University of Sheffield
Department of Educational Studies

Doctor of Education
Dissertation

Parental Challenges to Educational and Legal Definitions of their Children's Special Educational Needs: An Examination of Decision-Making in the Field of Special Educational Needs

Sarah Carrier

Tutor: Dr Peter Clough

June 2001

Table of Contents

Acknowledgements

Abstract

Introduction 1
1. Conflicts of understandings and discourses 2
2. The function of law 3
3. The power of discretionary decision-making 5
4. Allocation of resources 6
Limiting the field of enquiry 10
Policy; the legal framework 12

1. Literature Review 14
Pre-Warnock Literature 14
"Education, Health and Behaviour" 14
Comment and Analysis 17
The Tizard Report 19
"Pedagogy of the Oppressed" 21
"Fifteen Thousand Hours" and
"The Early Detection of Reading Difficulties" 21
An international perspective 25
Post-Warnock literature 27
Theoretical educational literature; philosophy of SEN 28
Disablement and discrimination 28
Separate or integrated? 30
Inclusion 32
Partnership with parents 34
Legislative and administrative structure; official documents 35
Theory and practical help;
books for parents, teachers and lawyers 38
Specialist journals and other publications 40
Legal aspects 41
Summary 44

2. The Concept of Need
Philosophical basis of the concept of need 46
A taxonomy of need 48
Rights and needs 50
Models of SEN 52
Changing labels 53
The need for inclusion 61
Present practice 63
Ethnic minorities and SEN 66
Summary 67

3. Legislative Intervention

Legal definitions of SEN 70
Corbett and the missing discourse 71
Legislation: The duty of the State to educate 72
Rights of parents 78
Rights of children 80
Mechanisms: The Code of Practice 82
Institutions: The Special Educational Needs Tribunal 87
Mechanisms: Judicial review 89
Summary 91

4. Further legal aspects; The Duty of Care

Public law 93
Legal remedies 95
The Duty of Care and the law of negligence 97
The Education Cases: No Duty of Care?
Immunity of Statutory Bodies? 100
Phelps v the London Borough of Hillingdon 104
Phelps: a landmark decision for education policy 107
The nature of dyslexia 109
Further implications and discussion 114

5. Methodology

1. Rationale and research questions 119
2. Theoretical framework or paradigms 120
On the shoulders of giants 123
3. Possible research strategies 126
4. Selection of research method 127
5. Procedures and data collection
i. Preliminary approaches and selection of cases 132
ii. An abortive SENCO survey 133
iii. Selection of cases 136
iv. Interviews 137
v. Other sources 139
vi. Legal aspects 140

Ethical Issues 141
Summary 143

6. Data Summary

Method of contact 145
Gender, age and family characteristics 145
Access to advice and help 147
Nature of difficulties and educational history 148
Terminology 151
Summary 152
Table of case studies 153

7. Analysis and Interpretation of Findings 154
Original Questions and new aspects 155
Models of Special Educational Need 155
Discourses and Language Codes 158
The taxonomy of Need 160
The function of the Law: Legal Awareness 161
The power of discretionary decision-making; the role of the SENCO 163
Inclusion and allocation of resources 165
A continuum of parenting 166
Keeping records and obtaining information 170
Summary 172

8. Conclusion 173
Theoretical underpinnings 173
Research Questions 175
Three concepts: Inclusion, Need and the Duty of Care 176
Appropriateness of the chosen research paradigm 177
Effectiveness of the use of case studies 178
Issues of Generalisability 179
The SENCO Survey 180
Parent Partnership Services; School-Home Liaison 182
Ethical Issues in the Research 184
Contribution to Scholarly and Professional Knowledge 185

References 188
Appendix 1 List of Cases 197
Appendix 2 Questions for SENCOs 198
Appendix 3 Questions for parents and others 199
Appendix 4 Case Study details
Case study one; Child "K" 200
Case study two; Child "Y" 206
Case study three; Child "C" 211
Case study four; Child "O" 213
Case study five; Child "T" 216
Case study six; Child "X" 219
Case study seven; Child "E" 222
Case study eight; Child "M" 228
Case study nine; Child "J" 234
Case study ten; Child "L" 236

Appendix 5 Phelps v the London Borough of Hillingdon and associated cases 240
Narrative; the High Court 240
Test results for Pamela Phelps 248
Anderton, Jarvis and "G" 249
Anderton; Statement of Claim to go ahead 249
Jarvis 250
The case of "G;" another refusal to strike out 252

Acknowledgements

I owe a great debt to the parents who welcomed me into their homes and told me about their struggles and triumphs, and to their children, without whom there would be no substance to this dissertation. I am grateful to all the local authority officers, EPs and teachers who gave me their time and allowed me to interview them. These include Bob Litchfield, the London Borough of Camden's Director of Education, Neil Hudson, Special Needs Officer, Sue Greaves, Parent Partnership Officer, Neil Smith, Special Needs Inspector, Marilyn Goodman, Statistics Officer, Clive Webster, Senior EP at the London Borough of Hillingdon, Sabina Melidis, and all the SENCos who talked to me but preferred to remain anonymous.

I am also grateful to the lawyers who allowed me to interview them or answered my queries by letter, especially Sharon Burkill and Jack Rabinowitz of Teacher, Stern and Selby, and John Friel. Richard Hill and his colleagues at the Elfrida Rathbone Parents Advisory Service were also helpful. All my colleagues in Camden and Westminster schools, their support services, and the School Home Liaison Project have helped me throughout the last four years and I have learned an immeasurable amount from the wise counsel they have given freely in many discussions, formally in INSET sessions and informally as we went about our daily business of teaching and learning. I should also mention the children in those schools, who were, of course, an important part of that teaching and learning. I have enjoyed, and benefited from, meetings of the National Association for Special Educational Needs and the Education Law Association.

I would like to thank the academic staff at Sheffield for their assistance and encouragement, particularly Professor Gary McCulloch for general guidance, and also John Quicke, Martin Desforges and Peter Clough. I am very grateful to Sheila Melbourne and Chris Gaffney for their advice on the technicalities especially in the last few weeks, Cordelia Hedlam Wells for her expert last-minute proof-reading, and Joyce Bunting for advice and binding.

I am grateful to the librarians at the University of London Institute of Education and the London School of Economics who allowed me access to their libraries and occasionally helped me find obscure documents. The clerks at the House of Lords helped me with access to the hearings. Professor Philip Graham advised me about the Warnock Report and lent me his copy of the Isle of Wight study, for which I thank him.

Finally I must thank all my family for putting up with the nuisance of me being grumpy or incommunicado at times, and especially my husband for endless discussions and inspiration whilst walking on Hampstead Heath, as well as taking over the chores sometimes.

University of Sheffield, Department of Educational Studies
Doctor of Education Part II Dissertation

Parental Challenges to Educational and Legal Definitions of their Children's Special Educational Needs: An Examination of Decision-Making in the Field of Special Educational Needs.

Abstract

This study explores parents' perspectives on their children's special educational needs and relates those perspectives to legal and other professional discourses. The key concepts used to organise the enquiry are *Special Educational Needs* (SEN), the *Duty of Care* and *parents' expectations*.

Ten case studies were undertaken and the findings compared with a number of set-piece, land-mark cases which were followed through the legal process, from the High Court, through the Court of Appeal and finally, on 27 July 2000, the unanimous judgement of seven law lords in the House of Lords. Comparison of the local case studies with the legal cases produced interesting implications for the future of special educational needs.

Ten parents were interviewed at the local level, as well as the local authority officer responsible for statements of SEN, the LEA parent partnership officer, and an parent advocate employed by a charity. At the national level, interviews were carried out with the solicitor acting for the plaintiff and the Principal Educational Psychologist of the defendant Local Education Authority.

The main conclusions are first, that parents' definitions of their children's special educational needs, despite much exhortation in the academic literature about parental involvement, are still undervalued by professionals. Further, some parents are less able than others to articulate those needs and further their children's interests, and will be reliant on professionals or interest groups to assist them.

Second, those professionals owe them a legal duty of care and can be liable for negligence if they give inadequate or wrong advice. This is relevant to the current debates about the role of educational psychologists and the promotion of inclusion.

The third conclusion is that the recent decisions in the House of Lords will have resource implications for LEA insurance as well as for the delivery of the education service, and finally the commitment to equality of opportunity and inclusive education means that all children with any kind of need, special or otherwise, statemented or not, must have access to an education which will help them reach their full potential.

Sarah Carrier
June 2001

Introduction

> With a little effort, anything can be shown to connect with anything else: existence is infinitely cross-referenced. And everything has more than one definition. A cat is a mammal, a narcissist, a companion, a riddle.
>
> Martha Cooley; "The Archivist"

Although the 1997 Green Paper on Special Educational Needs (DfEE 1997b) is now superceded by the proposals for a new Code of Practice and Thresholds Guidance (DfEE, 2000) the recognition that parents of children with Special Educational Needs (SEN) face exceptional pressures continues and the draft Code further commits the Government, Local Education Authorities (LEAs) and schools to the concept of partnership with parents. The Green Paper posed the question "*How can we provide effective support for parents and swift resolution of disagreements?*" The draft Code is the part of the Government's answer. Is it possible for the State to use the law to protect all children with SEN and advance their interests, or does this only secure the rights of those children with powerful advocates? By an advocate I mean someone, a parent or next friend, who understands the general issues and is motivated to succeed on behalf of the child and flexible in their approach to unforeseen events, seizing opportunities that arise to place the child in a superior or better position than would otherwise be the case. The original purpose of this dissertation was to consider how some parents view their children's special educational needs; and what might be meant by *effective* support. This involves the inter-connectedness of lay and professional understanding and educational, legal and medical principles, hence the quotation at the start.

Firstly, do parents see their children's special educational needs differently from the professionals, for example teachers, psychologists or lawyers? Secondly, what is the role of

legal authority as the final arbiter in educational and administrative decisions? This leads to a consideration of legal conflicts and will involve a discussion of some aspects of legal reasoning and jurisprudence.

Thirdly, the power of discretionary decision making is an essential part of the reasoning behind the Code of Practice. (1994) Local education authorities only have to "have regard to" the Code of Practice and this will still apply with the new Code, which maintains that

> there is scope for flexibility and variation in the responses adopted by schools, early education settings and LEAs. (DfEE 2000)

Thus LEAs will continue to have considerable discretion in the way they provide for special educational needs, which raises an age-old dilemma between the ideals of local autonomy and the uniformity of centralised government. Why should provision be different in Salford and Surrey, Bermondsey and Belgravia? The criticism that the Code inhibits teachers and LEAs from developing individual and innovative ways of meeting needs will be discussed later. This is linked with the fourth issue, the allocation of scarce resources. Are there parents who are happy with the resources used to meet their children's needs at Stages One and Two of the Code of Practice? In my experience many parents are satisfied with what might be less than their entitlement and do not disagree with the school's assessment of their child's need simply because they do not understand that there might be alternatives, or have not the energy or resources to take matters further. There are also parents who expect more than the school, or indeed the LEA, is able to provide.

1. Conflict of understandings and discourses

The underlying theme is that education is essentially initiation into the discourse of humanity,

and that learning to communicate is the most significant objective of education and schooling. This view owes much to Bernstein's work on the varieties of language and socio-linguistics in which he aims to show that "conflict between social groups may be reduced or contained by creating a discourse which emphasizes what all groups share, their communality and their apparent interdependence." (Bernstein 1990 p 9) Thus not only do ostensibly mono-lingual children need to master different rules, grammars and vocabularies within their own language to cope with different environments and situations, but in the same way adults need to learn the definitions, "dialects" or jargon of whatever profession or employment they take on and even parents have to learn the language of parenthood. To a certain extent success in one's profession will depend on one's proficiency in that particular parlance, and the jargon or specialized terminology will play an important part in initiation into that group. It is hardly surprising that difficulties arise when inter-professional groups get together and need to talk to each other and to laypeople, such as parents.

Yet the difficulties are not just that professionals and parents may fail to communicate with each other and ignore the others' points of view. Their failure to act together may prejudice the outcome for the very people in whose interests they purport to be acting, the children in their care. Corbett (1998a, p 62) comments that

> when professionals talk of empowering people it tends to be on their terms and using their own view of the world.

2. The function of law

As we shall see in Chapter 3, legislation has progressively raised the expectations of parents in many areas of education, and especially in that of Special Educational Needs. Those parents

who challenge the education system in order to obtain for their child what they consider to be their just deserts need to be able to learn the appropriate terminology, to articulate their child's needs and master the conventions of committees and paper-work. At the same time, the philosophy of special needs and the literature discussing its theory and practice grows apace, in parallel with the legal discourse, but with little cross-reference between the two. In my experience very few teachers consider it to be necessary to know even the basic legislation and often do not seem to be aware that the records they keep could become important evidence, hence the constant complaints about too much paperwork. The 1994 Code of Practice suggests that teachers should keep detailed records about children who have special educational needs and for whom they hope to obtain a statement leading to extra provision, and this is re-iterated in the 2000 version. Teachers often do not have time to record incidents in enough detail, if at all. Lawyers, on the other hand, have little idea of what teachers do and may share the general media disillusion with (at times bordering on contempt for) teachers. The legal concepts of "a duty of care" and "reasonableness" have precise legal meanings and are crucial for many cases. Non-lawyers, however, may not appreciate the *legal reasoning* behind these terms. I shall explore these legal concepts and attempt to relate them to the literature of special educational needs.

Corbett (1998b) explores the wider context of special educational needs historically, internationally and at a community level, and her analysis includes an examination of the notion of universal literacy and compulsory schooling, the issue of challenging or disruptive behaviour, and the medical approach to special educational needs. She focuses on values,

choice and entitlement and the way popular culture impinges on these ideas. I have followed her lead and linked the notion of individual need with the concepts of democracy and inclusive education, while extending the context to encompass the field of law, including case law. This has led me to explore the philosophical and legal implications of these ideas, not least the paradox that whilst recent governments have paid increasing lip-service to individualism, they have nonetheless enacted more and more prescriptive education legislation.

3. The power of discretionary decision making

Whilst the content and method of teaching, especially in the primary school, is, more than ever before, closely defined by a government body, the Qualifications and Curriculum Authority (QCA), local financial management of schools has been introduced with the aim of reducing the power of local education authorities to manage school budgets. At the same time parents have been given important rights, notably by the Education Acts of 1993 and 1996, to participate in decisions concerning their children's education, but it has not always been possible to honour those rights, for example in choice of school, where the only "choice" is the school "choosing" which children to admit. Many appeals to the Special Educational Needs Tribunal involve choice of school, whether it may be special or mainstream, maintained or private. For example, in 1995/6 there were 391 appeals which included placement (43%) and 513 which did not include placement. Of these 391 appeals 181 were upheld and 210 were dismissed. (Source SENT 1996)

At Stages One and Two of the Code of Practice (1994), Headteachers and Special Educational Needs Coordinators (SENCOs) have considerable discretion in the way they prioritise children

for screening, diagnosis or interventions. Stage Three is defined by the involvement of other agencies in drawing up an Individual Education Plan (IEP) and in decision-making, but the Educational Psychologist generally plays a major role in deciding which children are eligible for a Statutory Assessment. Although the new Code of Practice proposes a change in the "Stages" and gives them new titles, the structure remains much the same. I shall consider this further in a chapter which will draw on the ideas of Lipsky, (1976) in particular his theory of "street-level bureaucracy" and the role of the personnel who decide, at "street level", who shall be eligible for resources. This leads to my next heading, because resources and their allocation is a crucial part of decision-making.

