

# Challenging The Barriers:

## Ensuring Access To Education For Children With Special Educational Needs



I'm a 2e

When I'm in class I might as well be a Tui  
Sitting high up in a tree singing all day



## ACKNOWLEDGEMENTS

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## EXECUTIVE SUMMARY

### Background

YouthLaw Aotearoa is a community law centre that provides free legal services to and on behalf of children and young people. Through our services, we have significant experience of the barriers children with disabilities face in receiving meaningful education in mainstream education in New Zealand. We wrote this report to highlight a range of issues we have identified as underlying these barriers and to advocate recommendations for reform.

### Barriers

We are aware of a number of barriers children with disabilities face in education including:

- Not being allowed to enrol at their local school
- Being excluded from extra-curricular activities
- Only being allowed to attend school for part of the day
- Teachers or teacher aides not being adequately trained
- Bullying or poor conduct from teachers or other students
- Procedures not being followed correctly
- Not receiving enough support in the classroom
- Being suspended or excluded from school from reasons relating to their disability
- Being asked to move to another school

The 2013 Statistics New Zealand Disability Survey found that around 24% of children with disabilities have an unmet need for help with their schoolwork in class, about 13% have an unmet need for special equipment to help with their learning and about 28% have an unmet need for adapted classroom materials. The survey also found that because of their disability – around 20% of children with a disability have had their schooling interrupted for a long period of time, 11% have had to change schools, 3% have had to live away from home to go to school, and 19% have difficulty attending school for the whole day.<sup>1</sup>

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<sup>1</sup> Source: Statistics New Zealand, Disability Survey 2013, customised report and licensed by Statistics NZ for re-use under the Creative Commons Attribution 4.0 International licence.

## **Issues**

### ***Lack of guidance and procedural frameworks for educational support***

We found that the current education system does not encourage a broad view of education which students with disabilities can thrive within. There is no clear definition of inclusive education or of the role of special schools. No formalised systems exist for determining the needs of students with disabilities which means that there is inconsistency in how they are identified between schools. The legislation provides inadequate procedural protections for the way in which support is delivered either by the school or by governmental bodies.

### ***Issues relating to the professional development and capacity of educators***

While improvements have been made in initial teacher education, there are still no compulsory courses on supporting students with high needs, programmes generally lack skill based content and practicum placements do not always have adequate mentoring. Educators still often lack the training or experience in supporting students with disabilities due to under-investment in professional development. Educators struggle to access professional development that is available and to appropriately support students with disabilities due to a lack of adequate funding for release time away from the classroom. Despite improvements with teacher appraisal processes over the last two years, there are still concerns that there is a lack of appropriate mentoring and supervision. Teacher aides usually have no qualifications or training and are sometimes left to look after students without the teacher's input. There is no funding provision to schools for the role of co-ordinating learning support for students with disabilities which limits the capacity of schools to respond quickly and effectively to needs. Schools have limited oversight or mentoring support from the Ministry of Education to help them adapt more inclusive practices.

### ***Funding support issues***

Ministry of Education led services to provide funding support are fragmented and unnecessarily complicated – and do not provide sufficient coverage or flexibility to respond to all needs. Schools and families find the application and appeals processes difficult. There is little co-operation between the Ministries of Education, Health, Justice and Social-Development, despite issues of disability in education being connected to other social outcomes. The eligibility criteria and limited placements in some targeted individual funding services mean that some students do not qualify for individual funding. This places greater stress on lower and moderate needs funding, as these types of funding are expected to pick up the slack. Most services do not get nearly enough funding which means many students miss out on or only receive limited support.

Even where funding is available, waitlists for specialist services can be very long due to a lack of available specialists.

### ***Assessment and reporting issues***

The National Standards do not provide a valid and reliable measurement of the achievement of some students with disabilities and do not measure student progress. This means that it can be hard to track the effectiveness of learning support for students and some families do not get enough information on their child's progress. Different schools use different means for internally tracking student progress which makes it difficult to compare data across New Zealand.

### ***Inadequate enforcement mechanisms***

There is currently still no enforceable right to education in New Zealand. Complaints are not always dealt with appropriately by schools or the Ministry of Education. Our enforcement mechanisms are ineffective, difficult to access and do not have the power to direct schools or the Ministry of Education to take any action.

## **RECOMMENDATIONS**

### ***Purpose***

- Reform policies for educational support for students with disabilities starting from a values and rights based framework

### ***Legislative and procedural framework***

- Amendments to legislation to provide –
  - A statement on the purpose of support in education for students with disabilities in line with international law
  - For an enforceable right to meaningful education
  - Clarity on a definition of 'inclusive education' and the role of special schools
  - The creation of a Code of Practice, outlining procedural protections for the support in education for students with disabilities
- Further investigation into creating or adopting frameworks to facilitate consistent identification and response to needs
- The promotion of opportunities for teachers to learn and become skilled in using these systems
- A requirement for schools to make clear processes for teachers to access further support for students identified as having additional learning needs

***Professional development and capacity of educators***

- Increased focus within initial teacher education on practical skills based learning
- Dedicated compulsory course components in relation to supporting moderate and high needs learners
- Strengthen processes around practicum supervision and ensure access within practicum placements to experienced inclusive teachers
- Strengthen processes around beginning teacher induction and ongoing mentoring for established teachers
- Ensure that schools maintain as much ownership over Communities of Learning as possible
- Investigation of using Communities of Learning to create opportunities for more direct teacher mentoring
- Encourage schools to manage teaching schedules in a way which allows for teachers to collaborate together to prepare lessons
- Funding to schools for dedicated teacher release time from class to engage in professional learning and development
- Further monitoring of teacher appraisal and accountability processes
- Investigation of external peer-review processes for appraisals
- Ensure teacher salaries appropriately take account of actual working hours
- Increase teacher release time to have more capacity to do out of class work relating to the support of students with disabilities
- Fund a dedicated staffing entitlement for a Special Education Needs Co-ordinator in schools
- Fund increased release time for the co-ordinator to engage in professional learning and development
- Greater support and accountability to schools from the Ministry of Education
- Investigation of using voluntary lateral accountability (between schools) and reviews
- Increased administrative funding to schools to allow Principals to engage in school leadership
- Investigate ways to exemplify schools that perform well in relation to the use of diverse approaches to learning and inclusive practice

***Funding support services***

- Increased operational funding to allow schools the capacity to engage in the newly announced Ministry of Education service delivery model as well as the processes we are putting forward in this report
- *Additional Learning Support*
  - Rename the Special Education Grant to Additional Learning Support
  - Greater funding to be put into this grant
  - Create a cap on Additional Learning Support above which schools are not expected to spend
  - Schools with a disproportionate amount of students with additional learning needs can approach the Ministry of Education for further Additional Learning Support funding. The Ministry of Education can ask for evidence of how existing funding has been spent
  - Schools are required to keep a basic record of how Additional Learning Support money is being spent and of students which are receiving additional support
- *Targeted Individual Funding*
  - Students who require funding above the Special Education Grant cap can receive targeted individual funding (replaces existing targeted funding services). This is sought by the school and family during the triage phase of the newly announced service delivery model the Ministry of Education has put forward. Schools and families need to provide a base level of evidence of the students need. For relatively low levels of targeted funding, evidence may be just a written explanation of what the funding is for and why it is required. For higher levels of funding, the Ministry of Education can request further evidence as they consider appropriate
  - The Ministry of Education can decline requests for targeted individual funding but this can be appealed
  - If the Ministry of Education wants specialist evidence (i.e. an assessment), the Ministry pays for this to take place
  - If the family or school is unhappy with any Ministry of Education assessment, they can appeal this and pay for independent assessment at their own expense
- Limited legal aid funding is made available to assist families on lower incomes with appeals



- Schools must record student progress and provide this to the Ministry of Education or families on request
- The Ministry of Education can be the fund holder for some services including specialist services, or can provide voucher based payments to families or schools
- Services or funding to provide greater advice and support to families

### ***Assessing and reporting***

- A consistent framework for measuring student progress within the New Zealand Curriculum that provides validity and reliability across all students – possibly placing greater emphasis on qualitative data – but in a way which communicates information easily to families
- Better information tracking on the connection between interventions and student outcomes
- Framework for school and Ministry of Education reporting on procedural actions – i.e. recording the formation of Learning Support Plans, reporting any identified disabilities of students which face formal disciplinary action etc

### ***Enforcement mechanisms***

- *Disputes resolution scheme*
  - Schools are required to have a system for dealing with complaints
  - Funding for a mediation process to help families, schools and the Ministry of Education resolve issues in education (related to disability or otherwise). This could be analogous to the mediation service already provided by the Human Rights Commission, but would be specialised in education issues, easily accessible, informal, relational and collaborative.
- *Complaints to independent agency*
  - This could be kept within the existing complaints service provided by the Office of the Ombudsman, or this function could be given to the Office of the Children's Commissioner in relation to education issues – as there may be benefit to having a specialised children's service which is enabled to investigate issues beyond disability
- *Education Tribunal*
  - Creation of an Education Tribunal with broad jurisdiction over all education issues (related to disability or otherwise)

## Challenging the Barriers

- Power to make binding decisions and directions to schools and the Ministry of Education
- *Audit and systemic research*
  - Ministry of Education continues to require schools to report on various procedures and has the power to review, support and challenge schools
  - Research would continue to take place in order to identify trends and systemic issues

## 1. INTRODUCTION

YouthLaw Aotearoa is a community law centre that provides free legal services for and on behalf of children and young people nationwide. One of the key legal areas we practice in is education law, providing advice and support to students within primary and secondary education. Over the last 30 years we have gained significant insight in relation to the barriers children with disabilities face in accessing a meaningful education. Although there are a few other charitable organisations like ourselves who are providing support to families in this area, our experience is that these families often do not receive enough support and struggle alone. We aim to help articulate the reforms which we believe are necessary in order to create an education system that fully support all students regardless of ability.

This report is broken down into four main chapters. The first three chapters provide a history of policy relating to special education in New Zealand, an overview of the legal framework, and an introduction to some of the barriers children with disabilities face.

The fourth chapter is the main body of the report and provides an analysis of the underlying issues we have identified and our recommendations. Many of the issues which we discuss are highly interrelated and we have indicated these relationships by making internal references where appropriate. In order to communicate the issues in a simplified and structured format, we have broken the analysis in this chapter into three main sections:

- **Purpose** – Looks at the purpose of education and special education support and outlines the higher level policy issues which currently inform this. The section introduces current policy and cultural positions and discusses some of the tensions that exist. We put forward the view that the Government needs to bring special education policies back to a central purpose that is centered on a values and rights based framework. We assert that this will require legislative reform and greater budget appropriations.
- **Practice and Provision** – This section looks at the practices and funding provisions which support students with disabilities in education. We analyse issues and provide recommendations which relate to the guidance and procedural frameworks for educational support, the professional development and capacity of educators, and funding support provisions.
- **Proving and Protecting** – The last section looks at issues and makes recommendations relating to assessing and reporting the effectiveness of interventions, and the accountability and enforcement structures for education.

## 2. KEY TERMS AND DEFINITIONS

The concept of disability has gone through a number of evolutions and the meaning assigned to terminology used can vary between users based on understanding and experience. We have tried to strike a balance between using language which we feel correctly represents our views and reflects views held within the disability sector, while also keeping the language recognisable and accessible to the reader. Within this paper the term disability is used to describe a relationship between a person and their environment which limits their participation in that environment in some way. This covers for example, the disabling effects of blindness in relation to seeing the environment, as well as the disabling effects of an education system that provides for only one style of learning.

Throughout the text we have generally used the term ‘**disability**’ to refer to a limitation which has been labelled with a specific diagnosis, or where we are discussing a particular legal provision which uses the term. We have generally used the term ‘**additional learning needs**’ to refer to any student with or without a diagnosable disability who needs extra support in order to learn in the classroom. We have used the term ‘**special education**’ or ‘**special educational needs**’ when referring to services in the context of their historical development.

Although we signal the use of abbreviations throughout the text, we have included here a list of some of the more common abbreviations and agencies for your reference.

**COL** – Communities of Learning

**CRPD** – Committee on the Rights of Persons with Disabilities

**ERO** – Education Review Office

**HRC** – Human Rights Commission

**IEP** – Individual education plan

**IMM** – Independent Monitoring Mechanism (on the UNCRPD)

**ITE** – Initial teacher education

**IWS** – Intensive Wraparound Scheme

**Ministry** – Ministry of Education

**NZCER** – New Zealand Council for Educational Research

**OECD** – Organisation for Economic Co-operation and Development

**Ombudsman** – Office of the Ombudsman

**ORS** – Ongoing Resourcing Scheme

**PLD** – Professional learning and development

**RTLБ** – Resource Teachers: Learning and Behaviour

**SEG** – Special Education Grant

**SENCO** – Special Education Needs Co-ordinator

**UNCROC** – United Nations Convention on the Rights of the Child

**UNCRPD** – United Nations Convention on the Rights of Persons with Disabilities

### 3. HISTORY OF SPECIAL EDUCATION POLICY AND PRACTICE IN NEW ZEALAND

#### 3.1 Pre-1989 context

Until 1987, special education services and provisions “evolved in a piecemeal manner” and were “never defined in any single, cohesive statement”.<sup>2</sup> The Education Act 1877 introduced free, secular and compulsory primary education for all children. The Act excluded any students who were considered to have a “temporary or permanent infirmity” from state schooling.<sup>3</sup> Consequently, students with special education needs continued to be educated outside mainstream education services.<sup>4</sup> Special education reforms were unsystematic throughout this period.

Services for disabled children were primarily provided by their families and charitable organisations. By the 1970s there was an established network of special schools and classes predicated on the medical model of disability.<sup>5</sup> From the 1960s and 1970s onwards, a growing discourse of rights challenged the suitability and effectiveness of the segregated education system for students with special education needs.<sup>6</sup> The segregation of students based on disability became increasingly viewed as “discriminatory, unsound educational practice, and an inefficient use of resources”.<sup>7</sup>

#### 3.2 Tomorrow’s Schools

Education administration was reformed beginning in 1989 as part of the broader public sector reforms of the 1980s, focussing on greater autonomy for individual schools.<sup>8</sup> These changes, known as the *Tomorrow’s Schools* reforms, were a response to the perceived inefficiency, inflexibility and excessive bureaucracy of the model that had existed prior to 1989.<sup>9</sup> The reforms eliminated local and regional education boards and placed the responsibility for the

<sup>2</sup> James Chapman, “Learning Disabilities in New Zealand: Where Kiwis and Kids with LD Can’t Fly,” *Journal of Learning Disabilities* 25, no. 6 (1992): 363.

<sup>3</sup> Education Act 1877, s 90.

<sup>4</sup> Alison Greaves, “Special Education 2000: Rhetoric or reform?” *ACE Papers* 12 (2003): 58.

<sup>5</sup> Victoria Trembath “One but not the same: Learning the lessons of inclusion” *ACE Papers* 5 (1999).

<sup>6</sup> *Ibid.*, 28.

<sup>7</sup> S Brown, “Special Education 2000: Developing a Policy for Inclusive Education in New Zealand,” *New Zealand Annual Review of Education* 6 (1997): 142.

<sup>8</sup> Ministry of Education *OECD Review on Evaluation and Assessment Frameworks for Improving School Outcomes – New Zealand Country Background Report* (April 2011) at 10 – 11.

Ministry of Education, *OECD Review on Evaluation and Assessment Frameworks for Improving School Outcomes – New Zealand Country Background Report* (Ministry of Education, New Zealand, 2010).

<sup>9</sup> *Ibid.*, 10.

administration and management of individual schools on Boards of Trustees elected from the community by parents at the school.<sup>10</sup>

The new model of ‘self-managing’ schools, under which schools competed for students, was expected to encourage better teaching and learning, and improve the overall performance of the education system.<sup>11</sup> Each school became a “self-managing institution”, with its own charter, procedures and operational funding.<sup>12</sup>

Schools’ Boards of Trustees became responsible for ensuring that a school met the legal requirements of the Education Act 1989 and the associated National Education Guidelines and National Administrative Goals. In addition to the school’s principal and a teacher, Boards now included members who were parents and who were part of the school community. This membership structure aligned with the intention of the Tomorrow’s Schools reforms to increase the involvement of families and communities in the governance of schools.<sup>13</sup>

The Ministry of Education was established in place of the much larger Department of Education, and its key roles included as providing oversight of the education sector, providing schools’ operational funding and providing education policy advice to the government.<sup>14</sup> The Education Review Office was created to assess school’s performance and ensure their accountability. The National Qualifying Standards Authority was formed to set curriculum standards for students at school, as well as standards at a tertiary level.

A new crown entity, the Special Education Services (“SES”), was also set up to “provide advice, guidance and support for the benefit of people under 21 with difficulties in learning and development”.<sup>15</sup> To this end, the SES was the educational agency contracted by the Ministry of Education for “providing specialist support and interventions” for students with special educational needs.<sup>16</sup>

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<sup>10</sup> Ibid., 11.

<sup>11</sup> Ibid.

<sup>12</sup> John Langley, “Introduction,” in *Tomorrow’s Schools 20 years on...*, ed. John Langley (Cognition Institute: 2009), 8.

<sup>13</sup> Ministry of Education *OECD Review*, 10.

<sup>14</sup> Ibid., 11 – 12.

<sup>15</sup> Anne Meade, “Market Ideology and Accountability: case studies in the early childhoods education and special education sectors in New Zealand,” *International Studies in Sociology of Education* 3, no. 2 (1993): 257.

<sup>16</sup> Ibid., 257.

SES also administered the special education discretionary assistance (“SEDA”) funding, received by individual students with special educational needs to pay for teacher aide support.<sup>17</sup> SEDA funding was contestable, and came under increasing pressure as the number of children with very high and multiple needs entering school increased.<sup>18</sup>

### 3.3 Special Education 2000

There was no meaningful change to special education in New Zealand until the introduction of the Special Education Policy framework (“SE2000”) in the 1990s.<sup>19</sup> By 1990, all education provisions for students with disabilities were fully included in the state education system and more students with special educational needs were being included in regular schools. At the same time, there was growing pressure for major reform of the existing special education policy from families, arising from dissatisfaction with what many still saw as piecemeal policy development.<sup>20</sup>

SE2000 was developed as a response to these pressures, with its stated aim being “to achieve, over the next decade, a world class inclusive education system that provides learning opportunities of equal quality to all students.”<sup>21</sup> Formulated as a “‘funding framework’ rather than a comprehensive policy”,<sup>22</sup> SE2000 consisted of interlocking provisions intended to deliver what a senior Ministry policy official referred to as a “simpler, fairer and more transparent funding system.”<sup>23</sup>

SE2000 restructured the way resources and services were distributed to students with special education needs, and changed the way schools managed special education resources. In the past, funding had been centrally tagged and provided to special education units at some schools. Under the new model – and particularly characteristic of the Ongoing Resourcing Scheme (“ORS”) – funding was wrapped around the individual student.<sup>24</sup>

In addition to targeted funding through ORS, new provisions for students with high or very high needs included the Severe Behaviour Initiative (“SBI”) and the Speech Language Initiative

<sup>17</sup> Margaret Chatfield, “The Special Education Grant: A Parent and Practitioner View of SE2000 Policy,” *Annual Review of Education* 8 (1999), 64.

<sup>18</sup> *Ibid.*, 65.

<sup>19</sup> Barbara Disley, “Can we dare to think of a world without ‘special education’?” in *Tomorrow’s Schools 20 years on...*, ed. John Langley (Cognition Institute: 2009): 67.

<sup>20</sup> Greaves, “Special Education 2000: Rhetoric or reform?”, 61.

<sup>21</sup> *Ibid.*

<sup>22</sup> Disley, “Can we dare to think of a world without ‘special education’?”, 67.

<sup>23</sup> T Davies, “Special Education 2000 – a national framework,” *Proceedings of the Special Education 2000 Research Conference* (Wellington, 1999).

<sup>24</sup> Disley, “Can we dare to think of a world without ‘special education’?”, 67.

(“SLI”). SE2000 also introduced schoolwide discretionary funding through the Special Education Grant (“SEG”). The roaming inter-school Resource Teachers: Learning and Behaviour (“RTLb”) service as provisions for students with moderate needs.

SES was restructured in line with these other changes, and its services became more “more specific and more focussed”.<sup>25</sup> Special schools continued to exist as an option available to parents or caregivers, although the system of resourcing outlined above was intended to support the mainstreaming of student and the trajectory toward the dismantling of special education facilities.

### **3.4 Major changes to SE2000 policies**

In 2001, following the government-commissioned review of special education by Dr Cathy Wylie, SES was disestablished.<sup>26</sup>

A transitional component was incorporated into the ORS in 1998, and after which the scheme became known as the Ongoing and Transitional Resourcing Scheme. The scheme was later renamed the Ongoing and Reviewable Resourcing Schemes (“ORRS”), after the transitional resourcing scheme was superseded by a reviewable component. In 2001, the ORRS scheme was extended to provide for a new group of students within the high needs band – those with “combined moderate needs”, covered by Criterion 9 under the scheme’s criteria.<sup>27</sup> This criteria still exists today.

The reviewable component of ORRS was dropped in April 2011, and the name of the scheme was shortened back to the Ongoing Resourcing Scheme (“ORS”). Currently, students who are ‘verified’ as being eligible for funding under the scheme will receive that funding until they leave school.

SEG is supplemented by the Targeted Funding for Educational Achievement (“TFEA”). Alongside the decile-weighting of SEG, the TFEA is an attempt to recognise and compensate for the greater likelihood that students from low socio-economic backgrounds will have mild and moderate special needs.

The IWS has been introduced to provide for children and young people with highly complex and challenging behaviour, social or educational needs, including those with intellectual difficulties.

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<sup>25</sup> Massey University, *Special Education 2000: Monitoring and Evaluation of the Policy, Final Report Summary* (2002 report), (Wellington: Ministry of Education, 2016), 9.

<sup>26</sup> Ibid., 8.

<sup>27</sup> Ibid., 21.



### 3.5 “Success for All”

In 2010, the government responded to the Review of Special Education undertaken in 2010 by releasing “Success for All – Every School, Every Child”. This policy outlined the government’s vision and set out the changes that the government intended implement over the course of four years to ensure that the education system was fully inclusive. ORS funding was extended under this policy to a significantly larger number of students.<sup>28</sup> The RLTB Service was restructured in 2012, amalgamating RTLB Clusters and aggregating resources across regions in order to improve management and leadership.

