results in vaguely worded Statements which fail to provide children with an entitlement to any particular amount of support.

The author's third additional recommendation is that the Government amend the Education Act 1996 to place a strict duty on LAs when writing Statements of SEN to specify the amount (as well as the kind) of special educational provision a child is entitled to receive. At a stroke this would outlaw phraseology such as *'regular speech therapy'* and *'help as appropriate'*.

There is a similar risk of vagueness currently in statutory assessment advice. The law requires LAs to obtain professional advice on children's needs and the provision required to meet them¹¹ but fails to refer to the amount of provision which a professional may judge a child to need. The consequence is that many LAs prohibit professionals from being explicit in their advice on how much help a child's needs call for.

The author's fourth additional recommendation is that the Government amend the 2001 Regulations to place a strict duty on LAs to obtain professional advice on the amount, as well as the kind, of special educational provision a child's needs call for. This would safeguard all children with SEN, including those with SLCN.

The duty gap

The Bercow Review reports: *'Concern was expressed about delegated funding to schools and the fact that, as this is not ring-fenced, (there is) the risk that those funds will be siphoned off, perhaps on a utilitarian motivation, to pay for the mass of pupils without SEN. The risk that funds might be diverted is compounded as delegation is not accompanied by oversight or monitoring by the local authority. As a result, there appears to be a deficit of accountability.'*

This is a *'risk'* for the majority of children with SLCN, who do not have Statements and who therefore rely for their entitlement on school

governors' duty to use their 'best endeavours' to ensure children with SEN receive the provision necessary to meet their needs.¹² This is a weaker and therefore less effective duty than LAs' duty to 'arrange' provision for children's SEN when they have Statements.¹³ The issue was noted in 2006, pre-Bercow, by the then Education and Skills Select Committee which recommended that the policy of 'unconditional delegation' should not be extended until other necessary conditions and improved school expenditure had been established.¹⁴ The Bercow Review recommended that 'the current DCSF review of the Dedicated Schools Grant should take account of how the school funding system supports the delivery of ... services for children and young people with special educational needs'. (Recommendation 18)

However, a more direct way of tackling non-ring-fenced unconditional delegation to schools of funding for SEN would be to amend the 1996 Education Act to firm-up school governors' duties to make the provision children with SEN (but without Statements) need by removing the 'best endeavours' qualification. It is general practice now to give school governors the money to meet children's special educational needs; they should be given the legal duty as well.

The author's fifth additional recommendation is that the Government amend the Education Act 1996 to remove the 'best endeavors' qualification to create a clear legal duty on school governors to arrange the provision which a non-statemented child's SLCN call for.

The enforcement gap

The Secretary of State for Children, Schools and Families has the legal duty – and the legal power – to enforce the law on special education.¹⁵ The Bercow Review uncovered major problems with regard to the provision of information to parents on what their children were entitled to, with the delivery of provision for students at the secondary level and with the provision of specialist aids.

The Review quoted a parent as saying: 'There is a lot of information out there but it's hard to find what I need. I am still struggling to find out exactly what a LA statement is and what it means to my family.' Also, 'Some parents reported that health and education services' staff were apprehensive in providing information because to do so would add to the demand on their time and resource. Others reported that staff lacked sufficient knowledge to be able to help them.'

In response, Bercow recommended that the Government remind LAs of their legal duty to publish information about their legal duties as LAs to meet the needs of children with SEN. (Recommendation 7).

The Review commented: 'Evidence tells us that some children and young people may manage reasonably well in primary education, but that their difficulties become more apparent when they reach the more language challenging environments of secondary school ... Many parents reported that services tended to "disappear" over time, especially ... on transfer to secondary school.' There is no specific recommendation in response to this finding.

The Review reports that 'children and young people who require alternative or augmentative communication aids (AAC) face a particular struggle to have their needs met,' and goes to some length explaining the need for a system of service delivery to replace the role of the Communication Aids Project (CAP), which was established by the then Department for Education and Skills in 2002, providing £5 million each year for expert assessment, communication equipment and training for school-aged children. The CAP was wound up in 2006, and Bercow recommends that the Government fill the gap by developing a 'hub and spoke' model of regional provision, co-ordinated by a national organisation to meet the needs of children and young people who use AAC.

Yet there are already existing legal duties covering each of these three issues of concern.¹⁶ The fundamental problem is a deficit in the enforcement of the law, which is the Secretary of State's duty. Whether the Secretary of State takes the law-enforcement function of her or his job description seriously would seem to be a matter of political will.

The author's sixth additional recommendation is that, if the Government does not want the Secretary of State for Children, Schools and Families to enforce the law with regard to SEN (which is what all children with SEN, not just those with SLCN, need desperately) then the Government must create an independent body which has the remit and the power to do the job. Otherwise, parents are entitled to view Parliament's law-making function as a mockery – at least as far as their children's special educational needs are concerned.