4. Allocation of resources

Since the 1981 Act parental partnership with schools and local education authorities (LEAs) has been promoted as especially important for children with special educational needs, to make sure that needs are properly identified and provided for. This has led to a second and perhaps more challenging paradox. The current emphasis on inclusive education is sanctioned by no less an august body than the United Nations, and claimed as a basic principle by the present government in the October 1997 Green Paper on Special Educational Needs (DfEE 1997), referred to earlier. This emphasis conflicts with the recourse to law by an increasing number of parents on behalf of their children, to obtain more resources, often, as already noted, in terms of placement at the school of their choice.

One of the significant features of the Green Paper is that it is the first time a Secretary of State for Education has introduced the notion of human rights in the Foreword of such a document.

Since that time the Human Rights Act 1998 has become law, and has come into operation in October 2000. Article 2 of this Act is the right to education, and the right of parents for "such education ....to be in conformity with their own religious and philosophical convictions." (1998 Chapter 42, Schedule 1, Part II.)

At least one fifth of children in the UK are defined as having special educational needs at some time or other in their educational career. This is a substantial proportion of the school population, approximately two million children altogether. Special educational provision generally involves extra resources and is more expensive than mainstream education, even when it takes place within the mainstream setting. At Stages One and Two of the Code of Practice (to be re-named *School Action*) this may only involve meetings and discussions between class teachers, parents and SENCos, and the preparation of suitably differentiated work, but this is an extra resource even if it only appears on a balance sheet as the SENCo's salary.

Parents and teachers, and indeed administrators, do not always agree about what is the appropriate provision for a child. As we shall see many parents and teachers see a Statement of Special Educational Needs as the ultimate objective for as many children as possible, in order to get extra resources, and because this is the only way to get legal protection for those resources. There are also parents who refuse to accept the need for a Statement and will not co-operate with a statutory assessment. The increased emphasis on parental participation has led to an increase in the number of disputes about provision and, frequently, a discrepancy between the parent's view of the child's difficulties and the view of the LEA. So there are

"participatory," "interpretative" and "economic" disputes. There is a conflict between *equity*, giving equal value to each and every learner, which is the position taken by ardent advocates of inclusive education, and *entitlement*, an individualised notion of a right to specific resources without regard to cost.

The polemic of the Green Paper strives to reconcile these views by stating that parents "will continue to have the right to express a preference for a special school where they consider this appropriate to their child's needs." (DfEE 1997b p45) As already noted, they do not necessarily have the right to *send* their child to that preferred special school if the professionals can show that it is an inappropriate placement, if it is so expensive that the cost would deprive other children in the area of scarce resources or if there is simply no place available. Two of the case studies I have undertaken illustrate this point. In both the LEA argued that the parents' preferred placement was inappropriate, and in both the parents were able to convince the Special Educational Needs Tribunal (SENT) that the LEA was acting unreasonably. "Unreasonable" and "reasonable" are defined legally in terms of the decision-making process, not the substantive issue.

Grant (1999) p71 suggests "that the right to inclusive education is too often the product of hard-won personal battles against the system." In the case he quotes, the right to main-stream education was insisted upon by parents for their child with Downs Syndrome. Evans (1998) hopes that personal individual challenges to the system in the form of appeals to the Special Educational Needs Tribunal will lead to general improvements in provision by showing up weaknesses and gaps and helping LEAs to be more aware of their obligations and duties.

Corbett (1998b) shows how the adoption of a medical label, such as dyslexia, can lead to a "rich entitlement to privileged services," and this can also be the product of a hard won personal battle.

Justice is traditionally thought of as being a means of maintaining and restoring a balance or proportion; its central precept being to treat like cases alike and different cases differently. This is important for resources; it assumes that in every case there are certain features in common with other cases, uniform or constant features, a reference to a standard which applies to the classification of that case. There will also be a varying criterion which will be used to decide whether cases are alike or different. Legislation by itself cannot decide what differences and similarities between individual cases must be taken into account. Nevertheless an important requirement of the precept "treat like cases alike" will be the use of a *concept of need*, especially where the law is involved with the distribution of benefits, such as social security, health or education. This concept will be examined in detail in Chapter 2.

There is also a general concern that SEN resources are being diverted to procedures and paper work, with increasing numbers of statements and appeals. This concern was reflected in the Green Paper, with a commitment to improve provision under Stages 1 to 3 of the Code of Practice (DFE 1994), and to reduce the number of children needing a statement. This might require a change in attitude on the part of LEAs and schools, where a statement is seen as the means of obtaining necessary extra resources. The proposed new Code of Practice (DfEE 2000) attempts to address this problem, emphasising the role of the SENCo in using the resources and expertise already in the school more effectively, so that the new phases are to

be called *School Action* (as noted on p7) and *School Action Plus*, rather than *School Support*, which was the original suggestion.

Very few parents have any knowledge, let alone understanding, of the Code of Practice, or indeed the statutory basis of special needs provision, although the authors of the new Code of Practice try hard to use words of one syllable, for example "set out" replaces "specify" in the layout of a Statement, an alteration that may cause the lawyers to seek for a hidden meaning. In spite of this a member of the British Dyslexia Association has estimated that the new Code of Practice requires a reading age of 17 which probably puts it beyond the reach of a large number of the population. Class teachers and governors have little time to make themselves acquainted with the details and although they may acknowledge the principles of inclusion and whole school responsibility to be educationally correct, nonetheless they often despair of being given the resources to put them into practice. It may seem to the parent that disputes are often more about the deployment of scarce resources than about whether a child has a special educational need, but parents' perceptions of how the need might be met are crucial.

Limiting the Field of Enquiry

These questions seem to be altogether too broad for an undertaking of this kind, with one researcher and limited time and resources and therefore I have had to reduce the scope of the questions and narrow my field of enquiry. The way this has happened has grown out of the procedure itself, so that the data collection has determined the limits of the questions. So my main concern will be to see *how far academic, educational and legal definitions of need approximate to parents' notions of need*. I shall justify this by describing the process of the

research in my chapter on methodology.

The way in which the concepts of special educational needs and other basic needs have been used in research and practice has informed my awareness of the importance of how underlying concepts are taken for granted and given a shared meaning by professionals without much critical examination. Studying the lives of children with special educational needs, as part of my role as Special Educational Needs Co-ordinator (SENCo), has given me an interest in the philosophical background of the concept of 'need' in the more general sense. So the theoretical and philosophical aspects of the research are as important as the fieldwork.

As Special Educational Needs Co-ordinator in a primary school I have been required to prioritise children on the basis of their perceived educational needs, as assessed initially by their parents or class teachers, then in discussion with myself and support teachers and later, perhaps, by consultation with other professionals such as the educational psychologist and the speech therapist. I explore theories of need and the precise meaning of the term *Special Educational Needs* in the next chapter. The investigation of general theories of *basic human needs* is an important part of the formulation of my research question.

I wanted to see how far these academic, educational and legal definitions of need approximate to parents' notions of need, and this has become the question that most interested me as I proceeded. Bassey's distinction between theory-in-the-literature and common-sense theory is important here (Bassey, 1995, p57.) I hope to use "common-sense theory," as Bassey uses the term, the "hitherto unrecorded knowledge of practitioners, (for example teachers,) which may well include the researcher, ... which underpins much of the action of ....

practitioners." Much of my field work and interviews has been directed towards drawing out those common-sense notions on which parents and teachers base their decisions and actions. I have been in post since the implementation of the legislation (Education Act 1993) which required schools to write their SEN policies to a prescribed formula, and to operate that policy in accordance with the Code of Practice.(CoP) (DFE,1994) Reflection on my own practice ties in with the theories expressed by Lipsky (1976) and with Weatherley's findings, (1979) that the work situations of public service personnel at the "street level" constrain policy implementation in predictable ways.

Policy; the Legal Framework

The Warnock Report (1978) set the context for legal challenges to the system by raising parents' expectations. The Report both reflected and developed a change in public attitudes towards children with SEN and to set out guidelines for meeting their needs more effectively. The resulting legislation, the 1981 Act, laid down the principles and practice that were to be followed, placing duties and responsibilities on Local Education Authorities (LEAs) and schools, health services and social services. The 1993 Act built on those principles and required the Secretary of State to publish a Code of Practice. This was produced to offer guidance to LEAs and schools but "not .... (to) .... tell them what to do in each individual case." (CoP 1994, Foreword, p i) The end point in the process is how the intentions of the legislation are implemented at "street level" which then feeds back into the process of public policy making via case law. This "end point" is my starting point. It is part of a complicated interaction between government institutions, (including the courts and public officials,)

involved individuals and the particular characteristics of the policy. I consider this in more detail in Chapter 4.

So one of the tasks of this dissertation, as an aid to answering the questions set out at the beginning of this introduction, will be to explore and to understand the lack of connectedness or cross referencing between education and legislative intentions and policy on the ground. I shall look at examples of the legal discourse on education, cases that have been through the courts and the Special Needs Tribunal, and since the number of these will be limited by the time available I shall only be able to make limited generalizations. I began with a quote from a novel in which T.S.Eliot figures largely and on the same page there is a direct Eliot quote

> The knowledge imposes a pattern, and falsifies,
> For the pattern is new in every moment. (Cooley, 1999, p3)

Nonetheless I hope the pattern that emerges will provide pointers for more intensive research and that my observations will be of interest to both educationists and lawyers, so that dialogue between the various professions, as well as with parents and children, may be improved. There will still be parents who try to use the system to obtain special treatment for their child at the expense of other children who do not have such powerful advocates and it is to these disadvantaged children I dedicate this work.

Chapter One

Literature Review

In this chapter I review the development of the concept of Special Educational Needs and examine the literature that has influenced my thinking and my research. The Warnock Report (1978) can be seen as a crucial point in this development. I shall discuss the Report itself in my next chapter. Literature on Special Educational Needs in the UK can be divided into pre- and post-Warnock.

Pre-Warnock Literature

Since this dissertation is mainly concerned with post-Warnock practice, I shall only make reference to three pre-Warnock works, the study of "Education, Health and Behaviour" in the Isle of Wight in the mid-sixties, (Rutter et al., 1970) the Tizard Report (1972) and Freire's "Pedagogy of the Oppressed." I then look at two pieces of research which appeared at the same time as the Warnock Report, Rutter's second influential book, "Fifteen Thousand Hours" (1979) and Clay's "The Early Detection of Reading Difficulties" (1975). The latter was only just beginning to have an impact in this country at the time of the Warnock Report, (1978) since it originated in New Zealand. I then look briefly at an example of the general trend towards a more humane view of special educational needs in the developed countries, before going on to discuss post-Warnock literature.

"Education, Health and Behaviour"

This study, which was based in the Isle of Wight, was written at a time when "handicap," was the preferred polite term for what we now refer to as special educational needs. This was originally a racing and betting term, a race for horses of all ages, or a "hand i' the cap", for drawing lots. (Skeat, 1887 p193.) By 1926 the association of the word with evening up the chances had become even clearer, "in a race when the better horses are weighted

or held back, so that all may have an equal chance of winning, allowance made to the weaker in any contest." (Nuttall's Standard Dictionary, p334) The implications of this terminology are, one supposes, that life is an unequal contest. In general, however, those with the handicaps are the weaker rather than the stronger and the handicaps do not even up the chances.

Rutter, a respected child psychiatrist, and his team wanted to

> give a comprehensive picture of 'handicap' in a total population of children who lived in a defined geographical area and who were in the middle years of their schooling. (p 3)

The Isle of Wight was chosen because at that time it was thought to be

> similar to England as a whole in social composition and .... reasonably representative of non-metropolitan areas in other parts of the country. (p 3)

The authors admitted (p 359) that

> because that social conditions on the Isle of Wight are generally better than those existing in the poor areas of most big cities it .... (was) .... unlikely that the rate of handicap elsewhere would be less than that which .... (they) .... found (in the Isle of Wight.)

The authors noted that the services for children on the Isle of Wight during the time of the surveys were better than or at least as good as those found in other parts of the country (p355) including a better pupil-teacher ratio and lower turnover of teachers. The population of the Island was about the right size (just under 100,000) to provide an adequate number of the cases they wished to study. They defined three types of "handicap,"

> intellectual or educational retardation, emotional or behavioural difficulties and chronic or recurrent physical disorders (including neurological disorders.) (p 3)

(which are not dissimilar to the proposed categories in the New Code, (DfEE, 2000, p60) discussed later.)

A fourth type, social handicap, was dealt with where it related to other handicaps, but this

was not seen as a "primary" handicap. They found that one child in every six had a "chronic or recurrent handicap." A high proportion (a quarter of those defined as handicapped) had at least two handicaps. The overlap of handicaps is described in some detail (p 353) and there is the comment that for over half the children there was "some disorganisation of family routine" or "impaired family relationships." (p 354) The authors admit that "handicaps of a social nature and certain developmental disorders such as speech problems and enuresis" were not included. The language of "handicap" and "retardation," and the emphasis on "treatment," may seem archaic in the post-Warnock world, but at that time a medical model of special educational needs was most prominent, for reasons that I shall discuss later. Half the team were members of the medical profession; two of the three editors were medically qualified, as were three of the other seven contributors. Three of the latter were educationalists, that is to say, a retired county education officer, the deputy director of the National Foundation for Educational Research and a lecturer in child development at the Institute of Education, London.

The study was one of the first attempts to use mass screening techniques and was also one of the first to use the term "special educational treatment" (especially in relation to reading eg p 52 & p 361.) It also drew attention to the notion of specific reading "retardation" as distinct from intellectual retardation and "general reading backwardness." It noted the correlation between "reading retardation" and behaviour difficulties, (p 241) as well as a "striking difference" (in being able to concentrate) between good readers and poor readers,

> over half the poor readers showed very poor concentration, compared with only 13.6 of the good readers. (p 249)

An interesting observation, for the purpose of this dissertation, was that

> the parents' initial assessment of the child's difficulties did not agree very well with other people's evaluation of his problems. (p 264)

I have looked at this study in some detail because one of the authors, Professor Philip Graham, told me in a private conversation, that the Warnock Committee (of which he was a member) used the evidence of this survey to surmise that about twenty per cent of the school population might have special educational needs at some time during their school career.

Comment and Analysis.

The Isle of Wight study influenced subsequent social psychological and medical discourses on Special Educational Needs both in the professional literature and in practice in several ways.

First, it set the scene for the Warnock Committee's recommendations. It was firmly based on the notions of professional expertise and lay deficit, especially parental deficit, as demonstrated by the quotation on the previous page. (p16) This position was underpinned by a belief that these deficits might be remedied by sufficient and appropriate resources. An example was their use of a medical model to explain (p363) how the "role of the expert" could be crucial in giving advice to the "ordinary classroom teacher." Very little of the analysis, however, was devoted to parental understandings or attitudes. Instead the orientation emphasised the children and their difficulties, almost to the exclusion of the parental role. Nevertheless the authors were aware of the methodological difficulties of analysing parental attitudes within the etiquette of questioning parents about possible childhood pathologies. In this the study hints at the language of "denial" in use thirty years later, without articulating it as such, thus; (p 268)

> When people believe that they cannot change a situation there is a marked tendency for them to come to believe that they are satisfied with the existing situation.

The authors also note that "the attitudes and behaviour of parents may .... be distorted by the presence of a handicap in their child." (p 310) and that parents' desire or demand for help "seemed to have little to do with either the severity of the disorder or its nature." (p 226) This comment is indicative of the differing interpretations of need referred to in my chapter on the concept of need, (Chapter Two) the difference between "normative" and "felt" need.