### 3.6 Investing in Educational Success

Investing in Educational Success (“IES”) was introduced by the government in 2014. It is a framework for collaboration between schools which is intended to raise student achievement by:<sup>29</sup>

- Improving teaching practice;
- Sharing expertise in teaching and learning; and
- Mutual support.

Under IES, groups of schools and kura come together to form Communities of Learning. Communities of Learning set shared goals based on their students’ educational needs, and collaborate to achieve them.

IES is characteristic of the broader social investment approach undertaken by the government. The social investment approach focuses on evidence-based, rigorous and early investment in order to improve long-term outcomes and reduce costs.

### 3.7 Learning Support Update

In August 2016, the Ministry of Education announced their intention to strengthen the inclusiveness of the education system and to modernise how learning support is delivered across the sector.<sup>30</sup> The “learning support” language replaces the previously used language of “special education”. This shift reflects the Ministry’s stated intention to discard terms that accentuate differences and barriers, and is part of four key focus areas.

<sup>28</sup> Peter Coleman, “Special Education 2000 Policy: Our Leaky Home?” *Kairaranga* 12 (2011): 14.

<sup>29</sup> Ministry of Education, “Investing in Educational Success,” *Ministry of Education*, accessed August 2016, <http://www.education.govt.nz/ministry-of-education/specific-initiatives/investing-in-educational-success/>.

<sup>30</sup> Ministry of Education, “Learning Support (previously Special Education) Update,” *Ministry of Education*, accessed August 2016, <http://www.education.govt.nz/ministry-of-education/specific-initiatives/investing-in-educational-success/>.

The other three focus areas for the Ministry include:

- Measuring performance and improving accountability. This will be achieved through a stronger outcomes framework under which the effectiveness of programmes and system performance can be better measured.
- Improving investment decisions. There are three priorities in this area:
  - Reviewing ORS with a focus on evaluating ORS funding for 18 – 21 year olds. The Ministry will look at whether there are better alternatives for helping these older students transition out of school.
  - Streamlining Communication Services with a focus on early intervention.
  - Clustering Behaviour Services (including the Severe Behaviour Service, IWS, and the School Wide Positive Behaviour for Learning Initiative).
- Improving and modernising the Ministry's own specialist services to overcome fragmentation and simplify access. There are several key new approaches:
  - Where students need intensive support and specialist services, there will be:
    - Early triage to identify individual needs, information and support for families.
    - Learning support plans documenting actions, resources and goals created in a collaborative process.
    - A lead practitioner to act as a contact point.
  - Communities of Learning, as developed under the IES initiative, will be supported to identify and respond to challenges faced by students who need additional learning support.

## **4. LEGAL FRAMEWORK FOR SPECIAL EDUCATION PROVISION IN NEW ZEALAND**

### **4.1 Education Act 1989**

The Education Act 1989 is the primary piece of legislation governing the New Zealand education system. Section 3 of the Act establishes the right to a free state provided education, which is compulsory for students aged six to 16.

Prior to the amendment of the earlier Education Act 1964 in 1987, New Zealand legislation had not expressly provided for a right to education – although elements of this right were reflected in the 1964 Act, which set out the right to free enrolment and education in state schools.<sup>31</sup>

The amendment became the first to guarantee the right of disabled students to attend their local school and to receive support to enable them to receive an education in a mainstream setting. Prior to 1987, there was no right for disabled children to attend their local school. There had been, however, increasing recognition that children had a right to free education “of the kind which he (sic) was best fitted and to the fullest extent of his powers”. Any sections in the Education Act 1964 providing for students with special educational needs were “permissive, not mandatory”.<sup>32</sup> Section 8(1) of the 1989 Act now states that “people who have special educational needs (whether because of a disability or otherwise) have the same rights to enrol in receive education at state schools as people who do not”.

The 1989 Act nevertheless preserved the ability to direct a student to a more “suitable, and possibly segregated, school” under s 9. In cases where a regular state school cannot make provision to accommodate a student with special education needs, s 9 of the Act creates a duty for the Secretary of Education to agree with or direct the student’s parents to enroll the student at a special school, class, clinic or particular state school. This provision means that special educational facilities as established under s 98 of the Education Act 1964 continue to exist. Section 10 of the 1989 Act creates a right of reconsideration, whereby parents of students with special educational needs can require the reconsideration of either of any decision or the Secretary’s refusal to come to an agreement under s 9.

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<sup>31</sup> See s 112A Education Act 1964.

<sup>32</sup> Chapman, “Learning Disabilities in New Zealand,” 364.

Section 60A of the Act lays out the regulatory framework for schools, and mandates the creation of the National Education Guidelines, which comprise of five components. Two of these components are the National Education Goals (“NEG”) and the National Administration Guidelines (“NAG”). The NEG’s consist of statements of desirable achievements by the school system, and statements of government policy objectives.

NEG 7 sets out success in learning for students with special educational needs through appropriate identification and support as a key objective. The NAGs outline the desired operational and administrative requirements for schools. NAG 1 states that schools must develop and implement teaching and learning strategies to address the needs of students with special educational needs.

Section 61 of the Act creates the requirement for each school Board to prepare and maintain a school charter. The charter’s purpose is to “establish the mission, aims, objectives and directions of the boards that will give effect to the national education guidelines and the board’s priorities”. Under s 63, schools are required to ensure that the charter complies with the Act as well as the NAGs, and must make a copy of the charter available.

### **4.2 United Nations Convention on the Rights of the Child**

The United Nations Convention on the Rights of the Child (“UNCROC”) affirms the rights of children, and the responsibilities of governments, parents, and children to uphold those rights. New Zealand signed UNCROC in 1990 and ratified it in 1993.

Article 23 of UNCROC recognises that support must be provided to disabled children in order to ensure that they have effective access to and receive education, in recognition of the fact that they have particular needs.

### **4.3 Bill of Rights Act 1990 and the Human Rights Act 1993**

The right to be free from discrimination is protected by Section 19 of the New Zealand Bill of Rights Act 1990 (“BORA”) which was added into the BORA by amendment in 1993. This section of the BORA interacts with the Human Rights Act 1993 (“HRA”) as it defines discrimination on the basis of the grounds provided by the HRA. The New Zealand Government is responsible for upholding this right, however Section 5 allows that the right may be limited where it is considered justified to do so. The justification of a limitation will be determined in line with the exceptions for discrimination permitted by the HRA and by New Zealand’s obligations under international law.

The HRA is intended to “ensure that all people in New Zealand are treated fairly and equally”.<sup>33</sup> The HRA provides that the Government and its agents must not discriminate on the prohibited grounds of discrimination, which include disability. The HRA also speaks specifically to educational rights. Section 57 prohibits an education establishment from refusing to enrol a student with a disability, unless necessary special services and facilities cannot reasonably be made available.

#### **4.4 New Zealand Disability Strategy**

The New Zealand Disability Strategy is a framework intended to enable the government to remove barriers that prevent the full participation of disabled people in society. The Strategy guides government agencies in decision and policy-making that affects disabled people. Objective Three of the Strategy is to “provide the best education for disabled people”. Actions under this objective include<sup>34</sup>:

- Ensuring that no child is unable to attend their local, regular school due to a disability
- Ensuring that teachers and other educators understand the learning needs of disabled students
- Improving schools’ accountability for the needs of disabled students

The Disability Action Plan 2014 – 2018 presents the “strategic priorities” that will strengthen the implementation of both the Disability Strategy and the UN Convention on the Rights of Persons with Disabilities.<sup>35</sup> Increasing the educational achievement of disabled children is outlined as one of the outcomes within the Plan.<sup>36</sup> The Action Plan also notes that this outcome is a priority area for the Ministry of Education.

#### **4.5 Daniels v Attorney General<sup>37</sup>**

Following the introduction of Special Education 2000, the Ministry of Education closed a number of special schools and facilities and students with special educational needs were increasingly placed into mainstream classrooms. A group of parents sought to judicially review

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<sup>33</sup> Human Rights Commission “Human rights legislation – New Zealand”, *Human Rights Commission*, accessed August 2016, <https://www.hrc.co.nz/your-rights/human-rights/human-rights-legislation-new-zealand>.

<sup>34</sup> Office for Disability Issues “The New Zealand Disability Strategy” *Office for Disability Issues*, accessed August 2016, <http://www.od.govt.nz/resources/publications/nzds/objective3.html>.

<sup>35</sup> Office for Disability Issues, *Disability Action Plan 2014-2018*, December 2015, <http://www.od.govt.nz/documents/what-we-do/ministerial-committee-on-disability-issues/disability-action-plan-2014-2018-update-2015.pdf>.

<sup>36</sup> Trembath “One but not the same,” 5.

<sup>37</sup> *Attorney-General v Daniels* [2003] 2 NZLR 742.

the policy primarily on the grounds that their children's right to education had been impacted adversely.<sup>38</sup> The Court of Appeal concluded in their judgment released in 2003 that there was no express and enforceable right to education contained in legislation. Nevertheless, the right to education was protected by procedural rights and a "the right to a system" made available by the legislation which "provides the framework for acceptable standards and accountability".<sup>39</sup>

#### **4.6 United Nations Convention on the Rights of Persons with Disabilities**

New Zealand signed the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") in 2007 and ratified it the following year. The UNCRPD is an international human rights treaty with an explicit social development dimension. Article 24 of the UNCRPD protects the right of persons with disabilities to education. It affirms that persons with disabilities have a right to an inclusive education and sets out what is required to realise this right.

To this extent, states that are party to the UNCRPD must ensure that persons with disabilities are not excluded from the general education system on the basis of their disability, and that they can access a free, inclusive education on an equal basis with others in the communities in which they live. Persons with disabilities must also be able to access individualised support measures that maximise academic and social development, consistent with the goal of full inclusion.

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<sup>38</sup> Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, *Making Disability Rights Real* (2012 report), (2012), 10.

<sup>39</sup> Sally Varnham, "Daniels v. The Attorney-General: Children with Special Needs and the Right to Education in New Zealand," *International Journal for Education Law and Policy* 1, no. 2 (2005): 240.

## **5. OVERVIEW OF BARRIERS AND HARMS STUDENTS WITH DISABILITIES FACE WITHIN EDUCATION**

“If the education system does not provide young people with special education needs the knowledge, skills and attitudes they need to achieve independence and success after they leave school, the cost to society will be far greater in the long-run in terms of unemployment benefits, welfare payments, and the costs of the criminal justice system”.<sup>40</sup>

Young people with disabilities are currently experiencing exclusion from the education system in a myriad different ways, often implicating significant and long-term risks.

YouthLaw has experienced a significant increase in the total number of special education related advice queries since 2012. There has been a particularly large increase since January 2015. Learning and intellectual disabilities form the largest proportion of this number, with a notably high number of cases involving Attention Deficit Hyperactive Disorder (“ADHD”) and Autism Spectrum Disorder (“ASD”). We note however that these figures may be partially attributed to the greater knowledge of YouthLaw’s services among the relevant support networks for children and young people.

The growing emphasis placed on intellectual disabilities and neurodisabilities reflects the wider transformation of the composition of disability since 1979. Developmental, emotional and behavioural conditions are now the “leading causes of childhood activity limitation” in the United States, rather than physical health problems.<sup>41</sup> Childhood emotional, behavioural and neurological disabilities have in fact become more prevalent than physical disabilities.<sup>42</sup> In New Zealand, just over half (52%) of children with disabilities are also identified as having a learning disability and around 39% identified as having a psychological or psychiatric disability. For around one fifth (21%) of children with disabilities, a psychological or psychiatric disability is also their main disability.<sup>43</sup>

These changes may indicate greater awareness and shifting diagnostic labelling of disabilities – “a child formerly considered distractible may now be considered diagnosable by parents,

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<sup>40</sup>Garry Hornby, “Inclusive Education for Children with Special Educational Needs: A Critique of Policy and Practice in New Zealand,” *Journal of International and Comparative Education* 1, no.1 (2012): 56.

<sup>41</sup> Neal Halfon, Amy Houtrow, Kandyce Larson, and Paul W. Newacheck, “The Changing Landscape of Disability in Childhood,” *The Future of Children* 22, no. 1 (2012), 25.

<sup>42</sup> *Ibid.*, 13.

<sup>43</sup> Source: Statistics New Zealand, Disability Survey 2013, customised report and licensed by Statistics NZ for re-use under the Creative Commons Attribution 4.0 International licence.

teachers, and health professionals”.<sup>44</sup> It is also likely that there is increased knowledge of these conditions, as well as “the need for a specific diagnosis to receive services such as early intervention”.<sup>45</sup> Education systems will need to adapt to this changing landscape of the disability in order to uphold any meaningful right to inclusive education.

The most common problem raised in advice queries that YouthLaw received was issues with schools’ process and decisions, followed by difficulties with funding. ‘Kiwi Suspensions’ – which include being sent home without the proper disciplinary procedure required under the Education Act 1989, and voluntary withdrawal of a student following a school’s request – were the second most commonly cited issue. Also noteworthy were complaints raised about staff handling of incidents, which often involved aggression, as well as formal disciplinary processes in line with section 14 of the Education Act.

YouthLaw’s own experience of special education-related cases is reflected in other research. There are myriad ways in which students with disabilities experience exclusion, including:

“...being denied enrolment and/or full time attendance at school; being denied access to, and participation within the curriculum; being bullied; inappropriate teacher and/or principal beliefs and practices in relation to funding; a lack of caring, valuing and responsibility by school staff; limited teacher knowledge and understanding; poor relationships between parents and school staff; and exclusionary beliefs and practices in relation to teacher aides”.<sup>46</sup>

A recent study notes that there are still persistent barriers “in relation to the accessibility, availability, adaptability and acceptability of education”.<sup>47</sup> Intellectual needs, ASD and behavioural needs were most commonly cited as the main area of need for children who had experienced barriers to inclusion at school.

Specific barriers to availability identified by families included teachers not being knowledgeable about the special needs of children, a lack of funding, a lack of teacher aide time and poor attitudes of both class teachers and school principals. In some cases, families noted that they resorted to privately funding the support necessary to meet the needs of their children. The lack

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<sup>44</sup> Amy J. Houtrow, Kandyce Larson, Lynn M. Olson, Paul W. Newacheck and Neal Halfon, “Changing Trends of Childhood Disability, 2001 – 2011,” *Pediatrics* 134, no. 3 (2014): 530.

<sup>45</sup> *Ibid.*, 536.

<sup>46</sup> Alison Kearney, “Barriers to School Inclusion: An Investigation into the Exclusion of Disabled Students From and Within New Zealand Schools,” (PhD Thesis, Massey University, 2009).

<sup>47</sup> Alison Kearney, “The right to education: What is happening for disabled students in New Zealand?” *Disability Studies Quarterly* 36 (2016).



of teacher knowledge often included issues around teachers failing to recognise needs and meet them, teachers holding the “outdated “deficit model” thinking” and teachers setting low expectations for disabled children.<sup>48</sup> Data gathered at a national level in New Zealand corroborates the existence of these barriers. Just under one third of all children (32%) with a mental or emotional disability have an unmet need for help with schoolwork,<sup>49</sup> indicating that they need more help and support with schoolwork than what they currently receive. Around a quarter of all children with disabilities (24%) have the same unmet need. 13% have an unmet need for special equipment to help with schoolwork and 28% have an unmet need for adapted classroom materials.<sup>50</sup>

Mirroring YouthLaw’s internal experience, the specific concerns of accessibility raised by families included issues of enrolment and full-time attendance. Families described being told to keep their children at home in the absence of teacher aide or “support worker “cover”” or situations where their children were only permitted to attend school for part days. There were also cases in which families were pressured to remove their children from schools and forced to accept certain conditions for enrolment. Collectively, experiences such as these reflect a “lack of responsibility to disabled students” by teachers.<sup>51</sup> Around one fifth (20%) of children with disabilities in New Zealand have had their schooling interrupted for a long period of time because of their disability, and a similar number (19%) struggled to attend school for the entire day. 11% of children with disabilities had been forced to change schools because of their disability and 3% have had to live away from home. Low income families are overrepresented in all three of these figures.<sup>52</sup>

Teacher and peer bullying act as barriers to a quality education that conforms to basic human rights standards.<sup>53</sup> Many families identified issues around the adaptability of schools to the best interests of disabled children, noting an absence of policies to support inclusion as well as inadequate adaptation of the school environment and resources. YouthLaw has experienced comparable issues with respect to the advice queries that we have dealt with, as noted in the analysis above.

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<sup>48</sup> Ibid.

<sup>49</sup> This includes intellectual, psychiatric, psychological, speaking, learning or memory disabilities.

<sup>50</sup> Source: Statistics New Zealand, Disability Survey 2013, customised report and licensed by Statistics NZ for re-use under the Creative Commons Attribution 4.0 International licence.

<sup>51</sup> John O’Neill, Roseanna Bourke, and Alison Kearney, “Discourses of inclusion in initial teacher education: Unravelling a New Zealand ‘number eight wire’ knot,” *Teaching and Teacher Education* 25, no. 4 (2009): 589.

<sup>52</sup> Note that for some questions around unmet needs, children from low income families were underrepresented (along with children from high income families) – suggesting that in some situations, students from low income families may be receiving more support, possibly due to their school’s decile rating or other available supports.

<sup>53</sup> Kearney, “The right to education”.

The Independent Monitoring Mechanism on the Rights of Persons with Disabilities (“IMM”) paints a similar picture. Figures from the Human Rights Commission (“HRC”) and the Office of the Ombudsman indicate that of the total number of students subject to suspensions in 2014, 1070 were students with disabilities.<sup>54</sup> The IMM is also concerned that a large proportion of these students “are likely to have learning and behavioural disabilities”.<sup>55</sup> The HRC has noted this issue in their submission into the ongoing Inquiry on students with dyslexia, dyspraxia and ASD, currently being conducted by parliament’s Education and Science Committee.<sup>56</sup>

Previously, the IMM has noted that access to funding and services continues to be a “common theme” among education-related complaints to the Ombudsman.<sup>57</sup> In 2012 and 2013, the IMM noted that the main category of complaint about government activity to the HRC related to the treated of disability in all sectors of education.<sup>58</sup> A lack of reasonable accommodation and unfair expulsions, exclusions and stand-downs dominated education-related complaints.

The strong link between neurodisabilities and youth offending are a powerful illustration of the risks of excluding students from education in the ways discussed above. Research from the United Kingdom indicates that young persons with neurodevelopmental disorders are over-represented among young people in custody.<sup>59</sup> It is highly likely that these numbers will be similar in the context of New Zealand’s youth justice system. Neurodisabilities are a key “risk factor for anti-social behaviour and offending, particularly where a young person does not receive appropriate support”.<sup>60</sup> Moreover, neurodisabilities make young people more vulnerable in the justice system, for reasons including:<sup>61</sup>

“...different degrees of comprehension and social (dis)comfort due to low reading age, limited literacy skills, slower cognitive processing speeds and comprehension, impaired or heightened auditory and visual perception, poor short-term memory and variable concentration, reduced ability to understand procedures and follow instructions, inability to comprehend cause and effect and/or consequences.”

<sup>54</sup> The Independent Monitoring Mechanism on the Rights of Persons with Disabilities, *Article 24: The Right to an Inclusive Education* (June 2016), 11.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, *Making Disability Rights Real* (June 2014), 78.

<sup>58</sup> Ibid; Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, *Making Disability Rights Real* (December 2012).

<sup>59</sup> Nessa Lynch, “Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice,” *Proceedings from the 2016 Neurodisabilities Forum* (Wellington, 2016).

<sup>60</sup> Ibid., 10.

<sup>61</sup> Ibid., 16 – 17.

New Zealand has a “somewhat fractured and disconnected approach” to young people with neurodisabilities who offend<sup>62</sup> Specific Learning Disabilities, ASD, Foetal Alcohol Spectrum Disorder and Communication Disorders are all identified as issues that “relate to and are causative of youth offending”.<sup>63</sup> Judge Becroft who was the former Principal Judge of the Youth Court and is now the Children’s Commissioner, notes that in England there has been a call for early identification (including through education) and effective early intervention as holistic responses to these issues. He concludes that an approach that emphasises early identification and early intervention are likely to be needed in New Zealand as well. Early intervention and identification are crucial to reducing youth offending, and for providing a fairer experience of the justice system to young people with disabilities. This will require cross-sector collaboration, where the onus of early identification and intervention does not lie on the youth justice system alone.

### **Case studies**

These case studies demonstrate many of the issues highlighted in YouthLaw’s internal data as described above, and are all instances where a child’s right to education has suffered or been compromised due to their disability. The families of these children were invited to describe their child’s experience of the education system.

#### ***Case Study One***

J is bright and has been diagnosed with ASD. J’s parents have removed him from school. J’s experiences have been spread over a number of schools, including six primary schools. J has experienced kiwi suspensions at different schools, and J’s parents have been frequently asked to come in to pick him up early. In primary school, J was often left alone in rooms for hours with nothing to do. In intermediate school, J was stood down without any recognition of his special needs. J’s behavioural problems were aggravated because the school failed to adhere to the plan set in place for him.

J does not qualify for ORS funding, and his needs were not met at his school. J’s parents were told that he could not attend school unless a parent accompanied him for the duration of the school day. He was also told that he would not be allowed to attend public events at the school as the school did not want any embarrassment. J’s parents felt that the school did not understand J’s needs, and did not have the resources to be able to meet those needs. J’s high school often

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<sup>62</sup>Andrew Becroft, “From Little Things Big Things Grow”: Emerging Youth Justice Themes in the South Pacific,” *Proceedings of the Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending* (May 2013), 24.

<sup>63</sup> Ibid.

resorted to punitive measures to manage J's behaviour. He was stood down repeatedly as a result. The school made it very clear that restorative measures would not be used, and were not considered worthwhile for J's case.

J also suffered from bruising and mental trauma as a result of one school using other students to chase J down. J did not have the opportunity to have positive social interactions at school, and J's mental health worsened substantially during his time at school. J's parents felt powerless to change the schools' stance towards and processes in place for J. They felt that there was no meaningful accountability to ensure that the schools adhered to proper process.