Conclusions

The Bercow Review is a powerful indictment of the present situation and a prospectus for change. The concern of the authors is very clearly stated:

'The overall position in terms of speech, language and communication services is highly unsatisfactory. Access to information and services is often poor, services themselves are very mixed, continuity across the age range is lacking, effective joint working between the health and education services is rare and there is something of a postcode lottery across the country. Above all, local commissioners attach a low priority to the subject ...

None of us is likely to forget the more harrowing testimonies from parents seared by bad experiences or professionals frustrated that insufficient resources, lack of training or present working arrangements prevent them meeting the needs of children and young people with SLCN as comprehensively as they wish ...

Let us be blunt. The status quo is unacceptable. Unacceptable to suffering parents. Unacceptable to dedicated professionals. Unacceptable to all who believe that the country has a moral obligation and a practical need to do better for and ith all of its citizens.

This Review is driven not by a desire for equity alone, but by a concept of national self-interest. Tackling this country's speech, language and communication problem is right on so many fronts – it is right for the sake of fairness, right for educational progress, right for social inclusion, right for employment generation, right for safeguarding mental health, right for reducing offending and right for our commercial advantage in an age in which a job for life is a relic of the past and the importance of communication skills in today's knowledge economy is greater than ever.'

The Government welcomed the Bercow Review in July and announced that they would be publishing their response, including plans for improving services for children with SLCN, in the autumn of 2008. But autumn has passed, and we are now, financially, in another country.

If provision for SLNC children is to improve, all of Bercow's forty recommendations must be adopted, which was the Government's original intention. We will know soon if they are going to keep to it.

If the situation is to be prevented from becoming even worse, tightening up the law on SEN (which the additional six suggested recommendations aim at) is an absolute necessity to protect special educational provision from the inevitable cuts which are going to be made in LA expenditure over the next few years.

References

- 1 Bercow, J. *The Bercow Report: A review of services for children and young people (0-19) with speech, language and communication needs*. DCSF. 2008.
www.dcsf.gov.uk/bercowreview
- 2 Geoff Lindsay, Martin Desforges, Julie Dockrell, James Law, Nick Peacey and Jennifer Beecham. *Effective and Efficient Use of Resources in Services for Children and Young People with Speech, Language and Communication Needs: Research for the Bercow Review* DCSF-RBW053. July 2008.
www.dcsf.gov.uk/research
- 3 Schedules 2 & 3 to The Education (Special Educational Needs), (Information), (England) Regulations 1999.
- 4 Section 321(1) Education Act 1996.

- 5** Paragraph 3:7, Special Educational Needs Code of Practice, DES, 1993. This advised: *'LEAs have a duty to identify among those children in their area with special educational needs for whom they are responsible, those for whom they must make statements. To help fulfill this duty, LEAs should gather information from maintained schools about registered pupils who live in the LEA area and who have special educational needs at Stage 3.'* These are children who would now be on School Action Plus.
- 6** Special Educational Needs Code of Practice, DfES, 2001
- 7** Section 324(3)(b) Education Act 1996.
- 8** Recommendations 31 and 33. The Bercow Review.
- 9** Special Educational Needs Code of Practice, DfES, 2001, para 8.37: *'Provision should normally be quantified (e.g. in terms of hours of provision, staffing arrangements) although here will be cases where some flexibility should be retained in order to meet the changing special educational needs of the child concerned.'*
- 10** *IPSEA –v- Secretary of State [2003] EWCA Civ 07 [2003] ELR 86 – Court of Appeal.* This was a ruling on what constituted 'changing needs' for the purpose of CoP paragraph 8.37. The Courts judgment was that a child's needs may be "changing" because the child itself is changing or because of the interaction between the child and its environment; but not because of external factors or changes; it is not permissible to leave provision unspecified or unquantified simply to allow for flexibility in the school's approach/arrangements. As per *L –v- Clarke and Somerset [1998] ELR 129*: *'The real question ... is whether [the statement] is so specific and so clear as to leave no room for doubt as to what has been decided and what is needed in the individual case.'*
- 11** The Education (Special Educational Needs) Regulations (England), (Consolidation) Regulations 2001, regulation 7(2)(c).
- 12** Section 317(1)(a) Education Act 1996.
- 13** Section 324(5)(a)(i) Education Act 1996.
- 14** Special Education Needs. House of Commons Education and Skills Committee. The Stationery Office. 2006.
- 15** Section 497 Education Act 1996.
- 16** In addition to the Information Regulations (op. cit), Local Authorities have a strict legal duty under Section 324(5)(a)(i) to arrange

the special educational provision specified in a Statement, regardless of what stage of schooling a child is at; and, a Statement must specify 'facilities and equipment' necessary to meet a child's needs as part of the special educational provision regardless of who will pay for it, under The Education (Special Educational Needs) Regulations (England) (Consolidation) Regulations 2001, regulation 16 and Schedule 2.

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