Secondly, in practical terms, the ignorance of parents about the availability of services for their children was commented on. The authors assumed that changes in the provision of services would be "followed by changes in the attitudes of people toward them" a common-sense assumption for which they offer no evidence. However, the need for the development of services in an experimental and evaluative framework was advocated. In this respect therefore, this study might be seen as a benchmark precursor of the "audit society"of the late twentieth century in which every new initiative has to be measured and evaluated for success or failure.

Thirdly, reflecting on the Isle of Wight study and its influence has led me to the view that it is necessary, if not essential to bring together the discourses and concerns of both parents and professionals. Theoretically, the authority of the professional with the power to mobilise resources should be matched to the needs of the child as filtered through the language of the parent. One of the key aspects of my study is to examine this parental articulation of need, "struggle" and understanding of their child's "best interests".

Finally, apart from passing references to the Mental Deficiency Act, (1927) the Education Act (1944) and the Mental Health Act (1959) the Isle of Wight study makes no reference at all to the role of law as a means of supporting and protecting the rights and duties of parents and children. This omission is not surprising, because it is typical of the

medical/psychological model of SEN at the time. Nevertheless it is important in the context of my analysis of the role of both Statute and case law in enabling parents and children to access their rights within the context of the duties owed to them by public authorities, and the way this is still a neglected area in the discourse of Special Educational Needs.

The Tizard Report

The Tizard Report (1972) examined the problem of children with specific reading difficulties and informed much of subsequent thinking on the matter, including the controversy over the ideas of "discrepancy" and dyslexia. I include this because it was written in 1971 by a sub-committee of the "Advisory Committee on Handicapped Children" who were asked by the Secretary of State whether any guidance was required by local authorities on the education of children suffering from dyslexia. The committee under the Chairmanship of Jack Tizard, Research Professor of Child Development at the Institute of Education, included Professor Graham, as well as the ILEA Staff Inspector for Special Schools, an organiser of an advanced diploma course for teachers of "educationally sub-normal" children and a paediatric neurologist. I dwell on the qualifications of this committee because they were all influential and prestigious members of the medical and educational establishment and this Report was widely regarded as the definitive view. In the 1980s there was considerable agreement with it and even now it is not totally irrelevant. It is perhaps surprising that the London Borough of Hillingdon did not produce it in their defence in the Phelps case. I shall discuss this later. (Chapter Four)

The Report emphasised the notion of a

> continuum spanning the whole range of reading abilities from those of the most fluent readers to those with the most severe difficulties. (para 8, p 3)

and warned of

> a danger that attention would focus on the group assessed as "dyslexic" to the disadvantage of those with perhaps equally severe difficulties but who happened not to be so assessed. (para 8, as above)

The authors preferred (as many still do) the term, "specific reading difficulties" as a more usefully descriptive term

> to describe the problems of the small group of children whose reading (and perhaps writing, spelling and number) abilities are significantly below the standards which their abilities in other spheres would lead one to expect. (Para 9)

The Report recommended systematic screening for reading "disabilities" at 7-8 years old. This can be compared with Clay's procedure discussed later. Withdrawal of children with reading difficulties from school in order that they might attend specialist "dyslexia" classes was not generally recommended because they would be missing valuable time in school and essential parts of the curriculum. The suggestions for helping these children in mainstream school sound pretty up-to-date; for example, plenty of oral work, including use of tape-recorders, and use of typewriters (only now it would be computers) where handwriting is a particular problem. (para 20).

The Report called for research and dissemination of best practice, and for better use of specialist teachers in ordinary schools, also suggesting that LEAs should

> review their provision for those who leave school without adequate reading skills. Such provision should include arrangements for a fuller investigation of those who present unusual problems. (Para 25,ix, p8)

This report has been important in the debate about dyslexia, and, together with the Isle of Wight study, it influenced the legislation which followed the Warnock Report. (See Chapter 3) It is perhaps ironic that this committee, with considerable *medical* expertise, chose an *educational* descriptor (specific reading difficulties) rather than a *quasi-medical* one (dyslexia.) I note later that the British Dyslexia Association has always insisted that

dyslexia is an educational and not a medical term. Nevertheless parents in my case studies told of their relief when dyslexia was "diagnosed," as if it were a medical condition.

Pedagogy of the Oppressed

Another book seems as fresh now as it did when I first read it in 1974. The title "Pedagogy of the Oppressed" (Freire 1973) was attractive at a time when primary schools were beginning to throw out the old rows of desks and classrooms were becoming more like workshops where children would be guided towards learning activities that interested them. The links between disadvantage and learning difficulties are now well established, and Freire reinforced the notion (which student teachers in the sixties were encouraged to embrace) that learners are not merely passive recipients or empty vessels waiting to be filled with knowledge. His ideas were framed by the peasant culture of Latin America in which he worked but they are of universal relevance, particularly in the context of the view that *the* definition of *disability* can be seen as a form of oppression. But the reason I include Freire here is that his work is an example of the discourse of the rights of children, emerging in the seventies, with the corresponding notion of the duties of teachers and other professionals. The language of rights and duties, and the relationship of educational need with law and justice are an integral part of my theme. I look at this view in more detail later. (p 25) All pupils, including those with special educational needs, make the best progress when they are actively interested and involved in their learning. This is particularly emphasised in the proposals for pupil involvement in the new Code. (DfEE 2000)

"Fifteen Thousand Hours" and "The Early Detection of Reading Difficulties"

Two other books had a significant impact upon the way the discourse on special educational needs was to be structured even though the term special educational needs was

not used in these publications. "Fifteen Thousand Hours" (Rutter, 1979) appeared at the same time as the Warnock Report, and documented research funded initially by the Inner London Education Authority (ILEA) and later (from 1975) by the Department of Education and Science. This study "had its roots in a comparative survey of children in an inner London borough and children of the same age with homes on the Isle of Wight," a follow-up of the study already mentioned, the results of which had been published as articles. (Rutter et al. 1975 a & b) It does not mention special educational needs as such, but Rutter wanted to find out if it really mattered which school a child went to, and which features of school were important. He assembled a multi-disciplinary team with the expertise of social work and social administration, teaching and educational psychology, developmental psychology and statistics. The work does not use the term special needs, but attempted to measure the numbers of "behaviourally difficult or low-achieving children" (p177) admitted to the schools studied to see whether this could account for variations in later behaviour and attainment. One conclusion was that it could not wholly account for such variations. Despite many criticisms of the selection of data, and the claim that the main conclusion (that schools can and do make a difference to children's life chances) is obvious and bordering on the banal, this book can be seen as the foundation stone of the school effectiveness debate, and indeed, of the idea that mainstream schools could be inclusive places.

Rutter nowhere states that his conclusions should change practice. Indeed in a reply to his critics (Burgess 1980) he said that it was not primarily policy research, despite being funded by the DES and the ILEA, but that he wished to describe what schools were like as social institutions. Nevertheless it was generally *seen* as "policy-orientated," and helped to encourage the metaphor of a school as a production function, with inputs that directly

affect outputs, both of which can be measured, a view which contributed to the acceptance of the idea of continuous "audit" and, for example, league tables for schools.

Rutter and the medical members of his team, used to dealing with patients, who are "treated," perhaps tended to see pupils as resources to be managed rather than agents in the process of their own learning. This view is typical of the "medical" model of special educational needs, which will be discussed in greater detail later.

The second book, "The Early Detection of Reading Difficulties," (Clay 1975,) also does not mention special educational needs as such, but is concerned with a research project that set out to do something that Rutter and his team were not able to do, that is, to change inputs and measure the change in outputs As Rutter says, (p 180)

> firm conclusions can only come from controlled experimental studies. The only way to be sure that school studies actually influence children's behaviour and attainments is to alter those practices and then determine if this results in changes in the children's progress.

This is precisely what Clay set out to do. Working in New Zealand, she was interested in a crucial pedagogical question, that is, how children learn to read, and how best to promote that learning, particularly with children who find it hard to get started. She carefully observed and documented the reading behaviours of children, and then applied that knowledge to devising a way of locating children who would benefit from specially prepared programmes, as well as developing a set of procedures for those programmes. She compared the results of the intervention with those of a control group, and her conclusions were that her methods were effective with children with a variety of reading problems, whether they were second language learners, or children with specific learning difficulties due to organic or neurological problems or to event-related difficulties. It is interesting to note that Clay's procedure, "Reading Recovery," does not rely on a medical

model of special educational need. The use of the word *recovery* implies that *something* has been lost and needs recovering, that *whatever-it-was* was there in the first place. Children can lose their "initial reading skills" (Clay, 1972, p10) or "stray off into poor procedures" (p11) Clay does not favour the notion of dyslexia, but develops the idea that there is a multitude of reading skills which need to be mastered and difficulties can usually be overcome by attention to the missing skill.

Thus there is a clear procedure for discovering how far each six-year-old child (for convenience, as near as possible to the sixth birthday) has made progress in the process of learning to read and write. Anyone who scores below a certain level is given extra intensive support for a specified period of time, usually with good results. The approach is that most children can learn to read, given the appropriate tuition. Although the emphasis is on individual achievement, ideally the programme is inclusive, in that it depends on a limited period of withdrawal, and everyone below a certain level of achievement is entitled to join it. (Clay, 1972, p 106)

Clay argued for changes based on a critique of practice and her methods grew out of a celebration of best practice. The utility of Clay's methods can only be dismissed on financial grounds. Its effectiveness is not in doubt, but the expense of training Reading Recovery teachers and the small numbers of pupils that can be taught by each teacher at any one time, means that a great deal of expense is incurred at the beginning of a programme. Prevention is better than cure, and it has been shown that this saves money on extra help later on, (Wade and Moore 1993) but nevertheless Reading Recovery is not generally seen as a financially viable solution to the vast problem of sustained and intractable illiteracy.

Schools and local authorities who are committed to it believe it saves money in the long

term, but it is initially expensive and labour intensive with daily individual sessions, and the official DfEE line seems to be that the National Literacy Strategy will improve reading standards without the need for Reading Recovery.

For our purposes, however, the emphasis placed on parental involvement is important, the enabling of parents to become active participants along with their children. Meeting with one Reading Recovery teacher can be far less intimidating for parents than a meeting with several professionals to draw up an Individual Education Plan. (IEP)

I include this here as an alternative strand in the debate of how to improve the lot of those children who have needs that are either temporary or not sufficiently serious to warrant a Statement. (This term is discussed in Chapter 4.) Clay's work seems to fall outside the main body of Special Education literature, and her work was only just beginning to receive international recognition at the time of the Warnock Report, but nevertheless it has had a profound influence on teaching methods. Indeed the National Literacy Strategy draws some of its inspiration from this work. "Reading Recovery" has been used as the basis for programmes for raising standards of literacy throughout the English-speaking world. (See eg Pinnell et al, 1988, & Wade and Moore, 1993)

An international perspective

Viewed from an international perspective, the Warnock Report can be seen as part of a general trend in the developed countries towards a more liberal and humane attitude towards "special education" which led to the UNESCO Salamanca World Statement on Special Needs Education 1994. For example, Weatherley (1979) investigated the problems of special education policy implementation in Massachussetts, and showed how legislation was in itself insufficient to achieve social objectives (the improvement of services for *handicapped* children.) Weatherley (p51) describes the "Core Evaluation

Process" (very similar to the current UK statutory assessment process) which involves an interdisciplinary team drawing together "information about the home situation, class performance, intellectual functioning, emotional adjustment, and skills of the child." Parents join with professionals to assess the child's problem and to prescribe a plan, an "Individualised (sic) Education Program." Weatherley was struck by the way parents, especially less well educated parents, were disadvantaged by this process. He pays attention to the role of jargon and the importance of language in excluding parents from the decision making process, and the hidden agendas and political bargaining in these assessment meetings. He uses Lipsky's concept of *street-level bureaucracy* (1976) ro interpret the assessments as the "locus of a bureaucratic struggle over power and status, control of time, money, staff and other resources." Control over resources at *Street-level* gives discretion to local professionals to interpret and adapt national policy to suit local needs with perhaps unintended outcomes.

This study provides an interesting starting point for an investigation into the way the education bureaucracy works here. Little seems to be different on this side of the Atlantic twenty years later. According to a report by the Centre for Studies on Integration in Education (CSIE 1986) Massachusetts was ahead of the UK in the implementation of special needs legislation leading to greater parental involvement. This report quoted the experiences of a family who went to Massachusetts with their child who had learning difficulties. They described how their desire for an integrated education was viewed positively in the States, whereas they had a battle with the LEA in the UK and were made to feel that they were difficult parents. Their experience might be compared with that of the Phelps family, (see Chapter 4 & Appendix 5,) whose request for a special school place for their daughter in 1985 was dismissed by all the professionals involved.

Post-Warnock literature

The Post Warnock literature on Special Educational Needs falls into several categories. First there is the theoretical educational literature, which challenges attitudes towards Special Educational Needs and either examines ways forward in promoting inclusion or justifies the status quo and retention of the whole structure that exists to service the SEN "industry." Most of this literature seeks to influence policy and practice.

Secondly, there is a growing literature on the legislative and administrative structure for Special Educational Needs. As I shall show later, (in Chapter Three) there has been a huge increase in the involvement of the State in education especially since the 1988 Education Reform Act, leading to many conflicts of interest between individual and state. This is in spite of the principles of freedom of choice, accountability and "market forces" which were all part of the rhetoric at the time of the ERA. Since then there has been a whole range of tensions between central and local government and between individual interests and the interests of the community, which affect special needs issues as much as any other area of education.

Thirdly there are the specialist books providing practical help for people involved in implementing the Code of Practice in schools, for example, "The SENCO Handbook," (Cowne, 1996) books of advice for parents, (Chasty & Friel, 1993) and books for solicitors advising parents or local education authorities (eg Friel & Hay, 1996) These categories are by no means mutually exclusive, but they could be matched with Mittler's sections on "Policy, Practice and Attitudes," in his book (1996) in honour of Stanley Segal, (who was largely responsible in persuading the government to set up the Warnock Committee, and was an energetic advocate on behalf of children and adults with special educational needs.) I shall discuss some of the contributions to this book later in this chapter.

Theoretical educational literature; philosophy of SEN

There are many recent books which bring together the ideas of several writers on a single theme to contribute to theoretical educational debate. One of these themes is equity and the balancing of concern for the child with special educational needs against the needs of other children in schools and the wider community. For example, Lindsay and Thompson (1997) have brought together a number of articles by various writers who explore the values which underpin the debate about inclusion. They admit that people may have different priorities according to their personal perspectives, for example their religious or secular beliefs. They, like many writers, explore the various models of disability and need, describing the *Deficiency or medical* model, where the need is seen to come from within the child. This is compared with the *interactive needs* or Warnock model where the difficulty is viewed as the result of the interplay of various factors, including the child's strengths and weaknesses, their constitution, experiences and family and the influence of the environment, resulting in specific needs, the satisfaction of which will lead to an improvement in life chances. I shall consider these models, together with the *social* model, in more detail in my chapter on the concept of need.