### ***Case Study Two***

M has two children, L and W. Both children have learning disabilities and are now home schooled. L has been diagnosed with ASD and is a bright student. L's school did not have the resources to manage his behaviour. He was only allowed to attend school for a maximum of two hours a day as the school would not permit him to attend without one-on-one adult supervision. Crisis funding was provided for L, allowing him to have a teacher aide for those two hours. However, this funding ran out quickly. Often, L's mother was called in to pick him up even when teacher aide support was available because the teacher aide was not trained to handle L's behaviour. L's teacher was scared of him.

When the school applied for RTLB support after L's behaviour had escalated, they did not receive it for a year. L's mother felt that no support was accessible to L until he received a full diagnosis of ASD. L's school said they had to stretch their SEG budget over every child, meaning that it was not used meet L's needs. L would often miss out on school activities, and would only be allowed to attend if M came as a one-on-one helper.

Many schools actively dissuaded M from enrolling her daughter, and would often suggest that they wanted only L because he was bright. The school M would have preferred to enrol her children in would have had to spread its SEG grant over a large number of students with special needs, due to its reputation as a magnet school. W's school did not provide her any extra support, and pushed her when she was unable to keep up with her peers. W eventually got left behind in class. The school did not have the resources to give W one-on-one teacher aide time and to keep up with W's needs.

W was also bullied by other students. She became terrified to leave her classroom, fearful, reclusive, and lost her confidence. After the school applied for RTLB funding, it was another 6

months before W was seen by the RTLB service. W often loses support because she has no labelled disability.

### ***Case Study Three***

K has global developmental delay, and has issues with understanding actions and consequences. K's school was unwilling to understand or meet K's needs. K was denied many opportunities at school that were given to other students, such as not being able to participate in cooking, art and tech. K was labelled as violent and aggressive, reflecting a lack of understanding of his behaviour and needs. The school refused to put in place strategies that would help support K.

There has been an absence of transparency and fairness in the disciplinary processes that K was subjected to. K has experienced kiwi suspensions. K's parents were told that K would have to attend a 'special classroom' or the principal would "take action on [their] own" and K would not be allowed into class the next day. When K's parent did not send K to school the following day and raised a complaint with the school's Board of Trustees, they were told that they had chosen not to send K to school voluntarily. K's parents then tried to involve the Ministry of Education but were told to excuse the incident as it involved an interim principal.

The school repeatedly made K feel unwelcome and was constantly finding ways to "get rid of him". They asked K repeatedly to consider other schooling options, and threatened to stand him down. Eventually the school bullied and intimidated K into agreeing to leave school. K's teacher aide support was taken away while K's family was looking for other schools, claiming that K needed to stay home until suitable support was found. K was told that the school was not the right environment. K's parents felt that they were being forced to keep him at home until a suitable school could be found.

The school also refused to work in partnership with K's parents. K's school refused when K's parents suggested and offered training for the teachers and teacher aides. Instead, they stated that they had a good understanding of ASD.

No processes were set up for managing K's behaviour, which K's parents feel set him up for failure. He felt unsettled and confused, leading to behavioural issues. The curriculum was not adapted in a way that was appropriate or suitable for K's level of needs or interests.

### ***Case Study Four***

A has higher functioning Asperger's and as a result was not eligible for ORS funding. A experienced bullying and abuse from his teacher and support staff, and was often segregated. He was not given the opportunity to participate as a "normal person" at school. A's school life was

## Challenging the Barriers

characterised by a lack of empathy and understanding. A has been emotionally traumatised as a result of his treatment at school, and has difficulty moving on from these experiences.

A's mother contacted YouthLaw and the Ministry of Education to attempt to remedy the situation, but was told that there was nothing that could be done. A's mother felt that the Ministry was very formidable.

## 6. ANALYSES OF KEY ISSUES

### 6.1 Purpose – What broadly are we trying to achieve with special education?

This chapter will address the question of what we are trying to achieve with special education in New Zealand. In doing so, it will look some of the ‘big picture’, policy issues relating to the role of Central Government and the Ministry of Education (“Ministry”). In attempting to put some perspective on how New Zealand’s education policies have developed in the last few decades, we will start by making some observations of issues we have identified in the formation of our current policies. We will then put forward an alternative approach.

#### 6.1.1 *Current pragmatic approach to policies*

It appears that Special Education 2000 (“SE2000”) was first conceived as a cohesive policy framework with an identified singular purpose – to provide support for students with special educational needs in a mainstream school setting. After the implementation of the policies however it was identified that there were several issues – particularly in relation to the perceived inadequacy of funding support.<sup>64</sup> Some people have gone as far as to say that the SE2000 policies were hijacked by a neo-liberal approach which attempted to limit funding.<sup>65</sup> Gaps appeared in the funding framework and instead of adjusting the existing funding structures, over the years the Ministry has added in further services to fill these gaps. We argue that this reflects a pragmatic approach to identified problems, instead of giving attention to how the funding structures could complement each other so as to fit within a comprehensive overarching policy for special education. The Ministry has acknowledged in their recent Cabinet Paper that more focus needs to be given to constantly reviewing policies to ensure that funding services are evidence based and fit for purpose.<sup>66</sup>

While the Ministry has commissioned many reports over the past decade which have made various recommendations, the Ministry has not publicised documentation on their response or position in relation to these reports. It appears that while some recommendations were followed, others were completely ignored. There also seems to be a general lack of transparency around Ministry decisions – such as the process currently in relation to the closing of Salisbury Special

<sup>64</sup> Cathy Wylie, *Picking Up the Pieces: Review of Special Education 2000* (2000 report), (Ministry of Education, 2000), 80.

<sup>65</sup> Rod Wills and Margaret McLean, “Who’s in, who’s out of New Zealand public schools? How decisions are shaped,” *International Journal of Inclusive Education* 12, no. 5 (2008): 515; Nancy Higgins, Jude MacArthur & Missy Morton “Winding Back the Clock: The Retreat of New Zealand Inclusive Education Policy” (2008) 17 NZ Annual Review of Education 145 at 160.

<sup>66</sup> Cabinet Paper “Strengthening Inclusion and Modernising Learning Support” (Office of the Minister of Education, 2016).

School,<sup>67</sup> or the controversial Education Act Update consultations last year which were not widely publicised and many viewed as being rushed.<sup>68</sup>

The Independent Monitoring Mechanism (“IMM”) on the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”) has recently raised concern over the fact that despite drastic policy changes in relation to special education provision, there have been no amendments to the Education Act 1989 in relation to special education for over two decades. They note that this stands in contrast to the developments in human rights law – including the ratification of the UNCRPD – which means policy changes have been piecemeal rather than systemic.<sup>69</sup>

The Human Rights Commission has stated separately that “human rights considerations are generally not at the heart of public policy decision making [in New Zealand].”<sup>70</sup> It appears to us that budgetary concerns have been driving out education policy rather than a child centred policy of education.

### **6.1.2 Conflict between policy positions**

As mentioned in Chapter 3, there have been several major sociological shifts which have been accompanied by major policy shifts within the education sector. This section will discuss four different conflicts we have observed within New Zealand’s education policy. The aim of this section is not to critique the policy positions themselves, but to highlight some of the inconsistencies and lack of cohesiveness between the policy positions. We believe the unresolved status of these conflicts underlies the barriers students with disabilities face within education.

#### ***Conflict between inclusive education policy and fiscal restraints***

Since the onset of the ‘Success for all – every school, every child’ policy initiatives in 2010 the Ministry has been focusing more attention on the adoption of a fully inclusive education system

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<sup>67</sup> Scoop Website “Salisbury School closure a bitter blow for families” *Scoop*, accessed August 2016, <http://www.scoop.co.nz/stories/PO1606/S00213/salisbury-school-closure-a-bitter-blow-for-families.htm>

<sup>68</sup> Jane Blaikie “Education Act Review: A Kind of ‘Merry-Go-Round’” *Education Aotearoa*, accessed August 2016, <http://www.ea.org.nz/education-act-review-a-kind-of-merry-go-round/>; Kirsty Johnston “Documents reveal focus of special education update”, *New Zealand Herald*, accessed August 2016, [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11478169](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11478169); New Zealand Council of Trade Unions “Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi to the Ministry of Education on the Updating the Education Act 1989”, *New Zealand Council of Trade Unions*, accessed August 2016, <http://union.org.nz/sites/union.org.nz/files/CTU%20Submission%20Updating%20the%20Education%20Act%20Dec%202015%20.pdf>

<sup>69</sup> Article 24 *The Right to an Inclusive Education* (Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, 2016) at 8.

<sup>70</sup> Human Rights Commission 18<sup>th</sup> Session of the Human Rights Council Universal Periodic Review – Report on New Zealand’s Human Rights Performance (2013) at 6.



across New Zealand schools. This was discussed in more detail in Chapter 3, but essentially operated on the idea that every child regardless of individual ability or needs should have access to education at their local school without being required to attend a Special School. The incorporation of concepts of ‘inclusive education’ go back further than this, at least as far back as the adoption of the Ministry’s 1991 ‘Special Education in New Zealand: Statement of Intent’. As a part of the focus since 2010 though, the Ministry has adopted stronger language around inclusiveness, set the target of attaining a fully inclusive education system by 2014, allocated additional funding towards to support schools and has undertaken a series of reviews by the Education Review Office (“ERO”) for the purpose of measuring progress.<sup>71</sup> Since then the Ministry has signalled an intention to drop language of ‘special education’ altogether so as to conform completely to an ideology of inclusion.<sup>72</sup> It is worth acknowledging that this policy position of inclusive education is in line with the vision for education within the UNCRPD.<sup>73</sup>

We argue however, that despite the change in rhetoric and positive intentions of the Ministry in relation to inclusion, the Ministry’s policy has not yet gone far enough – as it has not brought about the changes in legislation, funding and infrastructure required for a fully inclusive education system. Increasing responsibility has been placed on schools to provide the necessary skills and support to students but without significant investment in increasing funding to schools to enable the capacity and capability to do this (we will discuss this further in Chapter 6.2). There is still a large gap between the desired outcome of inclusive education and the provision of support that is required to achieve that. The Ministry needs to recognise that significant change requires significant investment.

### ***Tension between a narrowly academic vision of education and the broader vision within the UNCRPD***

Part of the aim of the Tomorrow’s Schools reforms was to create more school accountability by measuring school’s outputs against various standards, aimed to promote competition between schools on the assumption that families would want to send their children to schools that are known to produce students that perform to a high academic standard.

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<sup>71</sup> Education Review Office *Including Students with High Needs* (June, 2010); Education Review Office *Including Students with High Needs* (July, 2013); Education Review Office *Inclusive practices for students with special needs in schools* (March, 2015).

<sup>72</sup> Cabinet Paper “Strengthening Inclusion and Modernising Learning Support” (Office of the Minister of Education, 2016).

<sup>73</sup> United Nations Convention on the Rights of Persons with Disabilities, art 24.

Currently a school's performance is predominantly measured by the reported progress of students against the National Standards.<sup>74</sup> The unstated assumption within the National Standards is that all students' progress is able to be measured against the same benchmarks – and that with the right support, students should be able to perform to the same level. For some students with additional learning needs these assumptions may be correct and the Standards could provide valid measurement of progress, given the right learning environment and supports. For other students with additional learning needs however, especially those with higher needs, these Standards may be inappropriate and may provide an inaccurate reflection of the quality of education provided by the school or the student's progress.

The current model can effectively punish schools for working with students with additional learning needs who do not fit within the standards. Public discourse and family behaviour (for example the demand for housing in-zone for schools which performs well academically) indicates that the public has largely bought into a school marketplace which competes using over-simplified perceptions of status in relation to academic results.<sup>75</sup> Sadly, there are very few measures of success which give recognition to inclusive values or the broader and holistic vision for education contained within the UNCRPD, which is toward the development of the whole child. This means that schools are primarily incentivised to produce high academic results within the strict limitations recognised – and may neglect to support students who cannot perform as well academically due to disability, or who require more funding to support.

There has been criticism of the 'Tomorrow's Schools' model on the basis that the school competition which it has promoted, has driven schools away from co-operation and collaboration, and has harmed the movement towards inclusive education because students with additional learning needs place a disadvantageous burden on the school.<sup>76</sup> Regardless of whether this is true, it follows logically that competition does not work to incentive particular outcomes – such as the adoption of inclusive values – when schools are incentivised to compete over the wrong things. Until this is addressed, there is the risk that schools will continue to compete over a very narrow vision of academic success.

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<sup>74</sup> Refer to school profiles on Ministry of Education "Education Counts", <https://www.educationcounts.govt.nz>.

<sup>75</sup> Alison Kearney "The right to education,"; Howard Fancy "Re-engineering the shifts in the system" in *Tomorrow's Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 41; Margaret Bendall "A leadership perspective" in *Tomorrow's Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 113.

<sup>76</sup> Kearney "The right to education,"; New Zealand Institute of Education, "Special Education crisis: hope in the Update? (2015), 12.

***Confusion between concepts of inclusion and integration***

Our current education system still produces somewhat mixed results when it comes to fully inclusive education. Many schools can and do provide meaningful education and inclusion, but for some schools, students with disabilities can still be seen as a burden or liability. New Zealand is widely considered as having one of the highest proportions of mainstreaming for disabled students in the world. Despite ERO reports showing an increasing proportion of schools displaying inclusive practices,<sup>77</sup> we suggest based on what we shared in Chapter 5, that this is not necessarily be translating into those students receiving a high *quality* of inclusive education. We will discuss those ERO reports in Chapter 6.3 further. As has been discussed by others including the Committee on the Rights of Persons with Disabilities (“CRPD”) earlier this year,<sup>78</sup> inclusion in a mainstream environment does not necessarily mean inclusion into meaningful education.

The traditional medical model of disability tends to create a dichotomy between those that are normally abled and those that are disabled. This is problematic because it conflates the presence of a spectrum of abilities and needs present within all students and risks schools taking a narrow view of identifying which students need support. This is a particular risk if a student does not have an identifiable or diagnosed disability, or has a disability which is less visible. In our experience, despite understanding the connection between certain disabilities such as Autism Spectrum Disorder and their corresponding emotional and behavioural symptoms; schools can still perceive this kind of behaviour as disobedience rather than attributing it to the student’s individual needs. This can lead to unfair disciplinary action or even exclusion. We suggest there still needs to be further normalisation of the diverse range of behaviours and responses to learning which different students can have within the classroom.

As Dr Cathy Wylie pointed out in 2002<sup>79</sup> and has been picked up in subsequent literature, “there has been a failure to challenge the assumption that students identified with high special needs require a ‘totally different pedagogical response to students with less need for support’.”<sup>80</sup> We often hear schools state that they do not feel adequately equipped to support a student with high special needs and this can be in the context of trying to refer the student elsewhere for education. We appreciate that schools can feel underequipped for the complexities of the role of delivering

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<sup>77</sup> Education Review Office, *Inclusive practices for students with special needs in schools* (March, 2015).

<sup>78</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment no. 4 Article 24 The right to inclusive education* (2016), para 11.

<sup>79</sup> Cathy Wylie “Meeting Individual Needs: legal identification, or systemic support?” *Set Research Information for Teachers* (2002): 4.

<sup>80</sup> Wills and McLean “Who’s in, who’s out of New Zealand public schools? How decisions are shaped,” 521.

education to all types of learners, but we submit that this is a reflection that our education system has not yet come far enough in adapting to become a system for all students.

The medical dichotomy of disability also tends to oversimplify causal factors in student achievement. Students tend to be categorised into sometimes arbitrary groups, such as disabled, lower socio-economic class, gifted etc. – and this often has implications for how the student is viewed by the education system, as well as how they are supported. What is needed is for the classroom environment to be more reflexive and responsive to the student, rather than expecting the student to adapt to a space that does not suit them. This means focusing on the process of education and the needs of the student, rather than the labels or the result. The CRPD holds that this is the vision for education in Article 24 of the UNCRPD, that inclusive education is a process which transforms the culture of the education system and strengthens its capacity so as to be able to reach all learners.<sup>81</sup>

These ideas are not new; focusing on needs rather than diagnosis' has been a central vision behind the Ministry's focus on inclusive education<sup>82</sup> and the Ministry talks about creating a Universal Design for Learning in their guidelines for schools on inclusive education.<sup>83</sup> It needs to be recognised though, that what we are describing is a cultural shift away from the more traditional understandings of student learning, which have been and still are prevalent.<sup>84</sup> The perception seems to persist in some schools that teaching students with additional learning needs is an additional task, rather than a fundamental part of the role of an educator; this needs to change. Further work needs to be done to continue to influence the culture of the education sector and shape the mainstream narrative of what education looks like.

### ***Conflict between devolution and accountability***

As a result of the changes brought about by the Tomorrow's Schools policy reforms of the late 1980's, New Zealand now has one of the most devolved education systems in the world. A devolved approach brings strength in the sense that the school Board of Trustees is formed from members of the community and local to the community, so is in the best position to understand the particular needs of that community and to create a school environment which serves those needs well.

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<sup>81</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment no. 4 Article 24 The right to inclusive education* (2016), para 9.

<sup>82</sup> Ministry of Education, *Supporting Positive Behaviours*, (2009), cited in Denise Powell, "A Review of Inclusive Education in New Zealand," *Electronic Journal for Inclusive Education* 2, no. 2 (2012): 14.

<sup>83</sup> Ministry of Education, "Universal Design for Learning," *Ministry of Education*, accessed August 2016, <http://inclusive.tki.org.nz/guides/universal-design-for-learning>.

<sup>84</sup> Kearney "The right to education".

From a legal perspective, it is important to note that a school's Board receives its power from the state, as Boards are delegated power by Parliament through Part 9 of the Education Act 1989. That is to say, schools are carrying out a state function and are acting on behalf of the state. This means that schools also carry the responsibilities of the state when using its power, including responsibilities under the UNCRPD. As such, the state is accountable for the actions of schools under international and domestic law and has an obligation to provide an appropriate amount of oversight so as to ensure that schools carry out these responsibilities and do not overstep their power.

Currently there is very little direct accountability between schools and the Ministry, which we will discuss in more detail in Chapter 6.3. Accountability is often perceived as a negative thing which is contrary to aims of devolution, but autonomy and accountability must always go together. The original proposal in the Picot Report which brought in school devolution, was 'local autonomy within central guidelines' – devolution was never intended to substitute local control for central.<sup>85</sup>

Morally there is an argument that schools and service providers should be accountable to families, as children retain an inherent vulnerability and lack agency in the education system. Families do not have the same power of choice that consumers do in a truly free market to take their 'business' elsewhere. Since society has deemed that primary and secondary education should be free and centrally funded, it is right for the Government to have a role in keeping schools accountable to what they are funded for.

From a relational perspective, a lack of accountability disempowers families within education. Families can become defensive and entrenched in an attitude of distrust when they feel that they have limited agency in the process.

### **6.1.3 A values based approach**

"At present the education debate is mainly about ways and means... It should be primarily about purpose, vision, and goals."<sup>86</sup>

We believe that the Government needs to formulate a centralised vision and policy for education which is framed around a values and rights based approach. Education has a broader purpose than investing into our future workforce – it is about the formation of children for their fullest

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<sup>85</sup> Fancy, "Re-engineering the shifts in the system" in *Tomorrow's Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 41.

<sup>86</sup> Harvey McQueen, "Towards a covenant" in *Tomorrow's Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 23.

participation in all aspects of society. Our education system should have a holistic vision which reflects Articles 29 and 24 of the UNCROC and UNCRPD respectively. It should be strengths focused, celebrate diversity and encourage reciprocal learning within which children are active participants.

It is important that those who have a stake in education are involved and given ownership over the process of forming policies and services. Without the goodwill, support and empowerment of the education sector, the Government will struggle to make meaningful changes.<sup>87</sup> Families must also be involved so that education reflects their cultural contexts and values.<sup>88</sup> To this extent, the Government must lead from alongside rather than trying to enforce top-down change.

### ***Legislative amendment***

Despite ratification of the UNCRPD in 2007 which provides a right to education for children with disabilities, the Education Act 1989 still does not provide for an enforceable right to education within domestic New Zealand law. As we discussed in Chapter 4, the case of *Daniels v Attorney General* held that Section 8 of the Education Act 1989 was too broadly construed to in itself provide an enforceable right. This judgment was passed prior to the ratification of the UNCRPD and could potentially be now overturned on the basis that Section 8 should now be interpreted consistently with our international obligations under the UNCRPD. Our view however, is that legislative reform would be more appropriate and is necessary to fully implement the right.

The UNCRPD creates a binding obligation on the New Zealand government, but since we have not yet signed the Optional Protocol, complaints relating to breaches of our obligations under the UNCRPD cannot be heard by the CRPD – meaning there is no enforcement mechanism within the international jurisdiction. Even so, Article 4 of the UNCRPD requires our Government to adopt all legislative measures to implement the rights recognised by the UNCRPD. The CRPD earlier this year stated that the legislative framework should include an enforceable right to education<sup>89</sup> and they have previously noted concern over our lack of enforcement mechanisms within domestic legislation.<sup>90</sup> Our view is that by not legislating for an enforceable right, our Government is currently in breach of its obligations in international law. The IMM stated earlier

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<sup>87</sup> Ibid., 22.

<sup>88</sup> Disley “Can we dare to think of a world without ‘special education?’” in *Tomorrow’s Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 65.

<sup>89</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment no. 4 Article 24 The right to inclusive education* (2016), para 28.

<sup>90</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of New Zealand*, 2014.

this year that our frameworks currently fall short of providing for the right to education as set out in Article 24 of the UNCRPD.<sup>91</sup>

We suggest that the abundance or extensiveness of laws governing a given aspect of society offer some insight into what Parliament – and by implication, our wider society places value on. Laws are created to protect that which is important and so society tends to legislate for what it values. Law also has an aspirational value in that it provides direction to our policies and feeds back into the public discourse by placing emphasis on particular rights and expectations.