Disablement and discrimination

The social model sees *disability* as a form of oppression or discrimination, concentrating on the uncongenial environments and hostile attitudes which contribute to disablement. This is similar to the view taken by Corbett (1996) which I look at later, but there are limitations to the comparison of disablement with other kinds of discrimination such as racism and feminism. People do not change their gender or colour, but they do wish to change attitudes and roles. An example of helping the deaf child to hear being a positive change is perhaps an unfortunate one in view of the debate about signing and cochlea

implants, and the notion that there is a hard-of-hearing community with its own language and culture. But the point is valid and is expressed in a more poignant way by Zola (1993)

> With the rise of black power a derogatory label became a rallying cry, "Black is beautiful. And when women saw their strength in numbers, they shouted, "Sisterhood is powerful." But what about those with a chronic illness or disability? Could they yell, "Long live Cancer," "Up with Multiple Sclerosis," "I'm glad I had Polio," "Don't you wish you were blind?" Thus the traditional reversing of the stigma will not so easily provide a basis for a common positive identity. (p168)

Contemporary novels often provide insights into various aspects of this theme. The point is made very forcibly by Kingsolver in her novel about a Baptist missionary in the Congo. The story is told by his wife and daughters, and the disabled daughter comments

> The arrogance of the able-bodied is staggering. Yes, maybe we'd like to be able to get places quickly and carry things with both hands, but only because we have to keep up with the rest of you..... We would rather be just like us and have that be alright. (1998, p491)

The voice of the disabled adult is more easily heard than that of the child. Allan (1999 p1) notes that

> the voice of the child is totally absent from most accounts of special education, silenced by professional discourses of needs which are concerned with matters of placement or practice.

She sets out to remedy this by looking at eleven pupils being integrated into mainstream and uses Foucault's ideas to discuss how individuals become the subjects and objects of knowledge and power. She shows how mainstream pupils are involved as "gatekeepers of inclusion", in that they assume a protective concern and a pedagogic role, policing the conduct of their peers with special educational needs. Her work is important in that it reminds us not to neglect the identity and individuality of children with special educational needs. Nevertheless it can be said that defining *needs* as *special* creates dependency. Armstrong claims that *Equal Opportunities* may be a "bogus discourse" where there is tension between

> a public rhetoric of equal opportunities, and government policies which in all areas of life are deepening inequalities rather than reducing them. (Armstrong & Barton, 2000, p 5)

He continues (p 11) by arguing that disabled people are

> disempowered by the discourses of "welfarism" and "benevolent humanitarianism" because a model of "care" is substituted for the struggle against the political and social processes of oppression.

He argues that targeting groups for equal opportunities suggests difference, but he does not show how the Race Relations, Sex Discrimination and Disability Legislation work in practice, or how courts reinforce or minimise those differences. This would be an interesting area for further research. The Special Educational Needs Legislation, as we shall see in Chapters Three and Four, certainly has this effect of reinforcing difference. At the same time, the vast investment in the National Curriculum and rigid assessment procedures sharpened the processes of selection and ranking.

These notions sit somewhat uneasily with concepts of equality, equity and justice, which are, after all, what the law is supposed to upheld, by legislation and the process of the courts. Parents and their children with special needs are disempowered in many ways, not least by the discourses in which they cannot participate, until or unless they are initiated into those discourses. My own case studies, discussed in Chapter Six, as well as the legal cases which have gone through the courts, (Chapter Four) show the varying success of parents in accessing the discourse of Special Educational Needs, whether in the medical, legal or other sense.

Separate or integrated?

I refer to Ainscow's work later when I consider the concept of inclusion, but his early work "Preventing Classroom Failure" (1980) was in the forefront of the debate, bringing some of the ideas and principles used by teachers in special schools to the attention of

mainstream teachers. Throughout the eighties the debate about the National Curriculum and integration led to a great number of thought-provoking publications which influenced official thinking, and especially the publication of "A Curriculum for All," produced by the Special Educational Needs Group for the National Curriculum Council. (1989) This produced cogent arguments for inclusion as well as giving valuable guidance to teachers on differentiation. In the same year, Roaf and Bines, among others, questioned the usefulness of the concept of special educational needs, noting that

> the language and concept of special educational needs have not overcome all the difficulties of terminology in special education, nor has the apparent potential change in provision and curricula been realised. ... despite intentions to limit stigma and labelling, it has become a new euphemism for failure. (Roaf & Bines, 1989, pp 6-7)

These two writers argue that teachers should be advocates for children's educational rights, and that schools should live up to their popular image as

> places of opportunity for children where they will be free from the limitations which can be cause by disadvantage and be various forms of privilege and unfair discrimination. (Roaf & Bines, 1989, p16)

They acknowledge that in race and gender issues a perspective of equality of opportunity

> has had to be strengthened by policies emphasising the active reduction of prejudice and unfair discrimination, through the courts...

Nevertheless recourse to the courts is rarely mentioned in the literature as a means of righting educational wrongs caused by tensions between basic social values and assumptions about individual differences.

Norwich (1994) looks at differentiation from the perspective of resolving the above tensions. He compares the negative view of "'difference' indicating lower status and perpetuating inequalities and unfair treatment" with the positive one of seeing learning and development needs as relevant to an individual. He acknowledges the dilemma of group

goals and distribution of resources; whether one should concentrate on improving average attainment or helping the most able or those with SEN. He also draws attention to the potentially conflicting educational philosophies of the Free Market and the Audit Society, the former leading to local financial management of schools and grant-maintained status and the latter to tighter control via OFSTED and the National Curriculum. He is critical of the Education Acts of 1981 and 1993 which created new structures (which I shall discuss in more detail in another chapter) but failed to address the problem of allocating extra resources to finance those mechanisms properly. By diverting resources from LEAs to, for example, the Special Educational Needs Tribunal (SENT), there is inevitably less cash for the support of children in ordinary schools.

The increased recourse to the courts as a means of redressing educational grievances has the same effect. LEAs will need either to pay increased insurance premiums, or (as is the practice in some larger authorities) to set aside monies to insure themselves and their employees against, for example, liability in negligence. This is relevant to my theme of resource allocation and its importance in decision-making, as well as the focus on legal aspects of special educational needs.

Inclusion

The theme of *Inclusion* is explored by many other writers and is implicit in much of the above. Croll and Moses (1998) take this as their topic, examining the reasons for the promotion of inclusion and its implications. They show that the process of inclusion has been slow and uneven, since it implies the reorganisation of schools to offer the appropriate provision. There is a suspicion that it might be seen as a cheap option; in 1990-1 a place in a special school cost four times the cost of a mainstream place. (Audit Commission, 1992a) Norwich's analysis of the statistics of school placements (1994) showed that there

was considerable variation in LEAs' provision. A child in Lambeth was six times more likely than one in Barnsley to go to a special school. (Norwich, 1994, p3) He found that between 1991 and 1992 there was a slight increase in the percentage of special school as against mainstream school places. There was great variation in the proportion of children with Statements in ordinary schools; for example in East Sussex 11.4% of these pupils were in ordinary schools; in Cornwall the figure was 83.7%. Of ten LEAs which had the lowest percentage of children in special schools six had the highest proportion of children with Statements in ordinary schools. Norwich concluded that while it was possible to draw comparisons between local authorities, it was difficult to interpret the significance of these differences (p10) which were due to different levels of social and economic disadvantage as well as different policies and practices. More up-to-date figures (DfEE 1999) show that the proportion with Statements has increased from 2.5% of all pupils in 1994 to 3% in 1999. The number of pupils (with or without statements) in special schools has decreased in total from 93,429 in 1994 to 93,085 in 1999, not a very substantial drop, but of course the total number of pupils rose. If we look at the percentages a different picture emerges. In 1994 43% of pupils with Statements were in special schools, whereas by 1999 the percentage had fallen to 35%, which might suggest a trend towards inclusion, but might also be due to the "success" of schools and parents in obtaining Statements for pupils with less serious needs in mainstream schools.

The Special Needs Tribunal hears many cases against LEAs refusal to grant a special school place, usually non-maintained, (SENT 1995) but parents wanting mainstream for their children can also be thwarted by bureaucracy. Croll and Moses discuss the pragmatic view that a range of provision is needed to meet the individual needs of children, showing how the values of rights and equal opportunities conflict with parental rights and parental

choice. In Newham a Labour Council with no opposition were able to implement a fully inclusive school system, fuelled by an ideological conviction that inclusion is superior. This meant that parents' wishes were subordinated to the political will of the Labour group and some children had to cross borough boundaries, as indeed they do in most authorities, to find appropriate provision. An interview with Graham Lane, Chair of Newham's Education Committee, (Griffiths, 1999) follows up these points in a somewhat idealistic tone. I shall consider this in greater detail when I look at inclusion in a later chapter, as part of my discussion of the concept of need.

Partnership with parents

Warnock is seen as a promoter of parents as partners but there is little doubt that the committee thought that decisions should be left to professionals, the view that parents had special knowledge of their children and professionals need access to this knowledge to make informed decisions. Warnock admitted in her Dimbleby lecture (1985) that

> parents cannot be equal to teachers in educational matters if teachers are to be regarded as true professionals. Even though educating a child is a joint enterprise involving both home and school, parents should realise that they cannot have the last word.

This is quoted by Armstrong (1995, p17) in his study of 29 children with emotional and behavioural difficulties in 3 LEAs. Looking at the involvement of parents, he says there is a contradiction in the professional/client relationship "that the concept of partnership does little to address." Participation in the decision-making process "serves ... to legitimize their dependency" (p 2) and as Allan argues (see above) children also are still generally excluded from this process. Armstrong's work is an example of a research project which looks at events, roles and relationships in an attempt to clarify and develop the rationale for improving communication and parental empowerment.

Wolfendale's publications over many years have emphasised the importance of involving and supporting parents and her latest contribution (Wolfendale & Bastiani, Eds, 2000), discusses how parents can contribute to school effectiveness. She argues that, as in social and health care,

> educational innovations in the home-school realm should in future be premised on 'what works' or in other words, evidence based practice. (EBP) (p 4)

She continues by saying that we ought to be continually

> adding to the stockpile of what works, and what does not, leading us to more sophisticated research and practice methodologies .... and a range of rigorous studies into what works. (p 4)

She suggests various ways of discovering what works, for example, auditing present practice, and using analytical and problem-solving techniques. The methods she details could be applied in most areas of research, not merely parental contributions to school effectiveness.

Legislative and administrative structure, official documents

The Warnock Report itself makes fascinating reading as a preliminary to later developments, and whilst many writers are critical of the detail or the legislation that resulted from the Report, most accept that it had a profound affect on the discourse, structure and delivery of education for children with special needs. The various Acts are also part of the discourse as are the Hansard Reports of the debates in both Houses of Parliament. Since the involvement of the State in education has increased so dramatically in the last forty years, so has the volume of literature produced by government departments and other agencies or quangos (Quasi-autonomous non-government organizations.) The

DfEE in its various guises (DES/DfE) has also produced a large number of circulars and other publications, for example, the consultative document on "Access to the System" (DfE 1992) which provoked a response from various SEN groups such as the Council for the Disabled Child. These groups set up the Special Education Consortium as a lobbying group to influence the 1992 Education Bill, which became the 1993 Act. At the same time the Audit Commission (1992 a & b) produced two publications with quasi-humourous titles. "Getting in on the Act" was a description of how schools were dealing with special educational needs; "Getting the Act together" looked to the future and was more prescriptive, in the form of a handbook. The pun-in-the-title continued with "The Act goes on" (Audit Commission, 1994.) This looked at the funding of Special schools and the commitment to resourcing mainstream schools to take children with special needs, so that funding follows them and it is not seen as a cheap option.

The 1993 Act was followed by a large number of circulars and, of course, the Code of Practice, (1994) and the 1996 Act, which gives the most recent official definition of Special Educational Needs, which we will consider later. The Code of Practice (1994) is an example of a government document which LEAs have to "have regard to", although it does not have the force of law. One peer apparently commented (Wedell, p71, in Mittler, 1996) that "he had regard to many documents before throwing them into his waste-paper basket." All schools, so far as we know, have attempted to implement it, fearing "special measures" or worse if they do not, and voices raised in protest in staffrooms during discussions on Special Needs Policies do not seem to have had much effect. The creation of a new "breed" of professional/bureaucrat, the special needs co-ordinator, has not been resisted, but rather, welcomed, and a whole new literature has been spawned. The only protests here seem to be those of the SENCOs themselves, saying that they are not given

enough time or status to do the job. (Gibson, unpublished research)

The Labour Government's White Paper "Excellence in Schools" was followed by a separate Green Paper for Special Educational Needs in 1997, setting out targets for 2002. This supports *inclusion* and early diagnosis, gives emphasis to working with parents and promises to develop the skills of all concerned. A whole section is devoted to emotional and behavioural difficulties, recognising that this is one area where the principle of *inclusion* is frequently challenged. These ideas are followed up in the new Code of Practice. (DfEE, 2000)

OFSTED itself has access to huge amounts of data on schools, produced for the purpose of inspection, and from time to time it publishes reports on particular topics, such as "Promoting High Achievement for pupils with SEN in Mainstream Schools" (1996) and its supplement, "The Implementation of the Code of Practice" (OFSTED 1997) which looked at the way schools were coping with special needs. It is a tribute to schools and teachers to note the extent to which the Code of Practice has been accepted and implemented.

The introduction of the Code of Practice (1994) and preparations for OFSTED inspections under the 1992 Act were, as OFSTED itself admits (p14) two external pressures which "have helped to concentrate minds on the place of special education within the school."

OFSTED's more recent long-term review of special educational needs in primary schools (1999) reports the inspectors' general satisfaction with provision. It notes problems with time constraints for SENCOs and the difficulties of fitting in planning, particularly with learning support assistants. Also changes in the organisation and funding of health authorities

> has left schools very confused as to who is responsible for (funding)

> provision....for support of pupils requiring physio- or speech- therapy. (p89)

It is also clear that

> many schools could not provide detailed information about their funding arrangements for SEN, often due to unclear information from the LEA but more frequently because the school itself did not have a clear rationale for the proportion of its funds which should reasonably be spent to support its pupils with SEN (p89)

Theory and practical help; books for parents, teachers and lawyers

Few would quarrel with the common sense notion that children do better if their parents are supportive of the school and interested in their education. Wolfendale has written widely on the benefits of parental involvement (1992) with Bastiani (1996), and describing parent-partnership schemes. (1997) Hornby (2000, published since I carried out my fieldwork) not only cites his own experience as justification for encouraging parents to be involved in their children's education, but quotes a number of studies that purport to show the benefits of different kinds of parent involvement, mostly from the United States. Topping and Wolfendale's work (1985) is a UK example of this for children's reading development. In a recent article, Ballantyne (1999) spells out other positive outcomes of parental involvement, but most of the literature quoted by Hornby is intended to provide teachers with the "knowledge necessary to build effective relationships with parents" (2000, p22) rather than convincing them that it is worthwhile to do so.

Hornby has developed a model in "the process of coming to terms with a child's special needs" which he has found useful

> both for helping parents to talk about their reactions and feelings, and for increasing teachers' awareness of the process which parents may be going through. (p101)

Hornby considers the perspective of family systems and the impact of one child's special educational needs on the rest of the family. From this he moves on to look at an

"Ecological model of family functioning" which he adapts from Bronfenbrenner (1979) showing how families may move through a series of stages from denial to acceptance of their child's special educational needs.

Hornby's book is written mainly for teachers, urging them to make use of parents and emphasising the value of so doing, without describing in any detail, except by way of anecdote or secondhand, any real evidence that this is the best way to proceed.

Phillippa Russell, on the other hand, although herself a parent of a child with severe learning difficulties, manages to speak for parents of such children in general, avoiding a personal anecdotal approach. From her point of view parents *are* involved, but what they need is empowerment. She presents a wider spectrum of evidence in a variety of publications. An example of this is her contribution to the book of essays in honour of Stanley Segal, already mentioned. Russell (1996) describes the way the Younghusband Report "Living with Handicap" (1974) was produced. She comments that this was

> the first attempt to identify the weaknesses and strengths of families caring for a disabled child by actually asking the consumers first.(p 74)

Russell is positive and hopeful that "increasingly families with disabled children or adult members can expect to see themselves as 'citizens' rather than 'patients'. As Director of the Council for Disabled Children she has been at the forefront of the lobbying activities of the various parental pressure groups seeking better services. These essays (Mittler 1996) as I have already noted, are grouped under the headings of Changing Policies, Changing Practice and Changing Attitudes, recognising that these three dimensions do not always happen together. One of them might be changed without necessarily changing the others.

Other contributions to this collection give "eye witness accounts of a number of attempts

to influence policy and practice" in the field of services for people with learning disabilities, including a reflective piece by Mary Warnock, to which I will refer in detail later. It is worth noting at this stage that Warnock, with hindsight, thinks that her committee

> should have been more ready to insist on what we all knew (but what which is perhaps more generally acknowledged now than then,) namely that some kinds of social deprivation produce, by themselves, special educational needs, which can and must be met (p56)

They were

> concentrating too exclusively on special needs arising out of .... medical rather than social conditions.

Wedell's chapter (pp 61-72) discusses Education Legislation to 1994 and notes that the Code of Practice (1994) places "major emphasis on schools themselves recognising their responsibilities" ..... "in ensuring provision for the broad range of pupils' SENs." He comments that this "downward delegation of responsibility is a standard way of passing on the blame for inadequate provision resulting from inadequate funding." This book of essays is part of an interesting trend, which I have noted at the beginning of this section, where authors draw together articles from various sources, often reprints from periodicals.

Specialist journals and other publications

The British Journal of Special Education began publication in 1973, as a forum for the exchange of ideas on theory and practice in special education. This is only one of many specialist journals, including the educational psychology and the child and adolescent psychiatry press, that have contributed to the many debates in this field. By 1994, according to Bassey (1995), there were "over two hundred journals reporting on different aspects of educational research and at least fifty books a year published on research findings.." (p34) Since then the number has probably increased and of these a significant number are specialist publications on Special Educational Needs. The British Journal of

Learning Support started publication in 1985. The DfEE and its various quangos, as already noted, such as the School Examinations and Assessment Council, (SCAA) the Office for Standards in Education (OFSTED) and the Curriculum and Qualifications Authority (CQA), have produced a large number of publications.

The amount of legislation that has been produced in the last ten years has greatly increased the involvement of the law in education and has led to the creation of the Education Law Association and the publication of the "Education Law Reports." The publisher of the latter has just launched (July 2000) the Education Law Journal "covering the whole range of issues in education law" and examining "key issues such as special educational needs." (From Jordan's promotional leaflet.) This leads us to the specialist publications on legal aspects of special educational needs.

Legal aspects

There have been at least two specialist books published recently to acquaint lawyers with the latest developments in the field of special educational needs and the law, both written by practising lawyers, and covering much the same ground. Oliver and Austen (1996) note that "education law is a growing area" ... "where boundaries and limits are constantly being tested and extended" (pvii) Their book is intended to help governors and SENCOs understand their obligations and responsibilities under the law, and to help parents through "the maze of procedure and regulation." Although it seems likely that only well-educated and literate parents would be able to find their way by using the book there is a very useful appendix (eight and a half pages) of "Other useful addresses" which would point the parent in the direction of helpful voluntary organisations and parent advocacy schemes. The Special Educational Needs Tribunal has produced a simpler, shorter booklet (DFE, 1995) which has five pages of useful addresses.

Friel and Hay(1996) have produced a book with similar explanatory objectives which is aimed more directly at lawyers, social workers and local education authorities. Both books are practical and descriptive with very little comment or discussion, but with extensive reference to both statute and case law. Only Friel and Hay are slightly critical of the Code of Practice, commenting that

> "it is silent on the issue of what happens if a child has special needs but where provision is not being made at the school or the local education authority has not the resources available or these are not made available."(p 16)

They also feel it is unrealistic to expect ordinary schools to have experience in many areas of disability. Another guide for parents, "Taking Action," has been produced by the Independent Panel for Special Education Advice (Wright and Poynter, 1996) which attempts to be more user-friendly with large type and a list of the forty most common problems which face parents. It aims to cut through the jargon and guide parents through the procedures. Nevertheless, they are silent on the issue of help for those parents who do not access the procedures, either because those parents have English as a second language, or because they do not recognise that their child has a problem, or even because the parents themselves have special needs.

Chasty and Friel's earlier book (1993) is mainly aimed at the parents of children with "specific learning difficulties," which term has been generally preferred to "dyslexia", largely as a result of the Tizard Report, (1972) already mentioned. The Education Act 1981 altered the "established expectations for children with specific difficulties in learning." (Chasty and Friel, 1993, p 24) The chapter on appeals draws attention to the serious delays caused by the old system, a fault that has to some extent been redressed by the creation of the Special Educational Needs Tribunal (SENT.) Chasty and Friel also make the point (p 29) that a school's perspective of a child's needs is group-based and if a child

conforms to the standards of the group s/he will not be seen to have special needs. Parents will have a different perspective and will be "very perceptive about their own child's rate of skills acquisition." This may be more likely to be true of the parents of dyslexic children encountered by Chasty as lecturer at the Institute for Dyslexia than for working class and ethnic minority parents. The latter find it far more difficult to take action. Some of their children might also be dyslexic, but these parents might not be aware that they could access help from the Dyslexia Association. I return to this point when I discuss my case studies.

The review of the first 20 months of the SENT carried out by Harris (1997) is subtitled "Access to Justice" and this is the primary concern of the book, to assess how far the SENT plays an enabling role towards parents and children. Harris found that 60% of the parents who responded to his questionnaire felt that the proceedings were easy to understand and 88% thought the procedure was efficient. The research found that parents benefited by being represented at tribunal hearings but that the effectiveness could be improved. A number of LEAs claimed that the new system was biassed in favour of parents and diverted scarce resources to children with successful appeals, "leaving less for special education as a whole." (Harris 1997, p 197)

In a survey carried out by the Independent Panel for Special Educational Advice, 29% of parents had paid an average of £100 for an assessment of their child's needs, which confirms the difficulties faced by parents on low incomes. (Harris 1997, p 102) The majority of respondents to the author's survey were middle class and he comments on the massive under-representation of ethnic minorities among appellants and these two points raise serious questions about access to justice for working class and ethnic minority parents and their children.

Harris notes the comment of the SENT President that "the Tribunal's workload appears to be disproportionately (in relation to the incidence of other disabilities) concerned with dyslexia,"which is interesting in the light of the comments of Galloway, Armstrong and Tomlinson (1994 p 4) that "parents of children with special needs" particularly those with dyslexia or emotional or behavioural difficulties, "now have greater access to reliable information and high quality support from voluntary groups than at any time in the past." An outstanding example of this is the success of the British Dyslexia Association in promoting awareness of dyslexia, backing it up with help for parents and adults, and training for teachers.

Summary

Several themes emerge from this literature review. Each piece of literature has been specifically chosen for its contribution to the various discourses of Special Educational Needs. Indeed it is part of my contention that the variety of these discourses, and the lack of agreement and interaction between them, makes it more difficult for laypeople, for instance parents, to be involved. It also shows the difficulties in finding a universally acceptable definition of Special Educational Needs. The estimate that one fifth of children might have special educational needs at some time during their school career emerged from the Isle of Wight study and was given official approval by the Warnock Report. The debate about the nature of literacy difficulties was shaped by the Tizard Report and developed by Clay. Rutter's "Fifteen Thousand Hours" reinforced the notion that there were certain features of schools that made them effective and the numbers of "behaviourally difficult or low-achieving children" admitted to a school did not necessarily influence outcomes. Both these researchers (Rutter and Clay) provided evidence that influenced the debate about integration and inclusion. The Warnock Report came at a time

when attitudes towards special educational needs were changing throughout the developed world.

The *Inclusion* debate and the various models of special educational need are developed in the literature, with the idea of discrimination coming to the fore. Inclusion is seen as a way of combatting discrimination, but there is tension between the needs of the many as against the needs of the few which has implications for the allocation of resources. The setting up of administrative structures for Special Educational Needs and the greater involvement of the law in education has been counter-balanced by attempts to involve parents more fully in the process. The creation of Parent Partnership Schemes and School Home Liaison Projects has undoubtedly assisted many parents to be more effectively involved and may in many cases help to prevent recourse to the courts. Nevertheless, there is little or no reference in the educational literature to the role of the courts in interpreting and enforcing the law, whilst books by lawyers are mainly directed at LEA officers and articulate parents, reinforcing the notion that educationalists and lawyers have too little common ground. These points will be explored further in relation to the case studies.

Finally, this review of some of the most recently published sources suggests that there may be a split between the *normative* and *comparative* views of need represented by the LEAs and schools, and the *felt* and *expressed* forms of need, experienced by children and their parents.

These forms of needs will be discussed in greater detail in the next Chapter.

Chapter Two

The Concept of Need

This chapter further develops the ideas introduced in the last one and begins by examining the philosophical and social policy background of the idea of *need* and the way it has been used as a mechanism for the distribution of resources. I take the dictionary definition of "need" to mean a want of something that one cannot do well without or a condition requiring relief. (Eg Chambers) I introduce Bradshaw's taxonomy of need (Bradshaw, 1972) and adapt it to suggest that professionals use a *normative* and *comparative* concept of need when taking decisions about a child's needs, whereas parents use a *felt* or *expressed* concept of need. The terms rights and needs are often used interchangeably. I analyse more closely the theories and models of need that exist in the educational discourse and the way the language and labels have changed, with the statutory definition of Special Educational Needs (Education Act 1981). This leads to a discussion of the concept of *inclusion* and the implementation of the Code of Practice, (1994) and the chapter ends with a brief look at the needs of ethnic minority parents.

The philosophical basis of the concept of need

Most commentators on the concept of *needs* seem to argue that *needs* are similar to *wants* or *desires* but are somewhat more objective than either of these. Human needs might be defined in two categories, needs for *survival* and needs for *autonomy*. (Doyal and Gough 1984)

The first category might be called absolute need, but even what is needed for survival can be relative, and related to the standards of each society or community at a particular time. Since the concept is essentially qualitative, it is as difficult to measure needs objectively

as it is to measure wants and desires. Human needs for survival were defined in a basic but negative way by Beveridge, using the term *want* to mean economic deprivation;

> But *want* is one only of five giants on the road of reconstruction and in some ways the easier to attack. The others are *Disease, Ignorance, Squalor and Idleness.*" (1942, p6 para 8, my italics.)

Definitions of the need for autonomy, on the other hand, are central to the concepts of human rights, which could be traced back to Rousseau and Paine, or, indeed, any of the great philosophers. The contemporary moral idea of personal autonomy emerged at the end of the eighteenth century, the opinion that each individual should be allowed to discover their own personal way of being, but over-emphasis on autonomy and freedom can challenge the need for a society that is integrated, fair, compassionate and nurturing. The literature reveals many attempts to define essential human rights which parallel definitions of human needs. For example Finnis (1980) lists seven basic "goods" for human beings; *life, knowledge, play, aesthetic experience, sociability or friendship, practicable reasonableness and religion.* These are supposed to be self-evident. The Beveridge giants' counterparts of *food and clothing, health, education, shelter and employment* are perhaps the equivalent merely of Finnis' life and knowledge. Ignatieff (1984 p15) lists further needs, *love, respect, honour, dignity, solidarity with others.* Thus, as Armstrong puts it

> 'needs' theory retains the focus on the individual that was characteristic of classical liberal thinking .... the concept of needs can be seen in the context of the power relationships which underpin it. (Armstrong, 2000, p 10)

Self-realisation, self-awareness and mobility leading to autonomy may therefore be as important as air, food, shelter and health. Although the conditions of biological life constrain human activity, their effects can be limited and overcome through the provision

ii. *Felt need* "is equated with want," the perceived needs of the individual, who does not necessarily demand gratification of the need, or even be aware that the need might be satisfied, but can nevertheless articulate the fact that his/her need exists.
iii. *Expressed need* is "felt need turned into action," where awareness of a need leads the individual or group to demand a service.
iv. *Comparative need* is where one group of people with certain characteristics receive a service whilst another group with the same, or similar, characteristics do not.

Bradshaw discusses the application of this taxonomy to housing need but it is equally relevant for a discussion of special educational needs. The four types of need will present in different combinations in every situation. Bradshaw is not without his critics in the social policy field. Here the debate about *need* involves a series of questions about how it can be defined in a manner that enables it to be used as a principle for the distribution of scarce resources.

Economists such as Williams (1974) and Nevitt (1977) believe the concept of need should be banned from any discussion involving resources because it is too illusive and value-laden. Williams goes so far as to describe concerns with *need* as "needology," a scathing dismissal of any non-economic approach to the distribution of scarce resources. Other social scientists such as Smith (1988) take a more philosophical and phenomenological view. He suggests that *need* cannot be reduced to a mere criterion for economic decision making but is a subjective experience of an individual preference which should be given dignity by being taken seriously by policy makers even though this means using their discretion.

Doyal and Gough have tried to reduce conflict and occasional confusion about the definition and use of the concept of need. Searching for consensus and certainty, they define

> basic individual needs as those goals which must be achieve if any individual is to achieve any other goal, however idiosyncratic or culturally specific these other

goals are (1984, p10)

As I already noted, these basic needs are the survival and autonomy of the individual. Armstrong takes Doyal and Gough's reasoning further, with a view that concentrates on structure and environment, thus;

> Human needs may be understood in the framework of which emphasis they have in common, in which case it is the absence of the conditions which satisfy those needs rather the character of needs specific to particular individuals or groups the become the focus of investigation and the target of change.
>
> (Armstrong & Barton, 2000, p 11)

Although Bradshaw's categories in his taxonomy are not mutually exclusive and may be difficult to operationalize, nevertheless I have found them relevant and useful for my understanding and interpretation of the information I have obtained from interviews. I have touched on this debate because the conflict we find in making sense of needs and related welfare experiences, including education, may simply be a necessary component of a system that aspires to democracy and freedom, involving rights and obligations, entitlements and responsibilities, rather than oppression and discrimination.

Rights and needs

Rights might be defined as legitimate claims to satisfy human needs. It is agreed by all the member countries of the United Nations (U.K. Human Rights Act, 1998) that a child has a right to education (HRA Part II Article 2) and housing, to be fed and clothed and not to suffer significant physical or emotional harm. The first of these, education, can provide not only autonomy, but the means of satisfying the other needs/rights in later life. Dworkin defines rights as recognition of individual claims against collective enforcement. "Individuals have rights when, for some reason, a collective goal is not sufficient reason for denying them what they wish." (Dworkin, 1977 p57) Thus the meeting place of rights

and needs is the point at which the satisfaction of one individual's need may be at the expense of others and may deprive others of the satisfaction of their equally valid needs. Although the concept of needs has its basis in individualism and human rights, the solutions are necessarily collectivist, and bound up with the allocation of scarce resources. The relative nature of need has been reinforced by the House of Lords decision in the case R v Gloucestershire County Council ex p. Barry. (1996-7) The local authority were able to take into account the limits of their resources when deciding the level of services necessary to satisfy a person's need. (See list of cases)

The language of needs and rights also involves the concept of duty. Legislation has steadily increased the duties of the State and the possibilities of intervention on behalf of children when the family is failing to provide for a child's basic needs. Whilst recognising the necessity to respect the integrity of the family and the importance of parental rights, welfare legislation has taken for granted the duty of the State to provide free education, medical care and income and housing support for families who are unable to provide these things for their children. The Children Act 1989 brought together the principles contained in a number of previous enactments to provide a more comprehensive general duty on local authorities to identify and provide for children in need, making the child's welfare the (court's paramount consideration." (Children Act 1989, S(1) ss (1)(6)) Section 17 of the Act makes it clear that parental rights and wishes must be respected and any intervention by the State must be justifiable. This is but part of a general trend towards the view that welfare consumers, rather than professionals, know best what their needs might be. This idea is promoted by client pressure groups such as the Children's Bureau and Age Concern and reinforced by the idea that the market should rule. Thus the concept of need

is fundamental for statutory welfare provision, including education. It is notoriously difficult to define, but it still remains important for allocation and distribution of goods and services. The current Labour Government recognises this, and in almost all areas of social welfare consumers or clients are being encouraged to challenge professional definitions of their needs. This gives rise to a paradox where education is concerned, because parents, rather than children, are considered to be the clients. As we noted in Chapter One, the voice of the child is seldom heard.