Despite the highly devolved nature of our education system as discussed in Chapter 6.1, the central government is still fundamentally responsible for providing leadership and oversight – both to the purpose and outcomes of education, as well as the processes and boundaries within which school Boards of Trustees operate. This responsibility is currently mandated both by the Education Act of 1989 and by the government’s responsibilities under UNCROC and the UNCRPD. If enduring reform is to continue within our education system, we must address the ‘structural biases’ within the current legislative framework by making amendments to the Education Act 1989.<sup>92</sup>

### ***Budgetary appropriations***

Our Government needs to make adequate budgetary appropriations rather than focusing on fiscal restraints. Learning is facilitated only when the learner feels validated and respected.<sup>93</sup> We recognise that all children equally have a fundamental and inherent value and so we should invest every effort into the creation of an education system within which all children can thrive. To not invest into overcoming all barriers to education is to say that these barriers are not worth overcoming.

## **RECOMMENDATIONS**

Reform policies for educational support for students with disabilities starting from a values and rights based framework

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<sup>91</sup> The Independent Monitoring Mechanism on the Rights of Persons with Disabilities, *Article 24: The Right to an Inclusive Education* (June 2016), 10.

<sup>92</sup> Human Rights Commission, *United Nations Committee on the Rights of Persons with Disabilities: Day of General Discussion on the Right to Education for Persons with Disabilities, 15 April 2015 – Submission of NZ Human Rights Commission*, (Human Rights Commission, 2015), 10.

<sup>93</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment*, 65.

## **6.2 Practice and Provision – What should learning support services look like?**

One of the key ideas we will put forward in this chapter, is that while the Ministry of Education (“Ministry”) adopted the principles of inclusive education with the introduction of Special Education 2000 (“SE2000”) – evolving a clearer and firmer stance on inclusion since then – not enough work has been done to create the necessary supporting infrastructure within our education system, to make special education in a mainstream setting work for all students. This chapter will briefly highlight some of the practical barriers to New Zealand’s education system adopting a more inclusive culture and will discuss some of the strategies that can be put in place to address these barriers.

### ***6.2.1 Lack of guidance and procedural frameworks for educational support***

We put forward in Chapter 6.1 the view that schools’ attitudes toward including and supporting the education of children with additional learning needs is inherently a cultural issue – informed by a number of underlying factors, including a clash of ideologies toward disability and education, a lack of clear guidance and oversight by the Ministry and by concerns as well as competing interests over funding. In 2007 the Ministry revised the New Zealand Curriculum, which resulted in major changes. Research by the New Zealand Council for Educational Research (“NZCER”) found that schools whose values most closely aligned with the new curriculum were significantly quicker to adopt and implement it.<sup>94</sup> It is clear then, that facilitating the cultural shift within the education sector to further adopt inclusive values will be important if the education sector is also to fully adopt inclusive practice.

Our position is that for systemic change to occur amongst schools which resist inclusive practice, the government must provide guidance at a legislative level to signify the cultural shift which is expected. Whilst this will not by itself bring about systemic change, we believe this is a necessary condition if the education sector – including the Ministry and other relevant governmental bodies – are to understand the nature of their obligations under the United Nations Convention on the Rights of the Child (“UNCROC”) and the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”). In this section we will discuss some of the issues relating to guidance and expectations for the sector.

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<sup>94</sup> Dr Sandie Schagen *Implementation of the New Zealand Curriculum: Synthesis of Research & Evaluation* (New Zealand Council for Educational Research, 2011), 21.



***Current education system does not systemically encourage inclusive practice***

In Chapter 6.1 we discussed the view that true inclusive education requires an education system that is not grounded on the assumptions that there are ‘normal’ paths to student learning or levels of student achievement.

Two relatively recent events have helped shift the education system further towards a paradigm of catering for diverse learning needs – often referred to as Universal Design for Learning (“UDL”). In 2007 the new Curriculum set out further expectations that educators will be aware of and respond to the diverse needs of students, will make use of a range of pedagogical practices and will engage in reflexive professional development.<sup>95</sup> In 2011 the New Zealand Teacher’s Council (now called the Education Council) amended the Requirements for Initial Teacher Education Programmes to include a new requirement that graduating teachers should have knowledge and skills relating to the provision of inclusive education for students with disabilities.<sup>96</sup> The Ministry has also taken an increasing focus on encouraging inclusive practice through guidelines and Professional Development for Learning courses provided,<sup>97</sup> as well as through resources such as the Inclusive Practices Toolkit which encourages community feedback and self-review.<sup>98</sup>

Despite these changes, there is still a clash of values within our education system between the more traditional view that education is purposed to produce high academic results and the broader view of education enshrined within the UNCROC and UNCRPD<sup>99</sup> – and many do not believe that the current system caters well for some students.<sup>100</sup> We do not see these as being necessarily mutually exclusive aims, but we are concerned that there are few measures of success for schools relating to achievement outcomes that relate to including students with additional learning needs who may not always achieve highly academically. We note that Education Review Office (“ERO”) reviews since 2010 have included measures relating to inclusive

<sup>95</sup> Ministry of Education *The New Zealand Curriculum 2007*.

<sup>96</sup> “Approval, Review and Monitoring Processes and Requirements for Initial Teacher Education Programmes,” *New Zealand Education Council*, accessed August 2016, <https://educationcouncil.org.nz/content/approval-review-and-monitoring-processes-and-requirements-initial-teacher-education>.

<sup>97</sup> Ministry of Education, “Inclusive Education Guides for Schools”, *Ministry of Education*, accessed August 2016, <http://inclusive.tki.org.nz>.

<sup>98</sup> Ministry of Education, “Wellbeing @ School,” *Ministry of Education*, accessed August 2016, <http://www.wellbeingatschool.org.nz/about-inclusive-practices-tools>.

<sup>99</sup> Fancy, “Re-engineering the shifts in the system” in *Tomorrow’s Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 41; Kearney “The right to education,”; Margaret Bendall, “A leadership perspective” ” in *Tomorrow’s Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 113; Graham and Jahnukkainen, “Wherefore art thou, inclusion?” 23; Hornby “Inclusive education for children with special educational needs,” 55.

<sup>100</sup> Jacky Burgon, Melanie Berg and Nicole Herdina, *Patterns of student progress in the Intensive Wraparound Service: NZCER IWS Evaluation*, (New Zealand Council for Educational Research, 2015), 76.

practice;<sup>101</sup> but besides being noted in these reviews, we do not see much recognition being given publically to schools that do display inclusive practices and cater for diverse learning needs.

We also recognise that schools often face financial barriers to taking a broader approach to education, because of the costs involved with supporting students with additional learning needs and the lack of funding support available. Schools are often better incentivised to invest their energy and resources instead on students who are able to perform well academically, so as to create a reputation for high academic achievement and attract more students (and the funding and donations that come with them) to the school. We will discuss this further later on in Chapter 6.2. For the broader outcomes of an inclusive and holistic education to be realised, these outcomes need to be given further weighting and exemplified as an expected part of the culture of excellence and professionalism within the education sector.

### RECOMMENDATIONS

- Parliament make amendments to the Education Act 1989 to include a statement on the purpose of education in line with Articles 29 of UNCROC and 24(1) of UNCRPD
- The Ministry to investigate ways to exemplify schools that perform well in relation to the use of diverse approaches to learning and inclusive practice

#### ***Lack of clear expectations for schools***

Despite a range of policy references to inclusive practice and the support of students with disabilities over the past 15 years, there is still an absence of any formalised framework of expectations with respect to the school's role in this area. We do recognise as above, that ERO reviews against a number of well drafted measures relating to inclusive practice and processes.<sup>102</sup> These are not codified however and do not have the status or effect of primary or secondary legislation. Schools can ultimately ignore ERO reviews and we understand are only referred to the Ministry for follow up by ERO in serious instances.<sup>103</sup> Even the National Education Guidelines – created by the Minister under delegated authority by Section 60A of the Education Act 1989 – have been described by the Independent Monitoring Mechanism on the Rights of

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<sup>101</sup> Education Review Office, "School Evaluation Indicators," *Education Review Office*, accessed August 2016, <http://www.ero.govt.nz/publications/school-evaluation-indicators/foreword>.

<sup>102</sup> Ibid.

<sup>103</sup> Education Review Office, "How ERO reviews early childhood services and schools," *Education Review Office*, accessed August 2016, <http://www.ero.govt.nz/how-ero-reviews/how-ero-reviews-early-childhood-services-and-schools>; Cathy Wylie "Getting more from school self-management" in *Tomorrow's Schools 20 Years On...* ed. John Langley (Cognition Institute, 2009), 142.

Persons with Disabilities (“IMM”) as commendable but not going far enough.<sup>104</sup> They are broadly aspirational, but in their current form are not measurable or enforceable and there have been suggestions that schools generally ignore these.<sup>105</sup> The Ministry has also published a series of guidelines for schools on inclusive practices,<sup>106</sup> which may provide helpful direction and advice for schools, but essentially retains the core problem of being framed as guidance rather than set expectations.

In particular we note an absence of:

- A concrete definition of inclusive education or explicit policy position on the role of mainstream versus special schools;
- Procedures or guidelines on the identification of those who have needs;
- Guidelines on which students schools are expected to provide additional support to;
- Procedures for a graduated response by the school;
- Procedures around keeping records or the release of information to families;
- Procedures around creating and reviewing Individual Education Plans (“IEP”);
- Requirement for schools to involve families.

#### *No definition of inclusive education or clarity around role of special schools*

We have already discussed the first issue in Chapter 6.1. Briefly though, we note again the report of the Committee on the Rights of Persons with Disabilities (“CRPD”) recently highlighted by the IMM<sup>107</sup>, stating that we need a legislative framework to include a clear definition of inclusive education and its objective.<sup>108</sup> This would clarify the rights of families to enrol their children at a mainstream state school and clarify the role of Special Schools under an ‘inclusive education’ policy.

#### *No formalised systems for determining needs*

In theory, all schools are supposed to provide discretionary support to students based on their individual needs. There is inconsistency however across schools in the way that need is

<sup>104</sup> The Independent Monitoring Mechanism on the Rights of Persons with Disabilities, *Article 24: The Right to an Inclusive Education* (June 2016), 10.

<sup>105</sup> Taskforce on Regulations Affecting School Performance, *Considering Education Regulation in NZ: Report of the Taskforce on Regulations Affecting School Performance* (2014), 18, cited in The Independent Monitoring Mechanism on the Rights of Persons with Disabilities, *Article 24: The Right to an Inclusive Education* (June 2016).

<sup>106</sup> Ministry of Education, *Special Education Policy Guidelines* (2003), cited in Denise Powell, “A Review of Inclusive Education in New Zealand” *Electronic Journal for Inclusive Education* 2, no. 10 (2012): 6.

<sup>107</sup> *Article 24 The Right to an Inclusive Education* (Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, 2016) at 7.

<sup>108</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment no. 4 Article 24 The right to inclusive education* (2016) at para 63.

determined and perceived, which means that students will receive a different level of support across schools. The identification of learning issues then relies heavily on the classroom teacher's intuition and the schools own internal processes for referral to external support where necessary. Our experience is that many schools do not have formalised referral processes and teachers do not always feel confident in knowing when and how to seek further support.

The inconsistency in levels of support across schools was an issue picked up by the Wylie Report in 2002 when looking at whether provision of discretionary special education funding to schools could be weighted towards schools with a higher proportion of students with special educational needs.<sup>109</sup> No substantial changes to Ministry policy have been made since then to try and ameliorate this problem, aside from the general encouragement for schools to adopt inclusive practices. A national definition of special needs as a means for creating consistency with the identification of need would be problematic, as this requires creating a definitive boundary of what is categorised as a special need.<sup>110</sup> This tends to work against the principle of inclusion, which is to normalise differences in learning styles and ability, rather than distinguish them as abnormal. A system which attempts to delineate 'special needs' related to disability from other kinds of needs, also would ignore the complexity of amorphous causes of need; such as from the interaction between socio-economic and physiological issues. Nonetheless, the CRPD has noted that countries need to adopt a consistent framework for the identification of children with additional learning needs.<sup>111</sup>

We suggest focusing on the processes by which schools identify and respond to all student needs. Schools could be required to implement their own framework for this process; as long as this was evidence based and could be verified as being effective. Both the United States and the United Kingdom have prescribed models for this process, provided at a central level for schools to use as a scaffold.

The US model – 'Response to Intervention'<sup>112</sup> ("RTI") – is a multi-tiered approach which aims to try multiple interventions of increasing intensity and monitor for student response. In the first tier, all students are regularly screened to establish an academic and behavioural baseline and to identify struggling students for further support within the class. Tier 2 provides increasingly intensive targeted support for those who are falling well behind the rest of the class – often in

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<sup>109</sup> Wylie *Picking up the pieces*, 84.

<sup>110</sup> Ibid.

<sup>111</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment* at para 63.

<sup>112</sup> David Mitchell, *Education that fits: Review of international trends in the education of students with special educational needs* (July, 2010) at 55.

small group settings. Tier 3 provides individualised support, potentially bringing in further funding within the school. If a student is still not making progress by this point they are referred for a comprehensive evaluation and are considered eligible for special education services. The UK model – ‘Assess-plan-do-review’<sup>113</sup> – is a largely similar approach, but is less tiered, focusing instead on a cycle of review and building on previous interventions.

We note importantly, that the point of both models is to create clear pathways for a student to receive support within the classroom. ‘Dynamic Assessment’ is another similar model which already receives some use within the New Zealand context and could be developed into a codified model for determining needs.<sup>114</sup>

### *Inadequate procedural protections for students with SEN*

Schools have largely been given open discretion in how to best support students with additional learning needs. While we recognise the benefits of schools retaining the freedom and flexibility to respond to the needs of their own students, this system currently relies heavily on the goodwill of schools with little procedural protection for students, who we note have an inherent vulnerability in this relationship. As an example by comparison, the UK Education Act 1996 and Special Education Needs Code of Practice sets out comprehensive guidelines which schools are required to consider when identifying, assessing and making provision for students with special educational needs. This includes detailed requirements for the school to ensure identification of children with special educational needs,<sup>115</sup> to make an assessment of the student’s needs,<sup>116</sup> to notify and involve the families and the student in any decisions,<sup>117</sup> to review the effectiveness of any interventions,<sup>118</sup> to keep a record of action<sup>119</sup> etc.

Likewise, the US Individuals with Disabilities Act and IDEA Regulations also set out comprehensive requirements for schools – including a right for families to request an evaluation for their child,<sup>120</sup> procedures for the creation and evaluations of IEPs,<sup>121</sup> procedures for determining the schooling placement of the student so as to be placed into the ‘least restrictive

<sup>113</sup> SEN and disability code of practice, 2015 (UK) para 5.32-5.43.

<sup>114</sup> Ken Ryba, “Dynamic Assessment and Programme Planning for Students with Intellectual Disabilities,” (1998) 27(2) NZ Journal of Psychology; Helen Hodges, *Dynamic Assessment in New Zealand: Knowledge, Application and Utility Amongst Resource Teachers of Learning and Behaviour* (2013).

<sup>115</sup> SEN and disability code of practice; Education Act 1996 (UK) s 317(1)(a)-(c).

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Individuals with Disabilities Education Act 20 USC 33 Regulations 300.301.

<sup>121</sup> Ibid., at 300.320-324.

environment’ that is appropriate for learning,<sup>122</sup> and procedural safeguards for the rights of families in this process.<sup>123</sup> We have included a brief overview of some of the key protections within the UK and US legislative frameworks in Appendix 2 and 3 as a reference.

A codified set of basic procedural protections would provide a minimum standard of expectations for school practice and would provide a benchmark for accountability.

### RECOMMENDATIONS

- A legislative framework to clarify the role of mainstream schools and ‘special schools’ in relation to students with disabilities
- Further investigation of building systems such as RTI into our education framework, which teachers can use as a scaffold for their teaching reflection and practice
- The promotion of opportunities for teachers to learn and become skilled in using these systems
- A requirement for schools to make clear processes for teachers to access further support for students identified as having additional learning needs
- The creation of a Code of Practice, outlining further procedural protections with respect to the provision of education and support to students with disabilities by schools

#### ***No codified accountability framework for governmental bodies***

The Ministry and other related governmental bodies operate in a similar legal vacuum to that of schools and other parts of the education sector. As these issues have been already dealt with in depth in Chapter 6.1 – we will simply note here that aside from a select few prescribed processes (such as the right to challenge certain Ministerial decisions by arbitration under Section 10 of the Education Act 1989), the Ministry has a wide discretionary freedom over the policies and services supporting students with disabilities in education. Although there are obvious political ramifications from any suggestion that special education policies are systemically discriminating or even just inadequate, there are no binding legal recourses which allow for an enforceable right to education for students who do need additional support. This is primarily because there is no codified legislative framework against which the Ministry can be kept accountable on substantive issues. Although as stated earlier there is the potential now for the Courts to find that Section 8 of the Education Act 1989 does provide a substantive and enforceable right to

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<sup>122</sup> Ibid., n 27, at 300.114.

<sup>123</sup> Ibid., n 27, at 300.500-300.537.

education, it is unclear how the Courts would frame such a right. Our view is that this is an area that Parliament is in the best position to address – and furthermore that the Government is currently in breach of its obligations under the UNCRPD<sup>124</sup> by failing to provide an enforceable legislative framework through which to keep the Ministry accountable to the public.

## RECOMMENDATIONS

- An enforceable legislative right to ‘reasonable accommodation’ within education
- The creation of a Code of Practice, outlining further procedural protections with respect to the provision of education and support to students with disabilities by governmental bodies

### ***6.2.2 Issues relating to the professional development and capacity of educators***

Research has clearly shown that good quality teachers are one of the most important factors for effective classroom learning.<sup>125</sup> As such it is important to invest properly into educator’s professional development and to increase capacity so as to allow them to effectively support students with additional learning needs.

#### ***Initial teacher education***

Tertiary level Initial Teacher Education (“ITE”) is a formative time for the shaping of a teachers understanding of inclusive theory and practice.<sup>126</sup> It is vital that ITE appropriately provides teachers with the skills to assess student need, adapt the curriculum, support a diverse range of learners and reflect on their own teaching practice.

Until relatively recently, special education has largely been taught within optional courses across most training institutes. Although training institutes have for the past decade included a focus on ‘differentiated practice’ – being able to reach a diverse range of learners – this was generally framed without explicit reference to disability.<sup>127</sup> Concerns have been raised by some, that the positioning of special education as an optional subject could reinforce the message that teaching disabled students was optional.<sup>128</sup>

<sup>124</sup> United Nations Convention on the Rights of Persons with Disabilities, art 4(1).

<sup>125</sup> Catherine Walter and Jess Briggs *What professional development makes the most difference to teachers?* (University of Oxford Department of Education, March 2012).

<sup>126</sup> Denise Powell “A Review of Inclusive Education in New Zealand” (2012) 2 *Electronic Journal for Inclusive Education* 2, no.2 (2012): 15.

<sup>127</sup> O’Neill et al, “Discourses of inclusion in initial teacher education,” 588.

<sup>128</sup> University of Otago College of Education *Themes of UOCE Initial Teacher Education Programmes* (July 2016) at 1.

In 2011 the NZ Teacher's Council (now replaced by the Education Council) amended the graduating standards for teachers to include a requirement that ITE providers ensure that graduating teachers had the knowledge and skills relating to inclusive practice for students with disability.<sup>129</sup> While this is a considerable step forward, some have commented that research into this approach has shown mixed results, as a permeated model does not necessarily allow for the time or focus on acquiring the necessary skills.<sup>130</sup> A review of graduating teachers at one institution found that while students were positive about the theme of inclusion being brought in throughout the course, there was a need for more in depth coverage.<sup>131</sup> Some Principals have also voiced the need for ITE providers to focus more on practical skills – particularly for the use of evidence based practice, problem solving and working with other professionals and families.<sup>132</sup> On the other hand, school-based practicums are a core component of practical learning during ITE and some student teachers have raised concerns about ensuring practicums provide appropriate opportunities to develop skills in these areas,<sup>133</sup> which the Ministry has also acknowledged.<sup>134</sup>

We support the Ministry's recent focus on developing post-graduate programmes with the aim of raising the level of expertise across the sector – possibly also with the intention of creating further capacity to improve the training and induction of new teachers. We echo the Committee on the Right of Persons with Disabilities' ("CRPD") call to ensure that ITE provides practical guidance and opportunities to learn from experienced inclusive teachers.<sup>135</sup> We agree with the Education Council's views that ITE should not be viewed in isolation to professional development<sup>136</sup> and recommend the Ministry looks to strengthen the processes around practicum supervision, teacher induction and ongoing mentoring for established teachers. We also urge a greater focus on skills based learning within ITE and dedicated course components in relation to supporting moderate and high needs learners.

<sup>129</sup> Education Council New Zealand *Approval, Review and Monitoring Processes and Requirements for Initial Teacher Education Programmes* (October 2010), 29.

<sup>130</sup> O'Neill et al, "Discourses of inclusion in initial teacher education," 588.

<sup>131</sup> Bill Hagan and Lyndon Todd "Student teacher perspectives in practicum: "How can I make a difference?"" *Te Iti Kahurangi*, 5, 9.

<sup>132</sup> Garry Hornby and Dean Sutherland "School Principals' Views of Teaching Standards for Inclusive Education in New Zealand" in Phyllis Jones (ed) *Bringing insider perspectives into inclusive teacher learning: potentials and challenges for educational professionals* (Routledge, New York, 2014), 48.

<sup>133</sup> Hagan and Todd, "Students teacher perspectives in practicum," 7- 8.

<sup>134</sup> Ministry of Education "Lifting the quality of initial teacher education provision (ITE)", *Ministry of Education*, accessed August 2016, <http://www.education.govt.nz>.

<sup>135</sup> Committee on the Rights of Persons with Disabilities, *Draft General Comment* at para 63.

<sup>136</sup> Education Council New Zealand *Strategic Options for Developing Future Orientated Initial Teacher Education* (2015).