Models of Special Educational Needs

Whatever particular view one takes of the aims, purposes and rationale of education, it is generally directed towards the ability at the very least to satisfy the needs stated above, to enable the recipients of education to survive and be autonomous as far as possible. All individuals, by virtue of their individuality, will have learning needs of one kind or another. The debate about needs in the education service is wide ranging, from the needs of more able children, through the needs of the many, to the needs of those who for various reasons cannot take part or make sufficient progress without extra resources.

In the last chapter I referred briefly to models of Special Educational Needs in the educational discourse, which I shall now define respectively as a *medical/ psychological* model, a *structural/sociological* model and an *interactionist* model. A *medical /psychological* model assumes that difficulties and disabilities are the property of the individual, who must adapt to his/her environment or be modified in some way to fit in. This might be termed an *individual deficit* model, since it relies on the idea of a deficit which may be remedied. Looked at in the light of the above taxonomy of need, we might say that the medical/ psychological model relies on a *normative* definition of need.

As Bradshaw points out, a normative definition of need is not absolute and will vary between cultures and the traditions of sub-groups, and different experts will lay down different and even conflicting standards. On the other hand, a *structural/ sociological* model sees problems as the failure of the system not the individual, and expects the system to make itself more congenial to the individual. This is a *system deficit* model. The social model referred to by Warnock (See my p 34) is a version of this. A variation of this that sees behaviour problems, for example, as the result of faulty up-bringing is a *parent/deficit* model.

There is a third interactive perspective, which claims that SEN arise out of the interaction between an individual's strengths and weaknesses and the extent to which a system supports that individual's development or fails to offer an appropriate framework. Within this perspective *felt* and *expressed* needs might take precedence.

Changing labels

As we shall see in the chapter on the legislative background of special educational needs

the 1944 Education Act required local education authorities

> to secure that provision is made for pupils who suffer from any disability of mind or body, by providing either in special schools or otherwise, special educational *treatment* (my italics,) that is to say education by special methods for persons suffering from that disability." (quoted in Cowne 1996, p8)

Although this meant that some groups were effectively excluded by the Act from any education, the concepts behind such provision were derived from the *medical /psychological* model and the notion of genetic intelligence, the view that disability was a medical rather than an educational phenomenon, requiring, indeed, "treatment," or "education by special methods" rather than ordinary learning and instruction. The medical profession, assisted by the new science of psychology, was largely responsible for deciding

which children had a *need* for such special "treatment". This was essentially a *normative* definition of need. Joynson (1989) plays down the role played by psychologists in education policy in the 1940s. In his study of "The Burt Affair" he draws a picture of Psychology as a new science struggling for recognition. Burt, at that time the London County Council's educational psychologist, the first in the country, was consulted by the Hadow Committee (1924) and helped to draft a report, *Psychological Tests of Educable Capacity*, which was published in 1926. Burt, according to Joynson, believed in selection by ability, but also believed that mistakes could be made and should be rectified so that education could be appropriate to the individual's capacity or needs. In view of the fact that Burt was knighted in 1946, it is hard not to believe that his influence on the people who made decisions was considerable. Hearnshaw, who later as Burt's biographer came to believe that Burt had falsified his data, spoke at Burt's memorial service in 1971.

> His place in the development of psychology in this country was of the first magnitude and his reputation was world-wide. No one man has done more to shape the profession of psychology as we know it today in this land. (Joynson, 1989, p27)

Although Burt's work has been extensively criticised and he was seen as right-wing, especially after his association with the Black Papers (Cox 1970) his work surely contributed to the trend towards more humane attitudes, with his insistence on the possibility of so-called "remedial" education to remedy the inappropriate categorisation of children.

The Handicapped Children Act 1970 recognised the needs of children with severe handicaps by giving them the right to education. By this time local education authorities, following the LCC's lead, were beginning to employ educational psychologists to test IQs to decide which children were "educationally sub-normal." This pejorative term began to

be replaced by the notion of "having learning difficulties" of one kind or another, which is seen as a much more positive and hopeful way of describing children with such problems. I touched on this problem of labelling in my last chapter. The *medical/psychological* model was beginning to be modified by a more *interactionist* model, with more emphasis on *expressed* and *felt* needs. At a time when increasing attention was being paid to equal opportunities it was argued that

> "the debate over the use of 'learning difficulties' or 'mental handicap' is more than just an issue of terminology alone. It goes to the heart of people's conceptions of their own identity and self-worth. It challenges the rest of us to confront our own conceptions and prejudices. And it obliges everyone who exercises power over the lives of people with learning difficulties to consider whether they are frustrating or facilitating their aspirations." (Cameron and Sturge-Moore 1990 p2)

Similarly terms which stressed the individuality of the child began to be preferred to those which defined the particular disability, for example, a "child with Down's" rather than "a mongol"; a "child with severe hearing and speech impairment" rather than a "deaf-mute." These terms were considered to be more respectful of individuals' dignity and more conducive to good relationships between professionals and parents/patients/clients, as well as being descriptive rather than "labelling". The term "remedial" for work with "slow learners" in mainstream schools began to be dropped. It is interesting that in some quarters the medical and genetic aspects of special educational needs seem to be once more gaining ascendency, with drug treatment for "ADHD" and the "discovery" of a gene for dyslexia. The idea of a "remedy" is still not far below the surface. Some parents search desperately for a "cure" to restore "normality," which may, however, be part of the process of coming to terms with disability.

Warnock's definition of need was essentially *normative*, suggesting that need should be assessed and defined by professionals and experts, who would have the responsibility of

guiding parents and obtaining extra resources to meet the perceived need. As I have already noted the view of Warnock as a promoter of parents rights is some way from the truth. She believed it to be "a question of collaboration not partnership" (Warnock, 1985) The term Special Educational Needs, favoured by the Warnock Report (1978) was made statutory by the 1981 Education Act and was defined in the 1993 Act thus;

> (1) A child has "special educational needs" if he has a learning difficulty which calls for special educational provision to made for him
> (2) ...a child has a learning difficulty if
> (a) he has a significantly greater difficulty in learning than the majority of children of the same age
> (b) he has a disability which either prevents or hinders the child from making use of the educational facilities of a kind generally provided for children of the same age in schools within the area of the local education authority or
> (c)he is under five years and is, or would be if special educational provision were not made for him, likely to fall within paragraph (a) or (b) when over that age.
>
> *Special educational provision* means.... provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local authority or grant-maintained schools in their area." (Part III, s 139, paras 1-3, & 4).

(This is substantially the same as the definition in the Code of Practice, 1994, except that the latter has the more politically correct addition of feminine pronouns. The draft new Code, 2000, uses "they," which fails to agree with the singular verb "is." Hopefully this will be put right in the final version.) There are three crucial problems with the above definition. First, in (a) above, the definition does not "specify the degree of learning difficulty that warrants being called a special educational need" (Booker, 1998, p9) This allows for variations in professional discretion, prompting Booker to argue for a national framework of "descriptors of special educational need" to redress this disparity. In particular it does not take into account *comparative* or *felt* need, and gives free range to *expressed* need, so that pressure groups and individuals may be more successful than others

according to the resources at their disposal, within the same education authority, or indeed in the same school.

The second problem concerns the use of the terms "area" and "local" which allow for substantial differences in provision across the country, between local education authorities and indeed between individual schools. The 1997 Green Paper (DfEE, 1997b) expressly acknowledges this problem.

> "Whether or not a child has SEN will therefore depend both on the individual and on local circumstances. It may be entirely consistent with the law for a child to be said to have special educational needs in one school, but not in another."(1997, p12)

Local Education Authorities have different criteria for defining need and for statutory assessment. Booker's suggestion (1998) for the development of national criteria or "descriptors" of special educational need, already referred above might overcome this problem of ambiguity and confusion. For example Nottingham and Birmingham, as described by Gray (1997), have done so, largely in an attempt to reduce the number of statements, and to use SEN resources for school-based interventions for individuals at Stages Two and Three. Westminster City Council

> recognises that
> it should not be assumed that all children who are under-achieving per se have special educational needs. The City Council sees raising of pupil achievement as the foremost matter for whole school policy.
> Children with physical, sensory, intellectual, emotional or behavioural difficulties do not automatically have learning difficulties. (City of Westminster 1998, p 7)

The London Borough of Camden does not make this distinction, but emphasises the importance of the Code of Practice's staged model as a way to "help children make sufficient progress so that they will not require Statements" and as " a means of matching provision to need." (Camden, 1995, p2) The proposed new Code talks of *thresholds* for

the purpose of deciding the level of need but it does not resolve the conflict between the ideas of flexibility and local autonomy, as against conformity and comparability.

The third problem is that of the legislation itself which divides children with SEN into two categories, those whose needs (and the means of satisfying them) are legally protected by a Statement and those who have no such protection. It is quite possible for a child to receive as much help from the LEA and the school (without a Statement) as s/he would get with a Statement but that help has not the protection of the Law. (See my Case Study Six)

Those who favour either the *sociological* or the *interactionist* perspectives of SEN might argue that it is not possible or even desirable to reconcile these inconsistences. Christensen claims that school itself is disabling because it "is structured in such a way that student diversity beyond very narrow prescribed limits cannot be accommodated" (Christensen p65) and asks how "school can simultaneously promote practices which disadvantage and stigmatize students while ...seeking to enhance their life opportunities." (p67)

Even an Individual Education Plan (IEP), is firmly fixed in the notion of individual deficit, despite the intention to ensure that its content is derived from and appropriate to the individual's specific need. Similarly the term 'learning support' is nonetheless a label, albeit a label which obtains extra resources. The proposed new Code tries to address this problem of definition by renaming the Stages, as we shall see later in this chapter.

Special education developed as "an exclusive field of study supporting a profession and a body of knowledge." (Florian, 1998 p 106) She continues

> The profession of special education is defined by an exclusive set of attitudes, policies, procedures and practices, many of which, however altruistic, depend on exclusion.

The act of identifying a child as having special needs can in itself be an act of exclusion. This fits with the social constructionist view that disabled people are not finding their own identity but

> are recipients of powerful professional categories... Their world is set about with particularly forceful categorical thinking. (Barton and Clough 1995, p 2)

These writers suggest that "normality is a tyrannical means" by which individuals are "socialised into learned helplessness and a culture of dependency." There is also the view that all our identities and indeed our needs are determined to a large degree by powerful influences such as gender, social positions and professional roles. Our need for autonomy has to be satisfied within and despite these constraints. Seeing disability as a social construct rather than assuming that the misfortunes of disability arise from medical and biological deficits leads to a desire to change power relationships so the people with disabilities can be independent and autonomous.

It is to be hoped that a culture which celebrates and values difference, responding to diversity, will lead to respect for each person and their need for autonomy. My response to this argument is that it is difficult for professionals, especially teachers, to have a moral and political commitment to the need for autonomy, and accept social responsibility as educators, without this advocacy becoming paternalistic and patronising. This difficulty can be recognised, but it should not be an excuse for laying aside the commitment.

Several writers note that it is perfectly possible to change language without changing anything else of importance. For example John Hall (1997 p xii) says that "getting the language right has taken precedence over sorting out underlying beliefs, attitudes and practices" and claims that it is "easier to learn new terminology than to change behaviour." This view is based on his experiences in Special Education and his book is a polemic

against segregation of any kind for children with special educational needs even in units attached to mainstream schools. At a time when comprehensive schooling and mixed ability teaching were perhaps at their peak of popularity, there was a change of emphasis towards integration rather than segregation, and this continued, despite a subsequent change from both collective and individual responsibility to an environment where the market and value for money seemed to be the key determinants for the meeting of needs. Nevertheless the growth in consumer rights and choice, as well as the notion of accountability, and increased awareness of disability due in part to the activities of pressure groups, has extended the notion of parent/client power to SEN issues. Thus the notion of *expressed* need has gained in importance.

The National Children's Bureau and numerous other voluntary organisations, including associations set up to support particular disability groups and others with a wider brief, have formed a strong lobby for Special Educational Needs. Like Phillippa Russell, Joan Sallis is an effective advocate of power for parents, on behalf of their children. She argues that the need for consensus about objectives and the exchange of information are crucial for parental participation. (Sallis, 1979, in McCormick, 1982.) Thus those who argue so forcefully for inclusion have to justify it to parents who want segregated provision and see the latter as necessary and more appropriate for their child.

Florian argues that the Green Paper appears to accept the assumptions that there is "a group of worthy people whose needs can only be met through the allocation of additional resources" and that "they can and should be identified, categorised and classified" (Florian 1998 p106)

The need for inclusion

It is claimed that an inclusive philosophy of education is in harmony with notions of equal opportunities and a fair and just multicultural society. Arguments in favour of inclusion centre on educational principles which Florian quotes as follows

- All children should have the right to learn and play together.
- Children should not be devalued or discriminated against by being excluded or sent away because of their disability or learning difficulty.
- There are no legitimate reasons to separate children for the duration of their schooling. They belong together rather than need to be protected from one another. (CSIE 1996, p. 10)

Inclusion is claimed as a basic principle by the present government in its Green Paper (DfEE 1997), but only if parents want it. Legislation and recent academic literature both advocate a move in this direction but they are bound by caveats of economic factors. Inclusion implies the reorganisation of the school environment to make it accepting of all individuals, to make sure everyone belongs, whereas integration implies binding together disparate groups into one homogeneous whole, where individuals have to demonstrate their readiness for an integrated setup. This again poses questions about the relationship between the individual and the environment, and the notion of *comparative* need. The assumption is that an inclusive system would be able to meet all needs, but without adequate resources equal opportunities might be in jeopardy, by failing to provide the specialist services some children need to facilitate their learning. Similarly the individual education plan (IEP) which focusses on limited targets for learners with Special Educational Needs puts emphasis on the individual whilst the new primary initiatives on literacy emphasise the learning environment for the whole class.

At the same time the "School effectiveness movement" is looking at the importance of the school as an organisation enabling all to learn. The effective schools movement and the

National Literacy Strategy perhaps reflect the view that it should be possible to adapt the environment to suit the development of the individual. On the other hand there is a certain dogmatism about the prescriptive nature of these initiatives which seem to leave very little room for variation in style and method. In spite of this there are many initiatives which challenge traditional models, for example the trans-disciplinary approach developed by Beckford School in Camden (Chapman and Ware 1999) where an occupational therapist and the SENCo worked with support assistants and parents to run a weekly group for reception and nursery children. The emphasis was on "a high degree of collaboration and joint decision-making between parents and professionals" and teaching the "skills associated with one profession to others who work with the child throughout the day." (Chapman 1999 p105) Other examples are the Somerset Inclusion Project (Thomas et al 1998) and the London Borough of Newham's initiative. (Griffiths, 1999)

Many educationalists, such as Ainscow, (1991,1997, 1998) have linked the ideas of school improvement and inclusion, and Ainscow (1998) describes how an Index of Inclusive Schooling can "support a school's efforts to widen its capacity for responding to diversity" and can encourage

> a move away from a scrutiny of individual children, defined as being in some way special, towards a wider and deeper investigation of the processes by which particular schools include or exclude all pupils.(p71)

Inclusion is not without its critics, for example, Lindsay (1997 p 57.)

> Inclusion is certainly problematic in the short term. Its promotion should also take into account other values. Is it more important for a child to be educated in the local school or to be educated well?

Hornby argued (1992) that

> the theory and practice of inclusion had gone beyond national policies on inclusion despite the lack of research evidence about its effectiveness.

Seven years on he maintains that

> the level of inclusion, either locational, social or functional, should be decided on the needs of each individual child and the exigencies of each situation. (Hornby, 1999, p157)

Thus there is a conflict between the pragmatic view, that requires planning for a range of provision to meet the needs of individual children and choice for parents, and the ideological conviction that makes inclusion a priority. In Newham the political ideal of inclusion could be put into practice because of an large political majority (Labour) on the council, and an initiative from a Chair of Education who was a parent of a child with special needs. Newham closed six of its eight special schools and uses one of those remaining as a resource centre for mainstream schools. (Griffiths 1999)

The current government view seems to be that the same "best practice" must suit all children in all areas, including those with special educational needs (and indeed those who are learning English as an additional language, which, as we shall see, is expressly excluded from the definition of special educational needs in the legislation and Code of Practice) and the Green Paper expresses the hope that these strategies will reduce the numbers of children identified as having special educational needs from 18% to 10%. But there are vested interests at stake, not least the huge investment that has been made in the new professional role of SENCo. True and absolute inclusion might mean the disappearance of a whole profession based on amelioration, remediation and integration.

Present practice

Throughout the legislation and the directives and circulars for implementation there is rhetoric about partnership and sharing. But behind the emphasis on consultation there is still anxiety about the deployment of scarce resources, and a suspicion that inclusion and

school improvement strategies such as whole class teaching have been selected for their inexpensiveness rather than for their effectiveness, emphasising *normative* need at the expense of *felt* need.

The Code of Practice model of a staged approach could be seen as a way of emphasising the needs of the few and the different, a continuation of categories and labelling, working *against* integration and inclusion by emphasising differentiation and fragmentation. Indeed "differentiation" seems to have become the conventional wisdom of much of the in-service training for teachers in all areas of the curriculum, since the inception of the National Curriculum, so that class teachers are expected to plan work at different levels to suit the various members of the class. Booker (1998, p9) suggests that to "place a child at Stage One of the Code of Practice is, in effect, to say that this level of difficulty is beyond the reasonable requirements of good curriculum differentiation." But at this stage the only extra input available may be the advice of the special needs coordinator, and the class teacher is expected to plan differentiation for that child, whilst "gathering information and making an initial assessment" of the child's needs. (Code of Practice, 1994, p 23-25) The class teacher is expected at this stage to inform the parent(s) that the child's name has been placed on the Special Needs Register but examples of "good practice"letters to parents do not specifically mention the register, even at Stages 2 and 3, and some parents dislike the idea of their child's name being on it. It has been suggested to me that this may be because they associate it with the "At Risk" Register, which term appears in the press in cases of child abuse. The proposed new Code makes no mention of the keeping of a register as such, but the emphasis is on individual and class records.

At present when the special needs coordinator and the class teacher decide that the child

needs significantly extra resources such as small group work or individual help, Stage Two, and the planning and writing of an individual education plan, (IEP) is appropriate. In the proposed new Code these two stages are subsumed in *School Action*. Thus in the context of Special Needs the professional status and power of teachers has to some extent been reinforced by Warnock and the subsequent legislation on special educational needs, just at the time when professional autonomy in terms of control over the curriculum was beginning to be drastically curtailed. The introduction of more financial autonomy for schools in special needs funding seems paradoxical in the context of increasing central control of school policies and the curriculum, with a proliferation of guidance from above, through legislation and the resulting regulations and circulars from the DfEE as well as the powers of OFSTED and the School Curriculum and Assessment Authority. (SCAA.)

The proposed new Code attempts to solve the problem of ambiguity in the way the Code of Practice is implemented. Teachers have seen the Warnock Stages as labels for individuals and their needs, rather than descriptions of ways of meeting needs and the kind of support provided for learning, a process model, which is how they were intended. This confusion has been compounded by the use of the "Stages of English Learning" (as a second or additional language) created by Hilary Hester of the Centre for Language in Primary Education, in which the "Stages" are, like the National Curriculum *Levels*, descriptions of steps on a ladder of achievement.

The original suggestion that Stages One and Two should be replaced by "School Support" and Stage Three by "School Support Plus" has now been replaced by "School *Action*", and "School *Action* Plus." This might go someway to change attitudes, and the metaphor of *thresholds* suggests parallel open doors to different courses of action rather than a ladder

which has to be climbed to attain the ultimate, the Statement.

Thus, despite a stated commitment to inclusion and excellence for all by both the previous and the present governments, there are still elements in the present practice which are separatist and divisive. It is significant that the White Paper (DfEE, 1997a) did not include proposals for SEN, thus emphasising the separateness of SEN.

Ethnic minorities and SEN

The separation of SEN from *English as an Additional Language* (EAL) might imply that there is a stigma attached to special educational needs which must not be allowed to contaminate those with a home language other than English. The Code of Practice expressly states that

> A child must not be regarded as having a learning difficulty solely because the language or form of language of the home is different from the language in which he or she is taught. (DFE 1994 p.5)

So are ethnic minority groups to be part of the movement towards inclusion? The new Ethnic Minority Achievement Grant does not exactly promote inclusion. It was difficult enough for class teachers to master the intricacies of Section 11 funding and which children were eligible for extra help under Section 11, whether the Section 11 teacher should teach mixed groups or just the children with English as an additional language, and to decide which EAL children also had special educational needs.

How much more difficult it must be for ethnic minority parents to challenge the system, even when they are provided with interpreters, tape-recorded explanations and parent advocates who speak their language. (Rehal, 1989) This may be one of the reasons for the under-representation of ethnic minorities in the appeals process. (Harris, 1997, p 195) It is also possible that some ethnic minorities may be more accepting of learning difficulties

and do not see them as something needing specialist help, a need neither *felt* or *expressed*. Some LEAs with large ethnic minority populations are taking ambitious steps (using Section 11 funding, now renamed Ethnic Minority Achievement Grant, EMAG) to identify children with English as an additional language who also have learning difficulties and to give them the extra help they need. To my surprise, despite the concerns of Harris (1997) that ethnic minority parents were "seriously under-represented among appellants" to the SENT which, he suspected, might be due to their reluctance to "utilise legal processes," all the parents (five) who had appealed successfully to the SENT, and replied positively to my letter asking for an interview, were from ethnic minorities. This is discussed in more detail in the chapter on Case Studies.

Summary

This chapter has covered the philosophical and social policy back ground of the concept of need in general. I discussed the ideas of survival and autonomy as a basis for need, and used a taxonomy of need developed in a housing context to classify educational need. I went on to look at the theories and models of need in the educational discourse, developing the issues about labelling and disability raised in Chapter One. Like the nature/nurture debate, these models fail by their "incapacity to understand, describe and, crucially to intervene in the experience of failure" (Clough, 1989, p 6) and the issues about labelling continue to be vexatious. This led to a discussion of Inclusion and current practice. The separate needs of ethnic minorities were briefly considered. These theories and models are crucial influences on the beliefs and practices of professionals who are accepted as authorities on the definition of need, in the "street level" sense of being in the position to direct resources towards a particular child with a particular need.

For the purposes of my research I needed to adopt a working definition of "need," hence the examination of these models. The definition of need in the Code of Practice seems to me to be the most useful for practical purposes, despite reservations about the conflict between relativity and universality. All children have educational needs and whether they can be called *Special* or not can depend on comparison with their peers, and the strengths and weaknesses of their environment. A child might appear to have Special Needs in one school or area, but not in another, merely because of the way the school environment meets his/her needs. At the same time parents' views of their children's needs are not to be disregarded, and it is part of my thesis that only by taking these views into account can a rounded picture be achieved. But this raises the difficulty that parents who have expertise or other resources may be able to access extra educational resources for their children at the expense of others.

Again, the conflict between central administration and local autonomy, especially in relation to distribution of resources, raises difficulties for the CoP definition. Should a local authority have the choice to spend more on Special Educational Needs than its neighbouring authority? The National Health Service and Social Services face similar ethical questions. Should treatment vary between authorities? The current Government view seems to be that it should not, hence the National Performance Assessment Framework (Health Act 1999) and the remit of OFSTED seems to have similar ramifications.

My acceptance of the CoP definition is rather tentative, particularly with regard to the two tiers of "Statemented" and "non-statemented" pupils, as I indicate later, but the challenge is to make sense of alternative explanations, and to use the power of conflicting categories

to justify practical solutions to recurring problems. Legislation and government directives are part of the solution, but interpretation of statute and the common law as expressed by the courts are a fundamental part of the discourse.

The next chapter introduces this growing area of legal discourse in what was once a purely educational debate.

Chapter Three

Legislative Intervention in Education; Legal Definitions of Special Educational Needs

In the last chapter I looked at the concept of needs in general and Special Educational Needs in particular. I discussed the changing terminology of SEN in the context of the Warnock Report and the legislation that followed. In this chapter I shall begin by looking in more detail at the way legal intervention in education has developed in the UK. We shall see how legislation has influenced policies and practice and explain why there is now an important legal element in the educational discourse, especially with regard to SEN.

Because of the problems surrounding the definition of learning difficulties and the variation in practice between LEAs, as well as the confusion and ambiguities alluded to above with reference to "need," many of the professional educational issues which in the past would have been settled by educationalists are now the subject of dispute. Given also the rights promised to parents by legislation it is not surprising that many of these disputes have become the subject of legal action. The legal framework has developed within a particular cultural context and operates in different ways in different countries, and the UK courts apply the Bolam [1957] test of reasonableness, which is that professionals, such as teachers and psychologists, have a common law *duty of care* to exercise their special skills carefully, by referring to a respected body of opinion. It does not matter if there are several contradictory bodies of opinion, provided they are accepted by a respectable authority. This was defined in the case of Bolam v. The Friern Hospital Management Committee [1957] 1 W.L.R. 582 and quoted by Lord Browne-Wilkinson in the House of Lords in the case X (Minor) v. Bedfordshire and others [1995] 3 W.L.R. 152, pp.198D-199B. It will

follow that general principles and their application in specific circumstances will be discussed in legal decision making. Thus a *comparative* definition of need will play a part, balancing one need against another, for example, the specific need of an individual could be looked at in the context of the more general need for the education service to use limited resources wisely.

Corbett and the missing discourse

Corbett (1996) examined the terminology of SEN in some detail in her book "Bad Mouthing," and in his introduction to the book Bidder (p.ix) further defined the concept of "bad mouthing" as

> the means by which the dominant discourse is maintained by the established elite no matter the current fashion whether it be eighteenth century paternalism or late twentieth century political correctness... One of the principal methods of bad-mouthing is by labelling people, bracketing them into defined sectors to enhance our significance.

Corbett compared Warnock, which she calls "the voice of enlightened modernity," with the voices of disabled theorists and theorists of disability. She equates the disabled with other groups who demand civil liberties and control of their lives. I have already touched on this in Chapter One. Corbett's hypothesis is that "special needs" is the " language of sentimentality and prejudice" and she explores the "dominant discourse and divergent discourses which reflect the language of oppression and a struggle for recognition" (1996 p 5) In her analysis of the uses of language and metaphor she looks at the four discourses (sociology, politics, medicine and art) which she defines as the central models of communication in this area. She identifies a "series of routes and tracks" with "boundaries... which are responsible for defensive protection measures to preserve power and status." (p18) Although she refers to legislation, surprisingly she does not include

law as one of these discourses. I shall attempt to remedy this omission, because the law has become increasingly important in all areas of education, with more and more statutory regulation of the educational process. Indeed law might be seen as the ultimate tool of the "established elite" referred to above. The alternative view is that the role of the law is to protect individuals from maladministration and wrongdoing, and to recompense them for damage done. These two views might be seen as a reflection of Durkheim's two functions of law, *repressive*, that is to say *penal*, law, and *restitutive*, or *civil* law, (Aubert, 1969, p 17) but there is a suggestion that in some ways the civil law can also be repressive if it fails to right wrongs. Corbett's metaphor of the three *tunes* of the 1990s, sociology, politics and the personal/artistic, like her discourse analysis, fails to recognise the importance of the lawyers' *song*.

The creation of the Education Law Association and the specialised Education Law Reports, as well as the setting up of the mechanism of the Special Educational Needs Tribunal, all testify to the growing volume and power of the legal discourse. It is now appropriate to look at the legislation, the rights of parents and children, mechanisms and institutions that make up the legal discourse.

Legislation: The duty of the State to educate

Since the nineteenth century Parliament has become ever more willing to produce statute law which involves the State in education. This is the context for challenges in the courts based on questions of statutory interpretation, as well as the common law (judge-made) decisions which we are going to consider. It is only comparatively recently, since the 1980s, that the courts have begun to play a more central role in educational issues, by

> clarifying the statutory responsibilities of LEAs in particular, for example on the definition of special educational needs, and on the contents of the statements of

special educational needs. (Buck/Harris, 1998, p25)

The duty of the State to educate children pre-dates the Butler Act of 1944. The prevailing political doctrine of *laissez faire* in the nineteenth century meant that state intervention in most fields was permissive. Until the mid nineteenth century fathers had absolute power over their children, and this was generally enforced by the courts, as Cotton LJ said in *Re Agar-Ellis*

> ...the court should not, except in very extreme case, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given by nature of the birth of the child. (1883, 24 Ch D 317, 334, CA; quoted in Bromley & Lowe, 1992)

It was not until the latter part of that century that Parliament began to recognise that it might be necessary to curtail a father's rights by legislation in order to protect the interests of children. The emancipation of women was accompanied by a change in public attitudes to childhood. The Married Women's Property Act 1870, the Infant Custody Act 1873, the Guardianship of Infants Act 1886 and the Custody of Infants Act 1891 gave important rights to women with regard to the upbringing of their children. Legislation was also eroding the power of employers and fathers whose children worked long hours at home or in workplaces. Until the Prevention of Cruelty to Children Act 1889 it was not an offence for those responsible for a child to cause her/him physical harm. Thus there was a gradual encroachment by the state upon the powers of parents over their offspring, with the establishment of rights for children and duties for parents, as well as permissive and discretionary powers for local authorities.

The House of Lords and the Church of England continually blocked successive government efforts to control and fund education. As early as 1833 Parliament approved a grant to be divided between Church and non-conformist schools, but it was not until the 1870 Act that

local rates could be raised for education. It allowed local boards to make attendance compulsory if they wished, and only allowed exemption from fees from those who could not afford to pay. Disabled children were included within the terms of reference of the 1870 Act, but it was not until 1918 that fees were abolished for elementary schools and education was made compulsory for all, including disabled children, up to the age of 14. The Forster Act 1870 was certainly a milestone in the development of the duty of the State to be involved in education but, because it was primarily a compromise with the church authorities, it was, like so much of the reforming legislation of the day, permissive rather than compulsory, permitting local school boards to make schooling compulsory if they thought fit and allowing free education where parents were deemed unable to pay. The Education Act 1902 which replaced school boards with local education authorities was a further encroachment on the power of parents to keep their children uneducated, but it was not until the Butler Act 1944 that the State began to take the major role in providing education at both primary and secondary levels.