## RECOMMENDATIONS

- Increased focus within ITE on practical skills based learning
- Dedicated compulsory course components in relation to supporting moderate and high needs learners
- Strengthen processes around practicum supervision and ensure access within practicum placements to experienced inclusive teachers
- Strengthen processes around beginning teacher induction and ongoing mentoring for established teachers

### ***Ongoing professional development and learning***

The role and responsibilities of teachers has changed drastically over the last decade and the success of including learners with disabilities relies heavily on the strengthening and development of the education profession as a whole. Many teachers feel that they have a lack of knowledge or adequate support to adapt the curriculum to students with higher learning needs<sup>137</sup> and schools report not having the capabilities to support such students.<sup>138</sup> Families with children with additional learning needs also complain that the attitude and lack of knowledge of their child's teacher creates a barrier to education.<sup>139</sup>

It is unsurprising then that many educators report believing that the mainstream education setting is not the appropriate learning environment for some students with disabilities.<sup>140</sup> Educators who still hold onto the belief that students with disabilities do not belong in mainstream education will be hard pressed to buy into or accept the cultural shift toward normalising disability within inclusive education, if they do not feel capable or supported to make the corresponding changes to their practice. A teacher's attitude towards their students is strongly connected to learning outcomes for students who need additional learning support.<sup>141</sup> Teachers will be influenced and limited by their overall school culture which is often set by school leadership – in particular the

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<sup>137</sup> Denise Powell "A Review of Inclusive Education in New Zealand", 11; Education Review Office *Inclusive Practices for students with special needs in schools* (2015) at 25; Ministry of Education *Engagement Forums Feedback: Special Education* (2015) at 51.

<sup>138</sup> Jacky Burgon and others, *Patterns of Student Progress in the Intensive Wraparound Service: NZCER IWS Evaluation* (2015) at 75.

<sup>139</sup> Alison Kearney, "The right to education"; Ministry of Education *Engagement Forums Feedback: Special Education* (2015) at 17.

<sup>140</sup> Jacky Burgon and others, *Patterns of Student Progress in the Intensive Wraparound Service*.

<sup>141</sup> Alison Kearney, "The right to education".

Principal.<sup>142</sup> A school's culture towards openness and change has been shown to be hugely important in adapting to changes in the direction of education policy,<sup>143</sup> and this culture is influenced by the professional learning and development ("PLD") of educators and school leadership.<sup>144</sup>

New Zealand teachers have often reflected negative attitudes toward PLD, in part because of the connotations of tokenism and the requirement to do PLD in their own time.<sup>145</sup> A recent meta-analysis by the University of Oxford found that effective PLD needs to – be praxis and classroom based, bring in outside expertise, be owned and driven by teachers, be collaborative, provide opportunities for mentoring, be sustained over time and to be supported by school leadership.<sup>146</sup> The themes of collaboration and ownership have been reiterated in New Zealand research as well.<sup>147</sup> To this extent, we agree with the approach the Ministry is taking in advancing the new Communities of Learning ("COL").<sup>148</sup> It appears the intention behind this development is to provide dedicated space for collaborative PLD between schools and teaching professionals, and to create new pathways for leadership and upskilling. We encourage the Ministry to ensure that schools can retain as much ownership as possible over these COLs. We also encourage the investigation of using COLs as an opportunity for more direct teacher mentoring.

Currently the Ministry centrally funds a range of PLD programmes for educators to participate in on an opt-in basis. Schools may provide additional funding towards professional development from its operational funding or Special Education Grant. Whilst teachers must participate in some form of PLD in order to maintain their registration, there is no minimum number of hours that must be completed.<sup>149</sup> Teachers are generally expected to undertake PLD in their hours outside of class and can be required by the school to undertake PLD outside of school time under their collective employment agreements.

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<sup>142</sup> Jenny Ferrier-Kerr "The Role of Professional Development and Learning in the Early Adoption of the New Zealand Curriculum by Schools" (2008) 14 Waikato Journal of Education 123.

<sup>143</sup> Ibid., 129.

<sup>144</sup> Ibid., 130.

<sup>145</sup> Ethan Smith "Professional Development and the impact of teacher relationships" (2015) 1 New Zealand Journal of Initial Teacher Education: Contemporary Teaching and Learning 41 at 42.

<sup>146</sup> Catherine Walter and Jess Briggs *What professional development makes the most difference to teachers?*.

<sup>147</sup> Smith, "Professional Development and the impact of teacher relationships".

<sup>148</sup> Ministry of Education "Investing in Educational Success", accessed August 2016, <http://www.education.govt.nz>.

<sup>149</sup> Educational Council New Zealand "Application to renew Full practising certificate", accessed August 2016, <https://educationcouncil.org.nz>.

There are a few studies which have shown that when looking at the amount of PLD undertaken by teachers, there is a correlation between high intensity PLD (average of at least 49 hours of PLD per 6-12 month period) and a 21% increase in student achievement.<sup>150</sup> When looking at lower intensity PLD across the same time period (5-14 hours), this was correlated with no change in student achievement. While there may be multiple unseen factors at play here, the correlation appears to suggest that PLD needs to be heavily prioritised in order to see returns in student achievement. The majority of countries which achieve highly on educational outcomes build PLD time into a teacher's normal weekly working day.<sup>151</sup> By comparison to New Zealand's lack of dedicated time for PLD, several countries including Sweden, Singapore and the Netherlands provide teachers with an average of 100 PLD hours per year – and this is in addition to regularly scheduled time for collaboration and planning with other teachers.<sup>152</sup> The Ministry has announced that it is currently undertaking a review and will be changing its approach towards centrally funded PLD over the next two years.<sup>153</sup> We are unsure of what this will look like at this stage but encourage the Ministry to invest further into sustained PLD for inclusive educational practice skills and funding release time for educators to engage in these programmes.

## RECOMMENDATIONS

- Ensuring that schools maintain as much ownership over COLs as possible
- Investigation of using COLs to create opportunities for more direct teacher mentoring
- Encourage schools to utilise teaching schedules in a way which allows for teachers to collaborate together to prepare lessons
- Funding to schools for dedicated teacher release time to engage in PLD

### *Concerns around teacher appraisal processes*

A further issue in relation to the professional development of teachers is the process around teacher appraisal. An older Organisation for Economic Co-operation and Development (“OECD”) report (2010) of New Zealand's teacher appraisal found that there was insufficient external input into teacher appraisal and that the declaration process for the renewal of teacher registration was insufficient to deal with underperforming teachers. It also found that teacher

<sup>150</sup> Linda Darling-Hammond and others *Professional Learning in the Learning Profession: A Status Report on Teacher Development in the United States and Abroad* (National Staff Development Council, Stanford, 2009). Note that this research undertook a meta-analysis of 1300 studies which identified only 9 studies where control groups were used to create experimental conditions. The findings were drawn from these 9 studies, which although only a small group, used a rigorous methodology.

<sup>151</sup> Ibid., 15.

<sup>152</sup> Ibid., 17.

<sup>153</sup> Ministry of Education “Professional Learning and Development”, <http://services.education.govt.nz>.

appraisal was highly variable across schools.<sup>154</sup> Studies have shown that mentoring in New Zealand schools tends to be very pragmatic and based on the mentor teacher's experiences, rather than inquiring into the mentee teacher's practice.<sup>155</sup>

We note that the Education Council released a new set of Practicing Teacher Criteria in 2013 and has run workshops with schools since then in order to improve appraisal practices.<sup>156</sup> We are sure that this has strengthened appraisal processes, but are concerned with the number of anecdotal reports we still regularly receive from families in respect to issues of teacher competency around supporting students with additional learning needs. There is still a perception that educational bodies are reluctant to take action to manage the performance of teachers where it is needed.

Encouraging constructive relationships between teachers, schools and families is vital for student outcomes and we are not advocating an adversarial approach to resolving issues of teacher competence. On the other hand, given the vulnerability of children and the lack of agency families can often have in these matters, we see the need for robust processes in place to ensure schools are appraising and supporting teachers appropriately. These processes will also strengthen the profession as a whole. The Education (Update) Amendment Bill 2016 has also provided for the constitution of a Competency Authority to replace the current Competency Assessor role within the Education Council and sit alongside the existing Disciplinary Tribunal. We suggest this is an area to be monitored further over the next couple of years, to ensure the appraisal and competency processes are working effectively and fairly. We suggest also that external peer-review could also be used to mentor and support teachers within the Communities of Learning, as long as this was appropriately moderated.

### RECOMMENDATIONS

- Further monitoring of teacher appraisal and accountability processes
- Investigation of peer-review processes

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<sup>154</sup> Ministry of Education *OECD Review on Evaluation and Assessment Frameworks for Improving School Outcomes – New Zealand Country Background Report* (April 2011).

<sup>155</sup> John Morris and Rose Patterson *Why New Zealand Must Strengthen Its Teaching Profession* (The New Zealand Initiative, 2013) at 58.

<sup>156</sup> Education Council New Zealand “Appraisal of Teachers Project”, <https://educationcouncil.org.nz/>.

***Lack of investment into teacher capacity***

The current rate of increasing demands on teachers has been described as unsustainable without further support<sup>157</sup> and we view the transition to an inclusive education system without serious investment into the infrastructure of the profession as deeply problematic. As the Education Council put it recently, “the challenge of being a teacher is more complex than previously understood.”<sup>158</sup>

At the risk of severely understating the nature of the teacher’s role, some of the ways in which the demands on teachers in relation to students with disabilities have increased since the introduction of Special Education 2000 (“SE2000”) include – the expectation that teachers will adapt curriculum content to diverse learners in their planning, the utilisation of multiple pedagogies to engage students, supporting individual students with higher learning needs, working alongside and managing teacher aides, liaising with other support agents including the Special Education Needs Co-ordinator (“SENCO”), Resource Teachers: Learning and Behaviour, Specialist Teachers, Ministry and families, utilising different forms of assessment for students, developing and overseeing the deployment of Individual Education Plans, reporting and administration demands, engaging in reflexive practice and ongoing self-development and undertaking further professional development so as to gain the necessary skills for doing all of the above.

It needs to be recognised that despite the increase in demands, schools have not been given additional release time to enable teachers to carry out these other duties. There has also been no clear shift in teacher salaries that can be attributed to compensating teachers for the evolving role. Although beginning teachers earn just above the average of what other adults with tertiary educations do in New Zealand (not taking into account hours worked)<sup>159</sup>, they earn less than their teaching counterparts overseas.<sup>160</sup> Teacher salary increase in New Zealand between 2000 and 2005 (after the implementation of SE2000) was much less than the proportionate OECD average change in teacher salary for the same time period.<sup>161</sup> Although the increase in secondary teacher salaries between 2005 and 2012 was higher than the OECD average proportionate change, the

<sup>157</sup> New Zealand Educational Institute *Special Education crisis: hope in the Update?* (2015) at 14.

<sup>158</sup> Education Council New Zealand *Strategic Options for Developing Future Orientated Initial Teacher Education* (2015).

<sup>159</sup> OECD (2014), “Indicator D3: How much are teachers paid?” in *Education at a Glance 2014: OECD Indicators*, OECD Publishing at D3.1.

<sup>160</sup> At D3.2.

<sup>161</sup> At D3.5.

change across our primary teacher salaries up until 2012 was roughly the same as the OECD average up until 2011 and only marginally higher between 2011 and 2012.<sup>162</sup>

The 2014 OECD report comparing teacher hours shows that our teachers have the 5<sup>th</sup> highest working hours compared across the OECD.<sup>163</sup> While our primary teachers spend slightly less time in the class (60% of the working hours required at school) than the average across the OECD (65%), secondary teachers spend more time in the class (74% of the working hours required at school) than the OECD average (58%).<sup>164</sup> It should be noted that this data does not take into account hours worked by our teachers outside of the hours schools are open. The respective collective employment agreements for teachers in New Zealand do not stipulate a maximum number of total working hours, so the weekly hours a teacher will work depend on the requirements of the individual school and on any additional hours the teacher puts in from their own personal time.

While schools can provide teachers with release time to undertake professional development, this again depends on the individual schools priorities and whether funds are available for this. Schools do not receive teacher release time for professional development – this is expected to be accounted for within the teacher’s out of class time. While we celebrate the Ministry’s recent announcement that they will be giving all schools at least 0.05 full time equivalent (“FTE”) release time for teachers to engage in the new Communities of Learning,<sup>165</sup> based on average teacher working hours at school, this equates to approximately 9.4 hours per year for a primary school teacher and 6.7 hours per year for a secondary teacher.<sup>166</sup> Compared to the countries we mentioned earlier which provide teachers with 100 hours of release time per year for professional development (on top of ordinary release time for collaboration with other teachers and lesson planning etc.), we still have a fair way to go. The OECD in its 2013 report on New Zealand’s educational policy made increasing teacher capacity a priority recommendation.<sup>167</sup>

## RECOMMENDATIONS

- Ensure teacher salaries appropriately take account of actual working hours

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<sup>162</sup> At D3.5. Note that the OECD does not have data in relation to NZ teacher salaries since 2012.

<sup>163</sup> OECD (2014), “Indicator D4: How much time do teachers spend teaching?” in *Education at a Glance 2014: OECD Indicators*, OECD Publishing at 474.

<sup>164</sup> At 474, note Table D4.1.

<sup>165</sup> Ministry of Education “Resourcing for Schools in Communities of Learning”, accessed August 2016, <http://www.education.govt.nz/>. Schools with 10 or less allocated full time teacher staffing units will receive 0.05 FTE, schools with more than 10 will receive an amount calculated on a pro rata basis with 0.06 FTE per 10 FTE teachers.

<sup>166</sup> OECD (2014), “Indicator D3: How much are teachers paid?”.

<sup>167</sup> Beatriz Pont and others *Education Policy Outlook* (OECD, 2013) at 10.

- Increase teacher release time

### ***Lack of training for teacher aides***

Teacher aides are a commonly used resource for supporting students with high learning needs in the classroom. The intention behind the use of teacher aides is usually to provide more intensive one-on-one support for students who need it, which ensures the teacher is able to attend to the entire class. Given the amount of time which they spend with a student, they can be a critical component in the learning process and a highly skilled teacher aide can make a substantial impact on student achievement.<sup>168</sup> The role of the teacher aide does not require any qualifications and due to the often transient nature of employment, is often filled by students or unskilled workers – who despite their dedication to the job, often lack any experience or knowledge of disabilities. The Ministry also does not provide any specific funding for teacher aide professional development – any training is currently paid for out of operational funding or the Special Education Grant, which is usually considered a low priority. Both teachers and families have highlighted concerns though about teacher aides lacking the relevant skills.<sup>169</sup> This is probably aggravated by the historic attitude of leaving students with high learning needs to be looked after by the teacher aide while the teacher teaches the rest of the class.<sup>170</sup> It is important that teachers work closely alongside teacher aides to direct with the implementation of the individualised curriculum and any Individual Education Plan.

## RECOMMENDATIONS

- Investigation into creating career paths for teacher aides
- Funding for a base level of skills based training

### ***No requirement or provision for schools around the employment of a Special Education Needs Co-ordinator***

With the development of every school's responsibility to provide support for students with disabilities, it is a given now that schools must appoint someone to coordinate and oversee these efforts. The Special Education Needs Coordinator ("SENCO") role usually involves supporting teachers in the identification, assessment and provision of additional support to students with disabilities; as well as co-ordinating with external providers including the Ministry and with

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<sup>168</sup> Ibid., 74.

<sup>169</sup> Ibid.,

<sup>170</sup> Wylie *Picking Up the Pieces: Review of Special Education 2000* (August 2000).

families. Although the Ministry assumes that schools will appoint a staff member to these duties, the role is not a formalised one and it receives no additional staffing entitlement from the Ministry in spite of the roles demands.<sup>171</sup> Schools will usually have the option of subsidising the role with part of their Special Education Grant or operational funding, allocating a managerial staffing entitlement toward it, or simply incorporating the role into that of a senior staff member with no increase in wages. As such, there are also no qualification requirements and our experience is that the quality of SENCOs varies greatly across schools.

Importantly, this also means that SENCOs often receive very limited release time away from any other duties. A recent survey of SENCOs across NZ by the New Zealand Educational Institute which received 352 responses revealed that just under half of SENCOs receive no specific release time at all.<sup>172</sup> Not surprisingly, 66% of the SENCOs surveyed said they needed more time for the role.<sup>173</sup> The same survey also found that 38% of SENCOS had no experience or qualifications related to learners with SEN before taking up the role and 23% said they had received no relevant professional development since taking up the role.<sup>174</sup> It also found a lack of opportunities and networks for collaboration with others.<sup>175</sup>

The lack of provision for a qualified SENCO role is a major barrier to schools' ability to successfully create a supportive and inclusive environment for students with disabilities. Schools should not be expected to provide for this role from existing operational and discretionary funding, given that the nature of schools obligations have changed drastically over the past decade and a half. If the Ministry is serious about investing into the success of an inclusive education system, they need to prioritise the creation of a dedicated staffing entitlement for this role and ensure that an appropriate qualifications scheme is phased in.

## RECOMMENDATIONS

- Fund a dedicated SENCO staffing entitlement for schools
- Fund increased release time for the SENCO to engage in PLD

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<sup>171</sup> New Zealand Educational Institute *Supporting Diverse Learners: Survey of Special Education Needs Coordinators (SENCO) 2016* (2016).

<sup>172</sup> Ibid., 5.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid., 6.

<sup>175</sup> Ibid.



***A lack of oversight and mentoring for schools by the Ministry of Education***

Despite the 2014 Education Review Office (“ERO”) evaluation on schools display of inclusive practices showing that 78% of schools were found to be ‘mostly inclusive’ of students with special needs, we highlighted in Chapter 5 that there is still evidence of students with disabilities facing barriers to education within their schools policies and practices. ERO is governmental body which currently carries the role for the review and accountability of schools. The review indicators underwent a major revision in 2010 and have made reference to outcomes relating to inclusive education since then.<sup>176</sup> As ERO reviews a school only once every 3-5 years, schools are forewarned about reviews, reviewers only makes brief observations of some teachers and only speak to some staff and families – the review process only offers a limited window to pick up on any systemic issues. This means that the review process relies to some extent on the goodwill of schools in co-operating in the process.

As a part of the review process, ERO asks schools to undertake a self-review. The 2014 ERO evaluation highlighted the concern that when undertaking self-review, schools would be more likely to look at how they had provided support to students with additional learning needs, rather than how effectively this support had promoted achievement.<sup>177</sup> This means that some schools were not well-placed to recognise shortcomings or make evidence based improvements.<sup>178</sup> Another important issue identified by ERO is that the review process relies on a schools self-identification of students with additional learning needs and they noted that it is possible that some schools provide well for some students with additional learning needs but not others.<sup>179</sup> The review process is still valuable, but relies on ERO and the Ministry also being responsive to complaints from the public when they arise – which we will discuss in further detail in Chapter 6.3.

Although ERO periodically reviews school performance and does provide feedback, there appears to be little ongoing mentoring available for overall school to improvement. This was an issue which was picked up by Dr Cathy Wylie in a review of how the Tomorrow’s Schools policies have developed which was written in 2009.<sup>180</sup> She noted that after an ERO review, it is fairly common for ERO to provide ‘under the counter’ feedback to schools – which schools can choose to take on board or ignore. ERO generally only refers matters to the Ministry when there

<sup>176</sup> Education Review Office *Evaluation Indicators for School Reviews* (2011).

<sup>177</sup> Education Review Office *Inclusive Practices for Students with Special Needs in Schools* (2015) at 21.

<sup>178</sup> *Ibid.*, 27.

<sup>179</sup> *Ibid.*, 8.

<sup>180</sup> John Hattie “Tomorrow’s Schools – yesterday’s news: the quest for a new metaphor” in *Tomorrow’s Schools 20 Years On...* ed. John Langley at 124.

are serious concerns regarding school performance and the Ministry might make directions for change, but there is no agency in charge of walking alongside the school to assist with implementing changes. In our experience – it appears that the Ministry is often reluctant to step in and interfere with schools, due to the now long-standing policy of school devolution. A possible suggestion made by Wylie, was that the Ministry could be well positioned to fill this role. The broad idea put forward was to shift the school-review capacity within ERO across to the Ministry and for the Ministry to take the broad role of supporting, challenging and keeping schools accountable. ERO could then take on a ‘business improvement’ role – reviewing the Ministry’s services and the education system as a global whole. We are not suggesting this is necessarily adopted as a model – but we do call for more support and accountability to schools. Increasing the capacity for ongoing mentoring and accountability relationships between the Ministry and schools will allow for the Ministry to be more aware of ongoing issues and to support the school where necessary.

We note that the Communities of Learning will provide some opportunity for mentoring between schools. Our view is that this should not replace the Ministry’s involvement in the support and accountability of schools, but that lateral accountability can be encouraged. This has been developed in some schools in the United Kingdom by a system of voluntary peer-review by other schools.<sup>181</sup> Obviously this may be resisted by some schools in an atmosphere still enshrouded to some extent in the idea of school competition, but as one author put it, “Competition between schools is not a zero sum game, since the whole system can be better; one school improving does not mean that another must get worse.”<sup>182</sup>

As discussed previously, the school culture is largely set by the school leadership – including the Principal and the Board of Trustees.<sup>183</sup> A 2015 OECD report of Sweden found that school performance was being negatively affected by the increase in administration work Principals were being required to engage in, which distracted them from the role of being a pedagogical leader.<sup>184</sup> Like New Zealand, Sweden has also developed a policy of high devolution of governance responsibility to schools which means that Principals have been burdened with a

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<sup>181</sup> John Morris and Rose Patterson *Around the World: The Evolution of Teaching as a Profession* (The New Zealand Initiative, 2013) at 49.

<sup>182</sup> Dale Bassett and others *Plan A+ Unleashing the potential of academies* (The Schools Network, 2012) at 50 cited in Morris and Patterson, *Around the World*.

Bassett, D., Lyon, G., Tanner, W., & Watkin, B. (2012). *Plan A+ unleashing the power of academies*. Reform and The Schools Network., p. 50; cited in 2013 NZEI *Around the world* p49.

<sup>183</sup> Ferrier-Kerr “The Role of Professional Development and Learning in the Early Adoption of the New Zealand Curriculum by Schools” at 129.

<sup>184</sup> OECD *Improving Schools in Sweden: An OECD Perspective* (2015) at 44.

range of governance tasks. We are concerned that similar issues may be found in New Zealand – a 2007 survey in relation to workplace stress for Principals found that 66% wanted a reduced administration workload<sup>185</sup> and recent news headlines would suggest little has changed.<sup>186</sup> We recommend an increase in administrative funding to enable schools to relieve some of these burdens and allow Principals to focus on school leadership so as to encourage an increased focus on inclusive culture and practice.

## RECOMMENDATIONS

- Greater support and accountability to schools from the Ministry
- Investigation of the utilisation of lateral accountability and reviews
- Increased administrative funding to schools to allow Principals to engage in pedagogical leadership

### 6.2.3 *Funding support issues*

Despite some of the recognised issues within the original Special Education 2000 (“SE2000”) funding model<sup>187</sup> – we view the underlying principles of the model to generally be in the right vein. The model included a mix of discretionary funding, targeted funding and clustered support for different levels and kinds of need. We have outlined the Ministry of Education (“Ministry”) services in more detail in Appendix 1. Although the model appears to have been well intended, we believe it was undermined by a few reasons – predominantly focused around a general lack of funding and not enough attention being given to the educational environment within which the funding was meant to be utilised. There were also general teething issues, as will happen with any new initiative and some systemic issues in relation to the governance of fund-holding bodies, including the Special Education Services (now incorporated into the Ministry as the Group Special Education) and the Resource Teacher: Learning and Behaviour (“RTLb”) clusters. We have discussed some of the key issues relating to the lack of formal procedural frameworks for education provision, and the failure to invest early on in the necessary professional capability and capacity within schools earlier in Chapter 6.2.

Due to the highly interlinked nature of the issues specifically relating to the provision of funding support for students with additional learning needs, this section will outline some of the key

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<sup>185</sup> Cathy Wylie “Principal wellbeing & stress in 2007 – are we seeing any changes yet?” (paper presented to NZPF Principal Wellbeing/Hauora hui, June 2008).

<sup>186</sup> John Gerittsen “‘Stress, burnout’ causing principals to quit early”, *Radio New Zealand*, accessed August 2014, <http://www.radionz.co.nz/>.

<sup>187</sup> Wylie *Picking Up the Pieces: Review of Special Education 2000* (August 2000).

issues within the current funding model and will put forward a group of recommendations at the end aimed at providing somewhat of a cohesive response to the identified issues.

### ***Fragmented and complex services***

One of the common complaints we hear from families is that the funding support services provided by the Ministry are enormously complex. This was also strongly reflected in the Ministry released findings of the Engagement Forums last year, looking at getting feedback from the public about special education provision.<sup>188</sup> The complexity presents a barrier to accessing the right supports in a timely way and also creates additional stressors for families and educators. The overall issue presents a few key themes which we will briefly highlight.

### ***Lack of cohesiveness and gaps in support***

Originally SE2000 was created as part of a radical overhaul to how special education funding was delivered. As such, the original model broadly fitted together and provided a framework intended to respond to provide differing levels of support depending on the level of need. Although the original model included some specialist funding for specific needs – including support for high level speech-language needs, high level sensory needs and moderate physical disability<sup>189</sup> – the original number of services was much less than what exists now. It appears that as the Ministry undertook reviews of the performance of SE2000 and discovered funding gaps, further services were developed overtime in response to demand and essentially tried to patch the holes as they appeared.

This has resulted in a large mix of isolated funding services which are managed in different ways (see Appendix 1 for a complete list). This makes it difficult for families and educators to know of and understand the range of available funding options for a student unless they are particularly experienced with the services, which was reflected in last year's Ministry Engagement Forums.<sup>190</sup> To their credit, the Ministry has worked to try and make information more easily accessible online and through published guides – but becoming acquainted with all that is available remains a gargantuan task.

The isolation of different funding into discrete services also creates somewhat of an arbitrarily rigid framework which does not always allow for flexibility with how funding is used. The Ongoing Resourcing Scheme (“ORS”) for students with high or very high needs for example provides for specialist services, additional teacher time, teacher aide support and a consumables

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<sup>188</sup> Ministry of Education *Engagement Forums Feedback: Special Education* (2015), 15 and 51.

<sup>189</sup> Wylie *Picking Up the Pieces: Review of Special Education 2000* (August 2000) at 38.

<sup>190</sup> Ministry of Education *Engagement Forums Feedback: Special Education* (2015), 15 and 53.

grant. Any kind of support required outside of this narrow range however must be sourced separately from a different funding stream. This adds further layers of bureaucracy and administration, as it can require multiple applications being made for different funds. It can also be difficult for students with needs that do not neatly fit into any of the funding categories to gain support outside of the discretionary funds. We have noticed this is a particular problem for students with psychological needs such as students with dyslexia, dyspraxia and autism spectrum disorders which have been identified in last year's Select Committee Inquiry as lacking support.<sup>191</sup> Students in these groupings may have high needs but not qualify for certain kinds of support such as ORS.

### *Difficulty applying/accessing funding support*

We also receive feedback that the application and referral processes are too difficult for families and educators. Applications can require detailed evidence, including medical assessments and detailed written information from teachers, the Special Education Needs Co-ordinator ("SENCO") and any other support personnel involved, as well as the family.<sup>192</sup> Aggravating this is that there may be multiple points of contact within the school, the Ministry and specialist services – which makes communication and planning difficult.<sup>193</sup> The criteria and what is expected in applications is not always clear to families or educators and in our experience, the success of an ORS application can rely heavily on the competence and knowledge of the person drafting it. There is little support for families in this process from the Ministry and if the school is not supportive they may have to rely on non-governmental disability advocacy agencies for support.

Although a 2012 audit of the Ministry found improvements with respect to the streamlining of applications for high needs students and guidance about application processes – the recent feedback shows that improvements can still be made.<sup>194</sup> Families with high needs children or children who are not currently receiving support are often already under extreme pressure and further improvements to the application and verification processes will create better outcomes for children and their families.

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<sup>191</sup> Education and Science Committee *Inquiry into the identification and support for students with the significant challenges of dyslexia, dyspraxia, and autism spectrum disorders in primary and secondary schools* (19 August 2015).

<sup>192</sup> Ministry of Education "Apply for Ongoing Resourcing Scheme (ORS)", accessed August 2016, <http://www.education.govt.nz>.

<sup>193</sup> Ministry of Education *Engagement Forums Feedback: Special Education* (2015), 57.

<sup>194</sup> Ministry of Education *Engagement Forums Feedback: Special Education* (2015).

*Government departments do not closely cooperate*

Until recently funding support for education in the classroom has often been viewed in isolation from other social services, with a small amount of cross over in relation to certain health and behavioural services.<sup>195</sup> As we noted in Chapter 5, there are strong links between health, educational and justice outcomes – with the noted example being in relation to children with foetal alcohol syndrome. We note that in taking a social investment approach to social issues, an ‘early intervention’ perspective for justice issues often means investing into education and health development, which broadens the scope of early intervention from the narrow focus the Ministry has recently put on early childhood services. While we agree that more investment needs to be made into early childhood education, as this is a highly formative time for children, early intervention needs to be viewed as a sustained approach throughout childhood given the link to later life outcomes. Several authors have called for more cooperation between governmental departments – particularly between Education, Health, Social Development and Justice<sup>196</sup> in order to create interventions that can support the whole development of the child.

***Eligibility and the appropriation and allocation of funds***

Determining a system for allocating funds between students and services is a complex task. We discussed earlier in Chapter 6.2 some of the issues relating to the way in which needs are identified in the classroom and we will further discuss issues around measuring student progress in Chapter 6.3. This section will outline some of the different models of funding used around the world for special education, some of their main limitations and will discuss some of the issues with respect to the allocation of funds within New Zealand’s current system, with a particular focus on the relationship between individual and bulk funding.

Review of the main models of funding

There are a few different ways funding models have been conceptualised for special education. Most funding models will make decisions about the allocation of funds in one of the three ways<sup>197</sup> –

- Supply – Funding will be allocated on the basis of available budget;
- Demand – Funding will be allocated on the basis of the amount of demand;

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<sup>195</sup> For example, assessments by specialists and CYFs involvement.

<sup>196</sup> Nessa Lynch “Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice” (paper summarising the contributions of participants at the 2016 Neurodisabilities Forum, Wellington, May 2016).

<sup>197</sup> David Mitchell *Education That Fits: Review of International Trends in the Education of Students with Special Educational Needs* (University of Canterbury, 2010), 81.

- Output – Funding will be allocated as a reward for outcomes.

This tends to develop funding systems which can be classed into these five broad categories of models (which are not mutually exclusive)<sup>198</sup> –

- *Discretionary funding*
  - Provides a set amount of bulk funding to every school which the school can utilise however they choose. Funding level is usually arbitrarily set based on *supply*. An example would be the Special Education Grant (“SEG”).
  - Strengths – Flexibility in the use of funding, schools are well positioned to determine the best ways to support their students, simple with limited administration, and predictable fixed cost.
  - Weaknesses – No guarantee that funding will be enough to meet demand, possible oversupply of funding if demand is less than estimated, often difficult to directly measure if funding is being used effectively or keep schools accountable to its use.
- *Categorical funding*
  - Provides funding to students who meet a certain criteria of disability or need. Funding level is based on *demand*. An example is the ORS.
  - Strengths – Prioritises funding for high needs students, provides a verification process to ensure funds are not provided unnecessarily.
  - Weaknesses – Students may need funding but not meet the limited criteria, creates a perverse incentive to ‘over identify’ by exaggerating need, often results in focusing on narrow medical or diagnostic criteria which can stigmatise individuals, focuses on deficit which can be traumatic for the child and family, increased administration and verification costs.
- *Voucher-based funding*
  - Provides funding that follows the student even if they change schools. ORS also falls into this grouping, as it follows the student.
  - Strengths – Strengthens parental choice, it can create positive competition between schools to improve the quality of their services to compete for students.
  - Weaknesses – As this model is generally an extension of one of the other models mentioned here it attracts the relevant weaknesses of that model.

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<sup>198</sup> Ibid., 87.

- *Census-based funding*
  - Provides funding by calculating or estimating the number of students with weighted characteristics. An example of this is also the SEG as the amount of the SEG is adjusted depending on the school roll and decile ranking.
  - Strengths – Tries to attain a balance between simplifying funding but also limiting over-supply by estimating need, can avoid the perverse incentive to over-identify by weighting funding based on fixed characteristics.
  - Weaknesses – Can still result in not meeting demand, can create inequitable disparities in funding between schools.
- *Actual-cost funding*
  - Provides funding by calculating or estimating the actual cost required to provide the necessary services. An example of this is the Intensive Wraparound Service (“IWS”).
  - Strengths – Meets the actual needs of students
  - Weaknesses – Increased administration and verification costs, issues with predicting demand, requires accountability measures to ensure schools do not over identify needs.

### *Individual funding*

The nature of targeted individual funding is that the Ministry has a desire to ensure that the student applying for funding actually requires it. Usually this means deciding what the purpose of the funding is and finding a way to delineate a group of students who are confirmed to need that funding. There are a few ways this has been done which we will explore briefly.

One method has been to create a set of criteria being formed against which any applicant is verified. Verification can take place through a written application with the requisite attached evidence which is reviewed against the criteria, or by observing the student in person. Many of the Ministry’s main funding services – including ORS, the School High Health Needs Fund, Communications Service etc. – contain some form of fixed criteria and so fit somewhere within a categorical framework.

One of the common complaints about both of these models is with respect to the resulting exclusion of students deemed as not qualifying for a service. It is important to distinguish that the actual underlying problem is not the exclusion of the student from the service, but occurs when there are inadequate alternative supports available – or where the family fears there may be a



lack of available support. This has been the case particularly with respect to the ORS.<sup>199</sup> As ORS is one of the few ongoing services which will support a student throughout their schooling, a decline of ORS funding is strongly associated with these fears. There has been a lot of debate over the years around the issue of whether the ORS Criteria should be extended to include more students.<sup>200</sup> This is based on the argument that the level of ORS support is necessary and appropriate for some students who do not currently verify under the Criteria, and also that insufficient alternative funding for moderate needs students is available.

Excluding students that actually do not require a certain level or kind of support is a legitimate use of criterion, however there may obviously be disagreements between families, educators and fund-holders about whether the student needs the support or not, or whether they meet the criteria. This was also reflected in the debate around ORS. Since its conception, the Ministry has been accused of manipulating the Criteria to include or exclude students based on the supply of funding available for the scheme. It appears this criticism originated when the Ministry published a report in which they estimated that approximately 2% of the schooling population are considered to have high or very high additional learning needs.<sup>201</sup> By comparison, estimations at the time of the actual number of students enrolled in ORS sat at around 1% - leaving an unaccounted for 1% of students who were considered eligible but were declined ORS. This remained unexplained, although the criticism has been debunked as being untrue.<sup>202</sup>

The ORS Criteria are relatively broad and must be interpreted in the light of the factual context of every applicant. The Ministry has provided further guidance on the Criteria – often referred to as the ‘benchmarks’ including case examples of students who might fit under each Criteria,<sup>203</sup> but in our view this has just further confused the issue. The case examples used in the benchmarks are very fact specific and add in seemingly arbitrarily age comparisons, for example describing Criterion 5 as including students who are learning the skills and knowledge usually achieved by children aged 2 and a half.<sup>204</sup> This creates the view that these benchmarks are being relied on over the original Criteria and creates uncertainty about the validity or reliability of the

<sup>199</sup> Wylie *Picking Up the Pieces: Review of Special Education 2000* (August 2000) at 38.

<sup>200</sup> *Ibid.*, 47; *IHC New Zealand v Ministry of Education* [2014] NZHRRT 20; Ministry of Education *Engagement Forums Feedback: Special Education* (2015).

<sup>201</sup> Wylie *Picking Up the Pieces: Review of Special Education 2000* (August 2000) at 38.

<sup>202</sup> *Ibid.*

<sup>203</sup> Ministry of Education “Criteria for Ongoing Resourcing Scheme (ORS)”, <http://www.education.govt.nz/>.

<sup>204</sup> Ministry of Education “Criterion 5 for ORS – high learning needs” <http://www.education.govt.nz/>.

verification process. The perception left by all of this, has been that the Ministry process around ORS verifications has not been very transparent, which was reflected in their survey last year.<sup>205</sup>

A compounding issue in relation to the ORS verification process is that while there is a comprehensive appeals process, the process is often seen as unduly burdensome and unfair by families. We have represented a number of clients in ORS appeals and our experience is that most families find the experience highly stressful.

Families can find the verification and appeals process to be demeaning and traumatic in that as the criterion focus on the learning needs of the child, they end up focusing on the child's deficiencies so as to measure these against the Criterion.<sup>206</sup> Although the ORS service takes pains to avoid language of causality, focusing on 'needs based' criterion, the evidence required to prove the relevant needs can often steer towards a diagnostic medical focus. This is partly due to the nature of that a diagnosis provides a heuristic to communicating an often consistent set of medical symptoms. We suspect that diagnoses provided by medical professionals tend to be considered more reliable than evidence provided by educational professionals in relation to disability. The identification with these labels can result in further discrimination for the student.<sup>207</sup>

The other primary method of providing targeted funding the Ministry has used has been to create a broad set of criteria and create a limited competitive fund which is allocated largely by the discretion of the fund-holder. The IWS is an example of this kind of method. IWS provides a wraparound service aimed at bringing together the school, Ministry, family and any involved specialists to work out an intervention plan for students within the broad criteria of having particularly high behavioural needs. Students are referred to the service on a discretionary basis either from an RTLB or by the Ministry. A set amount of funding is allocated to the IWS service and the service has a set amount of places available. A prioritisation panel makes a prioritised list of all of the applicants and the highest priority students within the number of available spaces are included into the service. Funding is then divided between the accepted students according to the actual-cost requirements of their intervention plan. Two of the big strengths of the service are the collaborative approach to interventions and the flexibility with the way funding is allocated and can be used.

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<sup>205</sup> Ministry of Education *Engagement Forums Feedback: Special Education* (2015).

<sup>206</sup> Peter Coleman "Special Education 2000 Policy: Our Leaky Home?" (2011) 12 *Kairaranga* 10 at 10.

<sup>207</sup> Linda J Graham and Markku Jahnuksinen "Wherefore art thou, inclusion? Analysing the development of inclusive education in New South Wales, Finland and Alberta" (2011) 26 *Journal of Education Policy* at 23.

One of the key issues we wish to highlight in relation to all of the targeted funding schemes, is that by virtue of only providing usually limited funds to eligible students for specific purposes, exclusion from funding within the targeted services creates a ‘roll down’ effect. What we mean by this is that students who are not eligible for high needs funding schemes or who do not get enough funding within their scheme, will generally create downward pressure on other lower level schemes which are available. We see this occurring within most schemes – the exception being the IWS because it receives high intensity funding. Consistent Ministry Special Education Service Client Satisfaction Surveys of families and educators have cited complaints about a lack of funding for services such as ORS.<sup>208</sup> ORS funding for example only provides limited teacher aide funding, so any additional required teacher aide time will usually be taken from the school’s SEG or operational funding. If the funding is not available then the additional support might not be provided, which in our experience can sometimes result in the student being asked to only attend school when teacher aide support is available. At the bottom of this roll down effect are the discretionary services, as they are best placed to fill any gaps in funding due to their flexibility.

### *Discretionary funding*

Discretionary funding is seen as a way of cutting administration and verification costs related to funding a usually larger group of students who have low and moderate needs that the school can identify. As the school has direct contact with the students, they can allocate funds flexibly according to need without the hassle or cost of applying for funding.

The Ministry allocates bulk funding to schools primarily through the SEG to support students with additional learning needs.<sup>209</sup> A portion of the SEG is allocated to every school equally as a fixed amount and the other portion is allocated per student enrolled and weighted to provide more to lower decile schools.<sup>210</sup>

The RTLB service is the other form of discretionary funding provided to schools for students with additional learning needs. The RTLB service creates a cluster of schools headed up by a lead school which employs specialist or experienced teachers called ‘RTLBs’. The teachers go into all of the schools in the cluster on a case by case basis to provide advice and support to classroom teachers with respect to strategies for supporting an individual student with additional

<sup>208</sup> Ministry of Education *Special Education Services 2013 Client Satisfaction Survey Summary of Findings* (2013) at 17; Ministry of Education *Special Education Services 2012: Client Satisfaction Survey Summary of Findings* (2012) at 24.

<sup>209</sup> Note that schools can use their operational funding as well.

<sup>210</sup> Ministry of Education “Operational funding rates”, <http://www.education.govt.nz/>.

learning needs. The RTLB cluster also holds two funding pools from which funds can be allocated to individual students for particular short-term interventions.<sup>211</sup> A panel of representatives from the cluster makes discretionary decisions about how to distribute funds.

Schools commonly complain about a lack of available funding to support students.<sup>212</sup> Due to the roll down effect we described in the section above, it must be inferred from these complaints that individual funding is inaccessible or perceived as being inadequate for the students who lack support, and that the school does not feel that they have enough available discretionary funding. Despite a steady increase in students requiring additional learning support over the last decade,<sup>213</sup> and an increase in the responsibility the Ministry has placed on schools to provide an inclusive classroom, the SEG has not been significantly increased since its inception.

The 2009 Cognition Survey of special education found that out of 245 surveyed schools – 54% reported that the availability of funds dictated whether and how they would allocate their SEG grant to a student and 33.5% of schools reported ranking students according to identified need in order to triage the allocation of funds.<sup>214</sup> The survey also reported around 9% of the total operational grants (the base level grant provided to run the school as a whole) received by schools was spent on students with additional learning needs and 53 of the schools surveyed reported receiving parental donations to top up the support of special educational needs.<sup>215</sup> A recent survey by the Education Review Office (2015) found that while many schools displayed inclusive practices, two thirds of schools identified a lack of funding as a major barrier to supporting students with additional learning needs.<sup>216</sup> A recent survey of SENCOs (2016) by the New Zealand Educational Institute found that 89% did not feel that their school received enough government support.<sup>217</sup> Over half of the surveyed SENCOs said that up to 60% of students were not receiving enough support<sup>218</sup> and 62% of those surveyed said that more SEG funding would help students with additional learning needs.<sup>219</sup>

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<sup>211</sup> Ministry of Education *Year 11 – 13 Revised Guidelines for Allocation and Use* (2015).

<sup>212</sup> 2009 Cognition Special Ed p149

<sup>213</sup> Cabinet Paper “Strengthening Inclusion and Modernising Learning Support” (Office of the Minister of Education, 2016).

<sup>214</sup> Terry Bates “National mission or mission improbable?” in John Langley (ed) *Tomorrow’s Schools 20 years on...* (Cognition Institute, 2009) at 79.

<sup>215</sup> Derek Wenmoth and Phil Coogan “Tomorrow’s Web for our future learning” in John Langley (ed) *Tomorrow’s Schools 20 years on...* (Cognition Institute, 2009) at 149.

<sup>216</sup> Education Review Office *Inclusive Practices for students with special needs in schools* (2015) at 25.

<sup>217</sup> New Zealand Educational Institute *Supporting Diverse Learners: Survey of Special Education Needs Coordinators (SENCO) 2016* (2016).

<sup>218</sup> At 6.

<sup>219</sup> At 6.

One of the additional problems with the SEG is that with the limited funding, investing into students with additional learning needs is an often expensive exercise which means that students requiring additional support can be perceived as financial liabilities. There is usually a bigger financial payoff instead with investing into students who can achieve well academically for relatively less cost; in turn creating a reputation of high academic achievement for the school which tends to rate more importantly for families looking to enrol their own children.<sup>220</sup> Increasing the school roll by attracting these families to enrol their children brings in increased revenue through additional base funding and through school donations.

This creates a perverse disincentive to accept the enrolment of students identified as needing additional learning support. While it is illegal to refuse enrolment on the grounds of disability (this will be discussed further in Chapter 6.3), schools can to some extent get away with this as there is limited accountability. Schools that do display inclusive practices and welcome all students can gain a reputation within the disability community and can end up with a higher than usual proportion of students with additional learning needs enrolling there to receive the better quality and more inclusive service. Schools like this are commonly described as ‘magnet schools’ – a term coined in the early days of SE2000 when this was first identified as an issue.<sup>221</sup> Due to the underlying issues with creating a dichotomy between students who require additional learning support and those who do not (discussed in Chapter 6.1), it is problematic to try and weight the SEG grant towards schools with a higher than average proportion of students with additional learning needs – as it is unclear how these students will be defined.

#### *Lack of continuity for funding & arbitrary cut-off criteria*

A limitation on some of the Ministry services is that they are time limited or only provided for specific age groups. The IWS for example provides for a Ministry psychologist’s involvement for up to 3 years and provides funding for up to 2 years. While there’s nothing to prohibit the IWS being renewed for a student, we are unsure if this is common. It is possible that a failure to make significant gains within the two year timeframe may be seen as evidence that the funding is not effective for that student and should be prioritised elsewhere. Recent research by the New Zealand Council for Educational Research (2015) identified that uncertainty around ongoing funding was predicted to be a barrier to a successful transition from the residential school back

<sup>220</sup> Kearney, “The right to education: What is happening for disabled students in New Zealand?”

<sup>221</sup> Wylie *Picking Up the Pieces: Review of Special Education 2000* (August 2000), 86.

into mainstream schooling and inadequate resourcing was identified as a barrier for some of the students who had finished the programme.<sup>222</sup>

Communication services including speech-language therapy is an example of an age limited service, being primarily focused on students who are aged between 5 and 8 years old.<sup>223</sup> While we acknowledge that language development is strongest at an early age, we see this as an arbitrary limitation on a service which should be available to all children.

It is clear that while some students will make gains in short term or time limited programmes, other students will need ongoing support beyond that and will face barriers when the short terms supports are removed. Educators have noted concerns that students may risk either not making further gains in education or even regressing on progress made during the short term programme.<sup>224</sup>

### ***Difficulties accessing support personnel***

Even with adequate funding, some students are unable to access support because of a lack of available personnel. This issue is usually raised in the context of professional services – such as speech-language therapy and specialist teachers etc., but is also a problem schools face in relation to employing qualified staff – particularly SENCOs and teacher aides.

It is well recorded that there are issues in relation to long waitlists – up to two years in some cases – and difficulty accessing professional services and even for receiving responses from within the Ministry.<sup>225</sup> The Ministry has acknowledged this issue in their recent Cabinet Paper and has said that they will work to ensure support is delivered in a more timely way,<sup>226</sup> so we will not discuss this in depth here.

One thing we will note is that while special schools will provide outreach specialist teacher services to mainstream schools, we understand that this is generally informally arranged and there are currently no structures within which this can take place. We have received reports from schools which have experienced difficulty finding specialist teacher support and we recommend some form of structures are provided by the Ministry to ensure sufficient access to specialist teachers.

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<sup>222</sup> Jacky Burgon and others *Patterns of Student Progress in the Intensive Wraparound Service: NZCER IWS Evaluation* (2015) at 57

<sup>223</sup> Ministry of Education “Supporting students with communication needs”, <http://www.education.govt.nz>.

<sup>224</sup> Ministry of Education *Special Education Services 2012: Client Satisfaction Survey Summary of Findings* (2012) at 22.

<sup>225</sup> New Zealand Institute of Education, “Special Education crisis: hope in the Update? (2015), 12.

<sup>226</sup> Ministry of Education *Engagement Forums Feedback: Special Education* (2015).

### ***The Ministry of Education's new service delivery model***

As part of their review of special education, the Ministry has announced a new service delivery model for additional learning support and funding.<sup>227</sup> At this stage the model is an overview of key aims without providing detail of how funding will be allocated. We will briefly highlight some of the key points of the plan and some of the questions it has raised.

The broad aims of the model include recognition of the fragmentation of current services and an intention to simplify and streamline the application and referral processes. Early education is a key focus, nestled within the overall purpose to increase evidence based practice in delivering support. The model aims to consolidate several services (including a consolidation of all behavioural services) so as to reduce arbitrary limitations and allow greater flexibility with interventions. This sits alongside a statement of intent to make central funding less prescriptive. The model also describes itself as intending to be child centred and to improve the involvement of families. As an addition, the new Communities of Learning are expected to work alongside the targeted individual support by identifying and addressing systemic issues within the area. Broadly speaking, the model sits within the steady progression the Ministry has taken over the last few years toward dropping language of 'special education' and looking instead to create one education system that provides support to all learners as they need it.

Interestingly, while they have created a model which is described as being a singular spectrum of support – the diagram they have used retains most of the existing services and looks just like a rearrangement of the current pyramid diagram which is commonly used.<sup>228</sup> While we support any move to reduce fragmentation and to design a cohesive system –we are concerned that this currently looks more like a re-dressing of existing services, rather than actually designing an integrated system. Without an integrated system, we are concerned that significant gaps in the current system will not be addressed.

We also support the move to simplify and streamline the application and support process. In theory, the diagrammatic outline of the service delivery model looks to be an improvement on existing structures. The diagram describes a process as follows:

1. A trigger notice is made by an educator, family member, another agency or a follow up review.

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<sup>227</sup> Ibid.

<sup>228</sup> Ministry of Education *Success for All: Special Education Briefing to Incoming Minister* (2014).

2. A triage is undertaken by the Ministry which responds to the notice by making contact and developing a learning support plan alongside all involved parties. Interim resources are allocated and a lead practitioner is appointed to be a single point of contact and to be responsible for the plan. Information and support are provided to the family.
3. Learning support plans are either led by the school or the Ministry, depending on whether the plan is considered to be low or high intensity. Resources are allocated and the lead is responsible to action the plan, account for resources and liaise with the involved parties. If the student moves schools, the plan moves with them.
4. A follow-up review is undertaken by the lead practitioner to determine if the plan is effective. Changes to the plan are made as necessary. Parties are informed of progress. If necessary, the process can be taken back to step one if there are new concerns to be investigated.

Some of the questions this model has raised include whether this is expected to provide a case management system and learning support plan for every student who has any level of learning support needed. While this would definitely increase the amount of information and accountability around needs, this would create a large volume of work for the Ministry as well as for schools – further stretching capacity if additional operational funding is not provided to both. We also wonder how decisions will be made about whether the school or the Ministry will lead plans and how decisions about resource allocation will be made within the existing services. We can foresee the possibility of conflict between the Ministry and schools especially as for low and moderate needs students, schools will be expected to direct their SEG towards these plans. As an additional note, as we stated earlier, we have concerns about the shift of funding from primary and secondary schooling to early education. While we agree that the Ministry should ensure that current funding is being well spent and we agree that early education should be a priority area – our position is that it is clear that there currently is a dearth of funding to schools, especially in relation to the SEG grant and in relation to operational funding for staff capability and capacity, and that more money needs to be invested into our education system rather than simply shuffling it around.

### ***The United Kingdom's funding model***

While it is never a good idea to assume that the adoption of the successful education models of other countries will find the same success in New Zealand without careful thought to our



educational context, several aspects of the UK model could be modified into the service delivery model described in the Ministry’s Cabinet Paper.<sup>229</sup>

The UK model was modified in 2014 and has developed some of its existing features. Schools receive discretionary funding called Additional Support Funding (“ASF”) which is similar to our SEG. There is a cap on what schools are expected to spend on any individual student with additional learning needs. If the cost for an individual student in a given year goes above this cap, the school can approach the Local Authority (similar role to our Ministry of Education) and they will receive a top-up to the necessary amount. If a school has a disproportionate amount of students with additional learning needs, the school can also request additional discretionary funding from the Local Authority. For high and very high needs students, the existing ‘Statements’ (which are a similar system to being verified into ORS in New Zealand) still exist as ‘Education and Healthcare Plans’ (“EHC”). The EHC plan combines funding and support not only for education, but also for health and social-service supports and carries through from birth to the age of 25. Families of a child with an EHC plan can request a voucher based payment instead of funding going directly to the school, which is intended to increase parental choice with services. The UK also funds support services for families and provides some legal aid funding support to families taking an appeal against a decision in relation to educational support. Some issues have been identified since implementation, including complaints that the cap on ASF funding is too high, as it does not actually match exactly what schools receive but is an estimated cap.<sup>230</sup> Some schools are saying they do not receive enough ASF funding – which is compounded by the fact that it’s hard to show when the cap has been spent on a student – and some families are saying that schools are not spending their funding.

## RECOMMENDATIONS

- Operational funding to be increased to allow schools the capacity to engage in the new service delivery model and the processes we are putting forward
- *Additional Learning Support*
  - Rename the Special Education Grant to Additional Learning Support
  - Greater funding to be put into the SEG grant
  - Create a cap on the SEG grant over which schools are not expected to spend – similar to the UK ASF cap

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<sup>229</sup> Cabinet Paper “Strengthening Inclusion and Modernising Learning Support” (Office of the Minister of Education, 2016).

<sup>230</sup> IPSEA *School funding reform: SEN Funding after April 2013* (2013).

- Schools with a disproportionate amount of students with additional learning needs can approach the Ministry for further SEG funding. The Ministry can ask for evidence of how existing funding has been spent
- Schools are required to keep a basic record of how SEG money is being spent and of students which are receiving additional support
- *Targeted Individual Funding*
  - Students who require funding above the SEG cap can receive targeted individual funding (replaces existing targeted funding services). This is sought by the school and family during the triage phase of the new service delivery model the Ministry has put forward. Schools and families need to provide a base level of evidence of need. For relatively low levels of targeted funding, evidence may just be a written explanation of what the funding is for and why it is required. For higher levels of funding, the Ministry can request further evidence as is deemed appropriate
  - The Ministry can decline requests for targeted individual funding but this can be appealed (see Chapter 6.3)
  - If the Ministry wants specialist evidence (i.e. an assessment), the Ministry pays for this to take place
  - If family or schools are unhappy with any Ministry based assessment or service, they can appeal this and pay for independent assessment at their own expense
- Limited legal aid funding is made available to assist families with appeals
- School must record student progress and provide to Ministry on request
- Ministry can be the fund holder for some services – i.e. specialist services, or can provide voucher based payments to families or schools
- Services or funding provided to support families

### **6.3 Proving and Protecting – How do we measure and protect additional learning support?**

In order to ensure our education system effectively serves our young people, there must be careful accountability both to the way in which support services are delivered and to the effectiveness of their outcomes. This section will look into the structures which exist for measuring performance and for providing protection to the students receiving services.

#### ***6.3.1 Measurement and reporting issues***

The Organisation for the Economic Co-operation and Development observed in a report published last year that high expenditure into an education system does not always translate into better outcomes.<sup>231</sup> Funds must be carefully allocated and to do this requires measurement of the effectiveness of interventions.

#### ***Lack of validity and reliability in how students with additional learning needs are measured for progress within the National Curriculum***

One of the key issues with requiring schools to adapt classroom practice to diverse learning needs is the process of adapting the curriculum in a way that provides achievable and measurable learning goals for the individual student. Measuring the progress of students with additional learning needs is important for several reasons. Firstly, it allows the teacher to see if classroom interventions are effective or where further support is required. It's also important for the Ministry of Education ("Ministry") to be able to keep track of student progress across schools and identify whether the current systems and policies are working to support such students. Lastly, it is impossible for schools to be kept accountable to both families and the Ministry for the quality of education services if meaningful information on student progress or educational interventions is not recorded or provided.

The Ministry undertook a complete review of the New Zealand Curriculum in 2007, which resulted in a new curriculum which specifically referenced the right to inclusive education in the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD").<sup>232</sup> With this re-write, the approach the Ministry took was to create a broad curriculum from which schools will develop their own school-wide curriculum, in a way which meets their own student's and community's needs. Teachers are then expected to adapt the school-wide curriculum for their own class instruction – using standardised testing measures to determine individual student and class progress.

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<sup>231</sup> OECD *Improving Schools in Sweden: An OECD Perspective* (OECD, 2011) at 26.

<sup>232</sup> Ministry of Education *The New Zealand Curriculum* 2007.

This approach to the National Curriculum has definite strengths, but is undermined to some extent in its application to students with additional learning needs, due to a lack of validity and consistency in the measurement of its outcomes across students and schools. The Ministry keeps track of student achievement across schools largely by the teacher's reporting of student data within the National Standards and other qualification frameworks such as NCEA. These are blunt instruments – working on the assumption that all students learn at a standardised rate – and are focused on a narrow group of specific achievement levels; rather than broader goals of education, student progress across time or the quality of education provided.

The National Standards and NCEA information published online for each school does not provide data on student progress, although schools do provide a narrative self-report on the school's progress against its own internal targets.<sup>233</sup> The National Standards and NCEA also do not work well in measuring learning outcomes for students with high or markedly differentiated learning needs; who although will possibly not score well against these measures, may be receiving benefits from education which are not being recorded. Furthermore, there has been recent criticism of the National Standards, as Ministry commissioned research from 2010-2014 has shown inconsistency in the way teachers have tested students (although the Ministry has pointed out that improvements have been made in the two years since then).<sup>234</sup>

Schools will of course keep their own track of student progression by internal testing and through narrative style term reports which update families on their child. This information is more detailed and can be recorded flexibly and so is more useful for students with high learning needs, but the methodology for determining student progress varies wildly between schools and teachers – and there is no specific framework provided for this by the Ministry. Some schools have said they have needed better guidance in the best ways to measure the learning outcomes of higher needs students – and both Ministry<sup>235</sup> and Education Review Office (“ERO”)<sup>236</sup> reports in 2013 identified this as an area where more work needs to be done. As the Independent Monitoring Mechanism on the Rights of Persons with Disabilities (“IMM”) has commented, “It’s

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<sup>233</sup> Ministry of Education “Education Counts” <<http://www.educationcounts.govt.nz>>

<sup>234</sup> Jenny Ward & Gill Thomas *National Standards: School Sample Monitoring & Evaluation Project, 2010-2014* (NZ Maths Technology Ltd, 2016) at 27, 66.

<sup>235</sup> Ministry of Education *Curriculum and teaching and including inclusive education capability building project initiation document* (2013) at 4-6.

<sup>236</sup> Education Review Office *Including Students with High Needs Primary Schools* (July, 2013) at 2.

difficult to see how educational outcomes for disabled students can be improved if they're not being assessed.”<sup>237</sup>

The Ministry has published a range of guidelines to assist teachers with the adaption of the curriculum for diverse learners – including those with disabilities.<sup>238</sup> It seems that many of these guidelines focus on two processes of ‘Differentiated Instruction’ (using different teaching strategies for different learners) and ‘Universal Design for Learning’ (a classroom design which caters for all learners by using a range of technological and curricula resources); as well as a range of strategies for removing various barriers to student learning. Most of the strategies relating to measuring the progress of students with additional learning needs seem to focus on providing additional support to the student during testing, which will be adequate for some students but not all.

It appears there was a report by the Ministry in 2010 which said they would include ways within the National Standards to measure the learning of students with special educational needs.<sup>239</sup> It is unclear whether the strategies for supporting learners in assessment were intended to fulfil this promise or if the Ministry is working on further adaption of the National Standards. The Ministry website currently states that the National Standards have been developed for all students – but have said that they will take a focus on measuring student progress.<sup>240</sup> As mentioned earlier, student progress is reported in an aggregated narrative style self-report by the school,<sup>241</sup> so this information has not provided any further guidance to teachers or provided any further information to families. The Ministry does recommend the use of Individual Education Plans (“IEPs”) by teachers to record progress<sup>242</sup> – but we know anecdotally from our work with clients that schools do not always use formal IEPs for students – even those with high needs – and the use of IEPs is highly inconsistent across schools. The Ministry also recommends a process called Narrative Assessment and provides what looks like rather comprehensive and helpful

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<sup>237</sup> *Making disability rights real* (Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, 2013) at 77.

<sup>238</sup> Ministry of Education “Making the curriculum accessible to all”, <http://inclusive.tki.org.nz/guides/making-the-curriculum-accessible-to-all>.

<sup>239</sup> Ministry of Education “Success for all – every school, every child” (fact sheet, 2010), cited in Denise Powell “A Review of Inclusive Education in New Zealand” (2012) 2 *Electronic Journal for Inclusive Education* at 10 – Note, we were unable to track down the original report.

<sup>240</sup> Ministry of Education “National Standards – Special Education Needs Fact Sheet”, <http://nzcurriculum.tki.org.nz/National-Standards/Key-information/Fact-sheets/Special-education-needs>.

<sup>241</sup> Ministry of Education “National Standards NAG2A(b) and NAG2A(c)”, <http://www.education.govt.nz/school/running-a-school/reporting/templates>.

<sup>242</sup> Ministry of Education “National Standards: Fact Sheets – Special education needs”, <http://nzcurriculum.tki.org.nz/National-Standards/Key-information/Fact-sheets/Special-education-needs>.

information on this style of assessment,<sup>243</sup> which relies on qualitative (narrative) data, but within a framework which allows a degree of quantitative comparison between students. We expect that the use of this style of assessment is likely to not be widespread though and it has mainly been developed with the view to measuring the progress of students expected to remain within level one of the curriculum. If this is true, then this style of measurement is unlikely to provide helpful population level data for the Ministry to use in analysing disabled student outcomes and it leaves families in the position of relying on the school's own method for reporting their child's progress.

### ***Issues in gaining useful population level data***

We would also like to highlight the difficulty of gaining useful population level data on disabled student progress within the current framework. The nature of adopting an inclusive ideology toward disability is that it necessarily obscures the distinction between students with and without disabilities, choosing instead to focus on adapting the learning environment to all individuals. This makes it problematic to attempt to identify and track any population of students with disabilities. Ironically, this makes it difficult to report on New Zealand's performance against its obligations under the UNCRPD in relation to student progress in education. The Ministry often refers to input measures to report on its own performance – highlighting money put into special education programmes. We see the use of inputs as a measure to be fundamentally flawed, as funding in itself provides no guarantee as to quality of outcomes without actually measuring the effectiveness of the programmes in some other way. It seems fairly antithetical within a neo-liberal framework that there has been relatively little accountability for the effectiveness of funding provided for special education services.

Whilst the Ministry has commissioned numerous reports into its services over the last decade – most have focused on issues with the frameworks and services themselves. We are not aware of many reports which have attempted to directly connect student outcomes to funding services.<sup>244</sup> The Ministry does track indirect data on student outcomes, such as the Client Satisfaction Surveys that the Ministry does to collect feedback about the core special education services (behaviour, communication and the Ongoing Resourcing Scheme)<sup>245</sup> and ERO reports on inclusive practices displayed by schools. It should be noted however, that indirect data does not

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<sup>243</sup> Ministry of Education "Through Different Eyes", <http://www.throughdifferenteyes.org.nz>.

<sup>244</sup> An example of one we have seen is Jacky Burgon, Melanie Berg & Nicole Herdina *Patterns of student progress in the Intensive Wraparound Service: NZCER IWS Evaluation* (NZCER, 2015).

<sup>245</sup> Ministry of Education "Special Education Client Satisfaction Survey", [https://www.educationcounts.govt.nz/publications/special\\_education/client-satisfaction-survey](https://www.educationcounts.govt.nz/publications/special_education/client-satisfaction-survey).

necessarily reflect student educational gains. The 2014 ERO report on inclusive practices found that despite 78% of schools displaying mostly inclusive practices, only half of the schools were found to effectively create positive learning outcomes for students with additional learning needs.<sup>246</sup> We mentioned this in Chapter 6.2 as well, but it's important to note that ERO also cautioned against placing too much weight on the reported rates of inclusive practices, as students with additional learning needs are not a readily delineated group and schools may provide well for some students and not others.<sup>247</sup>

The IMM in a report earlier this year observed that current data collection by the Ministry does not allow outcomes data to be collected or analysed.<sup>248</sup> We believe this highlights the need for the Ministry to develop a measurement framework which more validly captures progress in educational gains for all different types of learner than what the National Standards and NCEA can currently achieve. This would not necessarily need to replace these standards, but could be used alongside them to measure progress. The framework could be a simpler version of the Narrative Assessment toolkit which could then provide reliability in data obtained between schools. The Ministry has signalled that it intends to take a social investment approach to education and create a clear outcomes framework.<sup>249</sup> We wish to re-iterate the importance that any outcomes are suited for purpose, providing a valid measure of actual learning for all different types of students and are used consistently across schools.

We also believe this highlights the importance of collecting data in relation to process based outcomes. The IMM has also highlighted a number of gaps in current data collection, particularly with reference to tracking processes and activities undertaken – for example, the number of referrals within a school to the Special Education Needs Co-ordinator, how frequently IEPs are being developed etc.<sup>250</sup> Closer tracking of these processes would provide what is referred to as ‘throughput evidence’, which is evidence of service response. While service response is not the same as measuring outcomes directly, confirmation of service response and compliance with minimum procedural requirements provides an inference of positive outcomes if those services and processes have been previously proved to be correlated with reliably positive outcomes. Measuring these activities not only provides information about what our education system is

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<sup>246</sup> Education Review Office Inclusive practices for students with special needs in schools (March, 2015) at 28.

<sup>247</sup> Article 24 The Right to an Inclusive Education (Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, 2016), 14.

<sup>248</sup> *Article 24 The Right to an Inclusive Education* (Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, 2016), 14.

<sup>249</sup> Cabinet Paper “Strengthening Inclusion and Modernising Learning Support” (Office of the Minister of Education, 2016).

<sup>250</sup> Chatfield, “The Special Education Grant: A Parent and Practitioner View of SE2000 Policy”, 16.

doing, but it allows for service providers to be kept accountable to these minimum expectations which provides a base layer of protection for students.

Currently schools will have their own internal procedures for recording complaints, but this information is not collected by the Ministry at a central level. Another good example of a current gap that exists is within the process for Stand-downs, Suspensions, Exclusions and Expulsions. Case law dictates that when considering any of these kinds of disciplinary procedures in relation to a student who is known to have some form of disability, the school must take into account the disability when determining if the student should be held responsible for their behaviour.<sup>251</sup> Currently schools are required to report to the Ministry whenever any of these four forms of formal disciplinary action are taken, but schools do not report the details of the situation or whether the student was identified as having a disability.<sup>252</sup> Obviously there are issues in relation to how disability is defined in this context, but nonetheless ongoing central level collection of this information would allow the Ministry to identify systemic issues and respond to these more adequately.

## RECOMMENDATIONS

- A consistent framework for measuring student progress within the New Zealand Curriculum that provides validity and reliability across all students – possibly placing greater emphasis on qualitative data – but in a way which communicates information easily to families;
- Better information tracking on the connection between interventions and student outcomes;
- Framework for school and Ministry reporting on procedural actions – i.e. recording the formation of Learning Support Plans, reporting any identified disabilities of students which face formal disciplinary action etc.

### **6.3.2 *Inadequate enforcement mechanisms***

One of the key tenets of a fair and democratic society is the principle that rights, including the right to education, can be enforced and that the state and its delegated agents can be kept accountable to its provision. We have already discussed New Zealand's current legal framework in Chapters 4 and 6.1 and have identified that at present no enforceable right to education exists within our legislation. Our view is that this is a breach of New Zealand's obligations under the

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<sup>251</sup> *A v Hutchinson* [2014] NZHC 253 at [39].

<sup>252</sup> Education Act 1989, s 18.



UNCRPD and at odds with the principles of natural justice. We have called for urgent reform to the Education Act 1989 to create an enforceable right to education. This section will discuss the issue of accountability generally within our current education system, will highlight some key issues we are aware of and will make recommendations for the reform of accountability and enforcement structures.

### ***Known issues***

We have already described some of the issues students with disabilities still face within education, but will briefly outline some of issues again here so as to comment on their relation to existing accountability structures. We have identified 9 broad categories of issues we experience commonly, although these are just indicative and should not be considered as exhaustive:

- *Enrolment issues –*

The Education Act 1989 provides that all students have the right to enrol at any state school.<sup>253</sup> Due to over-crowding, some schools in conjunction with the Ministry have created enrolment zones which prescribe a geographical area within which students have the automatic right to enrol, but which limits the number of students enrolling from outside of the zone by only accepting these students on a ballot basis depending on available places.<sup>254</sup> Although students with disabilities have the same right to enrol as any other student,<sup>255</sup> some schools have invented subtle ways to disincentivise families of students with disabilities from attempting to enrol. We are aware of families who are told that another school would be more suited to the student with disabilities and are given the hint that their child will not be welcome. This has also been reported by others, including ERO's 2014 review which heard from families reporting similar practices.<sup>256</sup> There is little families can do to challenge these responses.

- *Exclusion from certain activities –*

- We are aware of complaints from families about their children being excluded from some activities. While they are allowed to participate in most of the curriculum, students can be excluded from activities – often extra-curricular activities such as sports events and school camps – where the school perceives

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<sup>253</sup> Education Act 1989, s 3.

<sup>254</sup> Education Act 1989, ss 11-11Q.

<sup>255</sup> Education Act 1989, s 8; Human Rights Act 1999, Part 1A; Bill of Rights Act 1990, s 19; United Nations Convention on the Rights of Persons with Disabilities, art 24.

<sup>256</sup> Education Review Office *Inclusive practices for students with special needs in schools* (March, 2015) at 10.

that there will not be enough effective support available or if there are behavioural concerns with respect to the student. Although behavioural concerns can be a legitimate reason to exclude a student from certain activities as part of a normal disciplinary process, our concern is that it appears often the exclusion is made without a willingness to provide support that would mitigate any behavioural problems. Students do not have the same right to participate in extra-curricular activities that they do in the core curriculum, but if other students are allowed to participate there may be issues of illegal discrimination.

- *Partial exclusion from school –*
  - This is related to the above issue but extended to exclusion from the core curriculum for part of the school day or week. This can be a spontaneous exclusion where the school calls the family and asks them to come and take their child home, or a continuous exclusion where the student is only allowed to attend part-time for an extended period. As above, this usually occurs where the school does not feel that there is enough available support (for example, if there is only teacher aide funding for 20 hours per week) or if there are behavioural concerns. It is illegal without the consent of the family to send a child home or to exclude them from part of the school day without following one of the formal processes prescribed by either Sections 14-17 (relating to discipline and safety) or Section 19 (relating to contagious health issues) of the Education Act 1989.
- *Poor quality of service –*
  - Service recipients may complain about the quality of any service provided, either by the school or by the Ministry.
- *Issues relating to the handling of incidents –*
  - These are issues with the conduct of educational professionals, usually within the school, who handle behavioural incidents poorly. Sometimes the educator may not have the relevant knowledge about the individual student and their emotional needs (such as a student who feels threatened when someone stands in close proximity to them), or who might be aware of the needs but do not follow established procedures carefully. Occasionally these issues can reach the level of emotional or physical bullying, usually when the staff member loses control of their own emotional reactions to the student's behaviour or shows poor attitude generally towards students with disabilities.
- *Procedural issues –*

- This category refers to issues where established procedures are not followed or there are natural justice issues, particularly with regard to decisions made about a student. We have distinguished this from the category above in the sense that these issues are not about how an incident is handled in the moment, but about decisions which are made later on or possibly impact on the relationship between service providers and the family generally. An example might be a failure to communicate information to families, or making a decision about funding in a way which follows an unfair process.
- *Lack of funding* –
  - We commonly receive complaints about a lack of funding support for students. These complaints may be from families with respect to a failure to allocate funds to the student by the school, or from families & the school with respect to inadequate funding provided by the Ministry.
- *Formal disciplinary procedures* –
  - Sections 14-19 of the Education Act 1989 provide for the formal procedures schools may follow in order to remove a student temporarily or permanently from school. Although failure on the school's part to carefully follow the prescribed procedures or to follow principles of natural justice when considering formal action (including taking into account the effect of disability on whether behaviour should be perceived as disobedience) will invalidate the action, there is little recourse for families for these failures.
- *'Kiwi Suspensions'* –
  - This phrase was coined to describe procedures that remove a student temporarily or permanently from school which do not follow one of the formal procedures prescribed by the Education Act 1989. These are illegal but somewhat widespread. YouthLaw will be releasing a report into 'Kiwi Suspensions' later this year.

### ***Current enforcement mechanisms***

Currently there are limited options to enforce or appeal a decision or action made within the education sector with respect to any student with disability. We will outline these briefly:

- *School's internal complaints processes* –
  - In the first instance any concerns about support provided by the school should be discussed with the teacher in the course of an ordinary family-teacher

relationship. Where necessary complaints are usually escalated usually either to the Head of Department, Deputy Principal or Principal who will then try to resolve any issues. At this stage if the family is still unhappy with the resolution they can make a formal complaint to the Board of Trustees. Usually after the outcome of a complaint families can request a reconsideration if they believe the Board did not consider all of the relevant details adequately. Families can sometimes feel that they have little agency in this process, partly because the school generally holds more power in the relationship and because families do not always have adequate information in relation to their child's learning.

- *Complaints to Ministry of Education –*
  - Complaints about Ministry provided services can be made to the Ministry who have a complaints management process. In our experience the Ministry appears reluctant to take complaints with respect to the actions or decisions of schools and usually refer these complaints elsewhere.
- *Complaints to the Education Review Office –*
  - ERO takes complaints with respect to systemic issues which may affect groups of students or are reflective of ongoing poor performance. Usually ERO will not take complaints with respect to individual incidents or decisions.
- *Complaints to the Education Council –*
  - The Education Council has established a Code of Ethics for Certificated Teachers which includes requirements about the ethical practice and standards which teachers must comply with. If there are concerns about the performance or conduct of a specific teacher, complaints can be referred to the Education Council which has the mandate to investigate and take disciplinary or remedial action against teachers.
- *Complaint to the Office of the Ombudsman –*
  - Under the UNCRPD, the Office of the Ombudsman has been appointed as the agency tasked to take complaints broadly in relation to disability issues. The Ombudsman can take complaints about decisions or actions of schools and the Ministry. Due to heavy workloads and limited capacity, the Ombudsman has noted unfortunate delays in responding to complaints and it can sometimes take up to 6 months for an issue to be resolved.<sup>257</sup>

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<sup>257</sup> Office of the Ombudsman *Annual Report 2014/2015* (Office of the Ombudsman, 2015) at 39.

- *Human Rights Commission and Human Rights Review Tribunal* –
  - Both of these bodies are constituted under the Human Rights Act 1999. Complaints about issues of discrimination in education can be taken to the Human Rights Commission who will usually try to assist with the resolution of issues and can provide mediation services. For serious or unresolved complaints, people can take a legal claim through the Human Rights Review Tribunal (“HRRT”). The HRRT will hold a hearing of the issues and evidence and can make a declaration that discrimination has occurred. The declaration holds no binding power and the HRRT cannot force parties to take any further action.
- *Judicial Review* –
  - Under the Judicature Act 1908, the High Court has the power to review any decision made by a state body or their agent. The Court has jurisdiction to review the decision of both the Ministry and of schools, as schools are carrying out a delegated responsibility on behalf of the state. The grounds for review are generally only procedural and the Court will usually not rule on any substantive issues. If the Court finds that a decision was illegitimate, it can quash the decision – but at this stage the decision has to be referred back to the body which made the decision to review again. As such, taking a claim through judicial review will not necessarily result in a new outcome being made, as the school or Ministry can simply choose to correct any deficiencies with the original decision and pass it again. The major limitation of the process is that it is costly (running into the tens of thousands of dollars in filing and legal fees) and can take several years to resolve.

Under all of the enforcement mechanisms we have discussed, we can see that there is no appeals process by which families can gain a binding and enforceable decision. This is a deficiency which needs to be corrected.

### ***Accountability***

There is an interesting tension between the need for the education profession to be trust based and self-accountable and the need for external accountability. This tension is amplified in the New Zealand context because of the high level of devolution of power and responsibility from the state to schools and the reluctance of the Ministry to intrude on this. We discussed these issues somewhat in Chapter 6.1 and our position is that in spite of school devolution, the Government still has a role in setting the policies and purpose of education and in keeping

schools accountable. Accountability does not necessarily need to mean close central bureaucratic control, but can be achieved through a number of overlapping means.

Organisation for Economic Co-operation and Development (“OECD”) research has shown that the best education systems are those which retain a balance of high school autonomy with high accountability.<sup>258</sup> The United Kingdom is currently moving towards higher autonomy for schools which has been seen as a positive development, but it is important to note that the UK already has strong accountability systems in place.<sup>259</sup> The OECD has attributed a drop in Sweden’s education systems performance recently to an imbalance between high school autonomy and low accountability.<sup>260</sup> Whilst ideally New Zealand will look to strengthen the sense of professional self-accountability within the teaching profession, we believe that for this to work we first need to drastically strengthen our accountability structures. We note that as education is centrally funded, families often do not have the option of ‘voting with their feet’ which lends towards children being extremely vulnerable within education. Increased protection for our children is essential. We argue that it is paradoxical to delegate state responsibilities without adequate, accessible and enforceable accountability measures.

## RECOMMENDATIONS

We recommend that a combination of overlapping and differentiated accountability structures is best. Each accountability measure provides a check against the unexpected failure of another form of accountability and ensures that there are multiples paths to dealing with an issue in the way which is most appropriate. The model we suggest is as follows:

- *Disputes resolution scheme* –
  - Schools should be required to have a formalised internal procedure for complaint management;
  - The Ministry should fund a complaints resolution scheme. This could be analogous to the Human Rights Commission mediation process, but specialised in educational issues, more readily accessible and more informal so as to create a space which does not create stigma for the parties or unnecessarily escalate the issues. This approach should be relational and collaborative;

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<sup>258</sup> OECD *PISA in focus, school autonomy and accountability: are they related to student performance?* (OECD, 2011) at 1.

<sup>259</sup> John Morris & Rose Patterson *Around the World: The evolution of teaching as a profession* (The New Zealand Initiative, 2013) at 42.

<sup>260</sup> OECD *Improving Schools in Sweden: An OECD Perspective* (OECD, 2015) at 46.

- We note that the Ministry's design for a new service delivery model could provide this kind of service within the Ministry's triage and learning support plan process, though there would be benefit in keeping any disputes resolution or mediation process independent from the Ministry.
- *Complaints to independent agency –*
  - This process could largely remain as currently provided by the combination of the Ministry, ERO, Education Council and Ombudsman. We suggest that there may be benefit in vesting responsibility for all education complaints (regardless of whether related to disability or not) to the Office of the Children's Commissioner ("OCC") and funding them for this – as the OCC will be able to provide specialised knowledge to children's issues and potentially ensure a shorter timeframe for complaint resolution. At the moment, the Ombudsman is primarily mandated to receive complaints in education related to disability which creates a potential gap where it is not clear if a student can be identified with a specific disability.
- *Education Tribunal –*
  - Our view is that the current jurisdiction of the judicial review and HRRT processes are inadequate to provide for an enforceable right to education. An Education Tribunal with the broad jurisdiction over all educational issues in relation to schools or governmental bodies would provide an accessible appeals process with the power to make binding directions to involved parties. This would ensure families retain agency in their relationships with schools and the Ministry and would provide an incentive for parties to comply with the legal guidelines so as to avoid litigation.
- *Audit and systemic research –*
  - The Ministry would continue to require schools to report on various functions and would have the power to review (either through ERO as at present, or by the Ministry directly) and support and challenge schools where issues are identified;
  - Research would continue to take place in order to identify trends and systemic issues.

## APPENDIX 1.

### Summary of current special education services in New Zealand

#### 1. Individually targeted services

##### *1.1 Services for high needs*

- School High Health Needs Fund
  - Provides funding for students with high health needs and who need care and supervision for more than six weeks.
  - In order to be eligible for a fund, a student must meet the following criteria that includes the following requirements:
    - The student must have a high a health need and must need a teacher aide to help care for them, maintain attendance and access to education at school.
    - The intensity or frequency of the student's high health need means that care is needed to protect their life, prevent severe effects on physical health, prevent accident or injury and control infection.
  - The fund pays for a teacher aide, and the funding level is determined by the Ministry of Education Individual Care Plan, which is reviewed annually.
- Intensive Wraparound Services ("IWS")
  - Provides support for students with complex and challenging behavioural needs.
  - Students get access to the IWS through referral by a member of the Ministry of Education's Special Education staff, an RTLB, or the student's ORS fund-holding school.
  - Once referred, a psychologist will assess the student and their needs, and work with the student, their whānau and school to create a plan which will identify that steps need to be taken.
  - The service is available for students between Years 3 and 10.
- Ongoing Resourcing Scheme ("ORS")
  - ORS provides services and support that can include specialists (such as speech language therapists, psychologists and special education advisers), additional or specialist teachers who work directly with the children, teacher aides and consumables.



- Students who have ORS funding may receive support from:
  - The Specialist Teacher Outreach Service are specialist teachers travel from Outreach Service provider schools to support students receiving ORS.
  - Students who are deaf or hard of hearing may receive support from Advisers on Deaf Children who are accessible until children are in year 3 at school, and Resources Teachers of the Deaf.
- ORS is managed by the Ministry of Education, Special Education and by delegated schools (Specialist Service Providers).
- ORS is provided to students who have:
  - Ongoing extreme or severe difficulty in learning, hearing, vision, physical and language use and social communication; or
  - Moderate to high difficulty with learning, alongside very high or high needs in hearing, vision, physical and language use and social communication.
- Behaviour Services and Support
  - Provided to students who are between year 1 and year 10 who have extreme and ongoing behaviour difficulties.
  - A caseworker works with the teacher and the school, involving the parents or caregiver, to implement an individual behaviour plan.
- Communication Service
  - Employs speech language therapists to support students with high communication needs, focussing particularly on students who are between 5 and 8 years old.
  - The speech-language therapist will work with the child's whānau and school to create a plan.
- In Class Support
  - Provided for identified students with additional education needs who will benefit from 5 hours per week of individual in-class support.
  - Students are identified through the RTLB service.

### ***1.2 Services for moderate or high needs***

- Physical Disability Service
  - Helps support students with physical disabilities. The service provides physiotherapists and occupational therapists to work with children and teachers to help adapt the environment to meet the child's needs.
- Special Assessment Conditions

- Allows a student to get support in assessments to remove any barriers to achievement.
  - There must be a disparity between the student's subject knowledge and their ability to express this knowledge.
- Assistive Technology
  - Students with the highest need are eligible for assistive technology and students must have a specific learning need, have limited access to the curriculum using standard classroom technology and be receiving support from one of the Ministry's special education initiatives.
- Property Modification Services
  - This is an extension to a schools base funding for specified property developments.
- School Transport Assistance
  - Covers transport between the student's home and their school, where the student is aged between 5 and 21 years, and meets the mobility and safety criteria.

## **2. Itinerant/mixed services**

- Resource Teachers: Learning and Behaviour
  - Are trained teachers who work with children experiencing learning and behavioural difficulties.
  - Provide targeted interventions for students who are between years 1 and 10. They also provide targeted support for students with high learning needs up to year 11, and class support including the Incredible Years Teacher programme for teachers of children aged between 3 and 8.
- Behaviour Crisis Response Team
  - Helps schools respond to extreme events in a way that stabilizes the school, keeps everyone safe, prevents the situation from deteriorating and links to the school to more resources and support.

## **3. Discretionary/school-wide services**

- Special Education Grant
  - A grant received by schools as part of their operation funding to support students with special educational needs. The amount received is tagged to the decile ranking of the school as well as the total number of children who attend the school. Schools are able to choose how they spend the grant.

- Interim Response Fund
  - Provided to keep students engaged in learning following a challenging behavioural event, while a long-term plan is being created. The application for this funding is completed by the school over the phone.

## **APPENDIX 2.**

### **United Kingdom's legislative framework**

#### **1. Education Act 1996**

The Education Act 1996 (UK) is the central piece of legislation relevant to the education system in the United Kingdom. In addition to a general right to education, the legislative framework in the United Kingdom includes a number of enforceable procedural safeguards for children and young people with special educational needs. Section 7 of the Act creates a duty for families to ensure that their children receive full-time education that is suitable not only to their age, ability and aptitude, but also to any special educational needs they have.

Section 316 of the Act was inserted by the Special Educational Needs and Disability Act 2001 (UK). This section creates a duty to educate children with special educational needs in mainstream schools, thereby enshrining the principles of inclusion and mainstreaming within the legislative framework. Governing bodies and local education authorities are under a further duty to use their best endeavours to secure that the special educational provision which is called for by a student's learning difficulty is made, under section 317.

This duty extends to ensuring that anyone who is likely to teach the student is aware of the student's needs, as well as the importance of identifying and providing for students with special educational needs. Under section 14, local education authorities must also ensure that there are sufficient schools for their area. In doing so, local education authorities must have regard to the need for guaranteeing special educational provision for students who need it.

Originally, the Act mandated in section 324 that local education authorities were required to make and maintain statements of special educational needs for students. Statements of special educational needs specified the special educational provision to be made for meeting those needs. Local education authorities were then required to arrange that the specified provision be made for the child.

#### **2. Children and Families Act 2014**

Section 22 of the Children and Families Act 2014 (UK) creates a duty for local authorities to identify all children and young people who have or may have special educational needs or disabilities in their area. Under section 24, local authorities are responsible for any child or young person who is in the authority's area and has either been:

- Identified by the authority as having or possibly having special educational needs; or
- Has been brought to the local authority's attention as someone who has or may have special educational needs.

The Act replaces statements of special educational needs with Education, Health and Care (“EHC”) Plans in order to better integrate educational provision with health care and social care provision. Statements of special educational needs will gradually be replaced by EHC plans over the period between 1 September 2014 and 1 April 2018. Local authorities must consult families when creating EHC Plans, under section 38. EHC Plans must be reviewed every 12 months.

Local authorities must also published a ‘Local Offer’ of the provisions or services which they expect will be available in its area for children and young people who have special educational needs and disabilities. This includes not only the education, health and care provision, but also any other training provision, arrangement for transport to and from schools and any provision that will assist in preparing children and young people for adulthood and independent living.

Where local education authorities or other relevant bodies act unreasonably, fail to fulfill their statutory duties or fail to perform their functions to an adequate standard, the Secretary of State for Education has the power to intervene to ensure that the authorities perform their functions properly and adequately.<sup>261</sup>

### **3. Special Educational Needs Tribunal**

Families and young people can appeal to the First Tier Tribunal (Special Educational Needs and Disability). The Tribunal is responsible for handling any appeals against local authority decisions that relate to, for example, a refusal to create or maintain an EHC Plan or statement and to assess a child's education, health and care needs. The Tribunal may also hear appeals relating to discrimination by schools and local authorities against children or young people with disabilities. Section 51 of the Children and Families Act sets out the grounds on which families or young people may appeal to the Tribunal.<sup>262</sup>

### **4. Special Educational Needs and Disability Code of Practice**

The Special Educational Needs and Disability Code of Practice: 0 to 25 years provides statutory guidance for organisations that work with children and young people with special educational needs and disabilities. These organisations include, for example, local authorities, the governing bodies of schools and First Tier Tribunal (Special Educational Needs and Disability). The Code

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<sup>261</sup> S 496, 497, 497A

<sup>262</sup> Children and Families Act 2014 (UK).

of Practice provides high level guidance, such as placing a greater focus on children and young people participating in decision-making processes and improving outcomes. It also includes more specific guidance – for example, on joint planning with respect to collaboration between education, health and social care, or on creating Local Offers.

### **APPENDIX 3.**

#### **United States' legislative framework**

The main piece of legislation relating to students with special educational needs in the United States is the Individuals with Disabilities Act ("IDEA") 1990 (US). IDEA comprises of four parts, of which Part B is the key section which creates provisions for school-aged children with disabilities.

The purpose of Part B of IDEA is to ensure that all children with disabilities can access a free appropriate public education ("FAPE") that meets their unique needs and prepares them for further education, employment and independent living. FAPE is defined as special education and related services that are provided without charge, include an appropriate school education and are provided in conformity with an individualised education program ("IEP").

An IEP document must be created for each student who attends public school and who is eligible for special education. The IEP defines the individualised educational objectives for each child, and must be developed, reviewed and revised by the IEP team which must include the student, the student's family, and a special education teacher or case manager. The IEP team must conduct annual reviews to ensure that the student is meeting or meeting benchmarks in order to meet his or her goals.

The primary IDEA legislation states that to the maximum extent appropriate, children with disabilities must be educated in the least restrictive environment:

“...children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

There are also a number of procedural safeguards contained in the Act, Regulations and local State Code of Practice. These safeguards are outlined in section 615 of the Act. Protections include:

## Challenging the Barriers

- The opportunity for families to examine all records relating to their child and to participate in meetings with respect to the identification, evaluation, education placement and the provision of FAPE to the child;
- Written notice must be given to the family whenever there is a proposal or refusal to initiate or change the identification, evaluation, education or provision of FAPE to the child;
- The opportunity of mediation for the family, where a legally binding outcome can be reached as an outcome of the mediation;
- The opportunity to file a state complaint;
- The opportunity to resolve a dispute through a due process hearing.



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