The 1944 Act greatly extended the legal obligations of the state, in an extraordinary "partnership" between central and local government and the Churches. This Act also gave legal sanction to the classification of children according to the newish discipline of psychometrics, allocating children to schools within a tripartite system (of Grammar, Technical and Secondary Modern schools) according to their "measured" IQ. I have already noted the part played by psychologists, in my previous chapter. (pp 49-50) It was this Act that allowed the Secretary of State to define "categories of pupils requiring special educational *treatment*" (my italics) and to make "provision as to the special methods appropriate for the education of pupils of each category." (Education Act 1944 s 33 (1))

As we saw in the last chapter this provision was based on a medical model and the notion of genetic intelligence. Thus the medical profession was largely responsible for deciding which children needed such special "treatment." The Warnock Report (1978) drew attention to this, reflecting the growing body of opinion that considered that the focus on health related categories was to the detriment of education for these children.

The link between increasing state interest in education in general and the decline of empire and Britain's position as an industrial leader need not be explored here, but the emphasis always seems to have been on the failure of the existing system and how it could be improved, which is ironic given the frequently expressed (by some) nostalgia and longing to return to an imagined golden age when standards were higher. The Labour Governments' attempts (James Callaghan's "Great Debate") to improve education in the early sixties and seventies can be seen to have been "as much about changing society as aiding education" Bedingfield (1998 p 105) The comprehensive schools initiative led to numerous legal challenges, generally concerning changes in the character of schools, and admission procedures.

Those Labour Governments won a large measure of support for their comprehensive scheme for secondary education, despite the rearguard actions of some Grammar Schools and their parents, but the emphasis was still on provision by local education authorities with comparatively little direction from central government and only a relatively small amount of involvement with legal processes, for example challenges to the change to comprehensive education, with the accusations of opponents being mainly about consultation about change of status. It is ironic that the Conservative administration from 1970-74 closed more grammar schools than Labour. There is not room here to explore

in any depth the links between the notions of comprehensive education and inclusion, but the principles behind both are similar.

The Handicapped Children Act 1970 gave children with severe handicaps the right to education, and it might be argued that universal primary education was only achieved in the UK with this Act. Before this Act the Health Services had duties towards this group of children but Education authorities did not. It was the Warnock Report, (1978) as already noted, that led to a fundamental change. Mary Warnock, an eminent philosophy don, in her discussion of modern philosophers, allows that they recognise

> that the language which we use about things may affect our attitude towards these things and therefore even our actions." (Warnock, 1960, p201)

She argues that

> under the general influence of Wittgenstein, it is increasingly recognised that in order to discuss any subject properly, it is necessary to see the language which is appropriate to it actually at work. (1960, p205)

As already discussed under the heading "Changing Labels" in Chapter Two, (p 49) the Report recommended the adoption of the term, "children with learning difficulties"(defined p 52) instead of the more pejorative labels in use such as "retarded" or "backward." This new label would cover the whole range of children, estimated by Warnock to be about twenty per cent of the school population, who at some time during their school career might need some extra help. Warnock admits that this was "a kind of a guess" (1996) based on the evidence presented to the Committee but without a statistical basis. As already noted, (p 17) this guess was based firmly on the Isle of Wight study data, an imaginative extrapolation. The Committee was attracted to the flexibility of the notion of Special Needs which would embrace the needs of specially gifted children and those with temporary problems that could be helped by a short-term intervention, as well as those with

longer term difficulties. The original change of emphasis towards the *integration* of children of all abilities into "mainstream" rather than *separation* came at a time when comprehensive schooling and mixed ability teaching were perhaps at their peak of popularity, and this was, according to Warnock, (1996, p54) the opinion of some members of her committee; "the ultimate goal of the reform of special education was a kind of extension of the comprehensive ideal," and they would not be "satisfied until all special schools were abolished." Although Warnock herself took a more pragmatic and "sceptical" view, the idea continued, and the growth in consumer rights and choice, as well as the notion of accountability, and increased awareness of disability, due in part to the activities of pressure groups, has extended the notion of parent power to SEN issues.

Since the 1980s the emphasis has been on *parental* choice, a major feature of Conservative education policy, resulting in the Education Acts of 1980, 1981, 1988 and 1993. The 1980 Act provided that LEAs must allow children to go to the school chosen by their parents unless the school was oversubscribed, or the choice was impossible because of admission agreements between school and LEA. However there is little evidence that parents have more choice as a result of this legislation and the main outcome seems to be that over-subscribed schools are able to select children (and parents.) The Act also set up the assisted places scheme, whereby central government would pay for children to attend fee-paying independent schools. Since the abolition of the scheme by the present government, the only way to get the state to contribute to private education is where a child has SEN for which there is no provision in the State sector. The 1981 Act provided the statutory framework for the assessment of special educational needs based on the recommendations of the Warnock Committee. This led to the legal definition of the term Special Educational

Needs. The 1981 Education Act used this term in place of "Disabilities." The definitions in the Act and Code of Practice (1994) have already been described (and criticized) in the previous chapter.

Rights of parents

> I have given you more power than you have ever had or dreamed of. (Kenneth Baker, 1998, as Secretary of State for Education, addressing a group of parents, Holden et al, 1994.)

Since the 1980s, and particularly since the election of the Thatcher Government of 1979, the distinctions between the "public" and the "consumer," and between a "service" and a "business" have become blurred, and public services are increasingly expected to provide value for money that can be measured in some tangible way. It seems that the Government, or at least the auditors, expect Governing Bodies to run schools like joint-stock companies, including an annual report to parents who are expected to act like shareholders. Whilst businesses are expected to provide profits for the shareholders, public services are required to be as small a burden on the "taxpayer" as is consistent with a reasonable service. At the same time, the status of the "professions" has been eroded under the guise of increased power and autonomy for the ordinary person, whether it be the "taxpayer", the consumer, the client, patient or parent.

New Labour started to call this entity a "stakeholder," meaning, no doubt, one who has an interest in the enterprise and Thomas (1997) uses the concept briefly in his discussion of inclusion and justice. Since I began this dissertation the term seems to be used more and more often. Basil Bernstein argues that the notion of a stake

> has two aspects to it, the receiving and the giving. People must feel they have a stake... in both senses of the word.... (1996 p 6)

The original meaning of the word "Stakeholder" was one who is entrusted to hold the bets

(stakes) for two or more gamblers and impartially delivers the stakes to the winner at the end of the gamble. It is curious (in the old-fashioned sense) that the language of gambling crops up again. The current use of the word appears to mean one who has an abiding interest or stake in the enterprise and therefore is not impartial. There is obviously some confusion with the idea of a "stockholder"or shareholder, one who has actually invested capital in a venture. I notice that the London Borough of Camden Council, in a leaflet promoting its development plan, uses the term in the latter sense. Likewise the DfEE in its Special Educational Needs Update 3 uses the term thus "The aims of the study were: to obtain the views of a range of stakeholders, including parents, teachers, senior staff in schools, LEAs, pupils and LSAs....." (November 1999, p3) and again in the Threshholds Document attached to the proposed new Code of Practice. (2000, p6) Hopefully there are no gamblers here, except in the sense that although life might be a lottery, the education system should do its best to even up the odds.

Thus *Education* legislation since 1980 has tended to give increasing rights to all parents in their "new" role as "stakeholders". The Acts of 1981 and 1993 gave rights specifically to parents of children with Special Educational Needs, based on the recommendations of the Warnock Report (1978.) This more positive approach to disability placed considerable emphasis on the concept of entitlement. As a result the 1981 Act focussed on the educational as well as the medical dimension, emphasising the importance of multi-disciplinary assessment and joint decision-making. It is possible to see a parallel here in the movement in the health service away from large mental institutions towards "care in the community" for adults with disabilities and learning difficulties. Some local education authorities began to make plans to close some of their special schools, or at least to

rationalise provision and to persuade mainstream schools to play a larger part, by allocating resources so that they might take children who might otherwise have gone to special schools. Specialised units began to be attached to mainstream schools so that children might have the benefit of specialist teaching and equipment for part of the school day but could experience being with their peers for the rest of the time, including assemblies and playtimes.

Thus arguments for integration were based on both equity and efficiency. The Fish Report (1985) was commissioned by the Inner London Education Authority (ILEA) with the intention of increasing integration, and the ILEA required its school governing bodies to consider how they might implement its recommendations. As Chair of the Governing Body of a large inner city comprehensive girls school in the eighties, I was involved in this debate. The governors discussed the issue at a special meeting and had meetings with our own teachers, with our parents, and then with the governors and teachers of the local special school. It was a difficult time and whilst most groups agreed with integration in principle, they found all kinds of obstacles to it in practice. They were suspicious that it might merely be a cost cutting enterprise and fearful that changes might not be properly funded. A number of parents fought a rearguard action to keep the special school open. Since then the special school has indeed closed, amid allegations of abuse, and the site is now a luxury housing development. This would be material for another dissertation.

Rights of children

Nevertheless mainstream schools began to recognise that integration was possible and desirable within what Fish (1989) called "dimensions of need" and since then the concept of a continuum of need has gained acceptance. The 1988 Education Reform Act

emphasised the right of all children to a "broad, balanced, relevant and differentiated curriculum," giving equal entitlement to children with special educational needs.

Since then the emphasis has changed. As already noted in the discussion of the concept of need (Chapter Two) *Integration*, the incorporation of a group into the main community,

> the physical movement of the child from one place to another without a concomitant expectation of necessary change by the mainstream school," (Thomas, 1997, p 103)

has given way to *inclusion* which is intended to imply greater involvement and acceptance of all children. As already mentioned (Introduction, p 5) this concept has received backing from UNESCO in the form of the Salamanca World Statement on Special Needs Education 1994, (quoted in the Green Paper, DfEE 1997a, p44) which calls on governments to enrol *all* children in mainstream schools, by extending the capacity of schools to provide for children with a wide range of needs. This switches the stress from the rights of parents to those of children. As we have seen S2 of the 1981 Act attempted to maximise integration by making it the duty of the local education authority to secure that the child with special educational needs "is educated in an ordinary school" subject to the conditions already mentioned.

The 1993 Act changed this, giving parents the right to relieve local authorities of the duty to consider integration under Section 160 of the 1981 Act but laying the same duty upon "any person exercising any functions under this part of the Act" who "shall secure ..... that the child is educated in a school which is not a special school unless that is incompatible with the wishes of his parents." This emphasis on the rights of *parents* rather than the rights of their children is parallelled in the current emphasis on the rights and needs of *carers*, those who care for disabled people, but it fits somewhat uneasily with the UN

Rights of the Child Declaration and the Human Rights Act.

Mechanisms: The Code of Practice

As we have seen, the 1993 Act required the Secretary of State to issue a Code of Practice (CoP) (DfE 1994) giving guidance to local education authorities and the governing bodies of maintained schools about their responsibilities towards children with special educational needs. The Code clarified the obligations and duties of LEAs and schools, health services and social services, and explained what could be done when there is disagreement, by way of appeal to the Special Educational Needs Tribunal. As already noted (p 31) the Act required LEAs and schools to "have regard to" the Code of Practice when planning for special educational needs, but an amendment to make the Code binding in law failed in Parliament. This was due to the Government's recognition that the effect of "having regard to" the Code of Practice might vary according to circumstances and over time. During the Committee stage of the Education Bill (1993) the Minister of State, Baroness Blatch told the House of Lords that there would always need to be an element of judgement in decisions about special educational needs. (Hansard, HL. Vol 554, No 83 paras. 14.13 & 14.17, 1993, quoted in Friel and Hay, 1996.) The Foreword to the Code makes it clear that it

> offers guidance to LEAs as to the circumstances in which assessments and statements might be made. It does not - and could not - tell them what to do in each individual case. (DfEE 1994 p.i)

It is not statutory, precisely so that LEAs have discretion to determine what is appropriate in their area. If they do not follow the Code of Practice, they have to have in place a system that they can justify as meeting the child's needs at least as well as the procedures in the Code.

We have already seen that a fundamental principle in the Code of Practice is the idea of whole school responsibility for special educational needs, involving "all teaching and non-teaching staff ....in the development of the school's SEN policy" (CoP, p 7). The Code of Practice also puts great emphasis on partnership which is seen as essential for effective provision for children with special educational needs, so that schools, LEAs, health services, social services and voluntary organisations are charged with working closely with each other and with parents. These points are re-emphasised in the proposed new Code, perhaps suggesting that insufficient *regard* has been paid to these in the original Code. On the other hand it is also a manifestation of *street-level bureaucracy,* (see Chapter One p 22) whereby central policies are implemented locally in various ways which have outcomes which were not foreseen by the legislators and policy-makers.

Under the Education (Special Educational Needs) (Information) Regulations 1994 mainstream schools were required to draw up a SEN policy, providing information under seventeen headings. This stipulation allowed very little autonomy for schools in their individual policies, although of course regulations are not always necessarily implemented in full by LEAs and schools. Nevertheless, with the shadow of OFSTED looming, many local education authorities provided training for special needs coordinators which included advice on drawing up the policy as a whole school activity, and indeed many schools spent a considerable amount of time drawing up and discussing their policies. Despite the emphasis on "whole school responsibility for special needs" in the Code of Practice and subsequent documents, it is paradoxical that the coordinator is generally relied upon to implement the policy, monitor the same, and report on it to the governors, as a single individual, often with little colleague or managerial support. This *whole school*

responsibility is re-iterated in the proposed new Code, emphasising the role of the SENCo in deploying resources and expertise, already in a school, more efficiently. This might be seen as another attack on "inefficient" teachers, who already feel over-worked and stressed.

The role of the Special Needs Coordinator (SENCo) is to deal with a range of issues concerning the relationship with the senior management team, the allocation of resources for special educational needs, and the involvement of parents at all stages of the Code of Practice. Many of these have surfaced in the consultation exercise which led to the production of the SENCO Guide.(DfEE, 1997c) This guide summarises the results of projects which have attempted to define good practice for SENCOs. I have already noted (p 53) that LEAs have different criteria for assessment and that indeed the legislation was framed to allow for local variation and discretion, although now it is acknowledged as a problem.

As we saw many LEAs now operate quite explicit criteria for initiating statutory assessments and issuing statements. The London Borough of Camden "Criteria" Document states an intention to reduce the average number of pupils with statements by "between .4 and .6 percent" (of the number with statements) because Camden had a higher percentage of pupils with statements than other similar LEAs (Camden, 1995 p3) Camden's three criteria for initiating statutory assessment are that the child's needs have "persisted despite the school's having taken relevant and purposeful action" to meet those needs, that the pupil "appears to have significant educational needs" (as carefully defined under various headings later in the document) and that those needs "may call for special educational provision which cannot reasonably be provided within the resources for

mainstream schools in Camden"

This puts the onus on to the school to prove it has taken steps to address the child's needs, but also relies on test results and National Curriculum assessment to define the levels of underachievement at which a statutory assessment will be initiated. The Authority define general learning difficulties sufficient for assessment to be a two and a half year delay in 2 or more areas, for example, a 7 year old child who is working towards Level One in most areas demonstrates attainments at or below the level of a five year old child. This has been Camden's policy for the past five years, but they are still one of the highest statementing authorities in the country. In 1997 only Camden and Islington in London, and seven other authorities outside London, had more than 3.5%of children with statements out of their total school population, (out of a total of 119 authorities.) (Green Paper, 1997, pp 18-9). One might expect big differences between LEAs as SEN seems to be related to socio-economic factors but the Green Paper points out that there is little or no correlation between the numbers of statements and the amount of deprivation in an area. One LEA official commented that in wealthier areas "there must be something in the water" causing dyslexia, because of the high incidence of statements for this in those areas. The proposed new Code of Practice tries hard to balance consistency of approach with flexibility and variation, for example

> These considerations apply to all children referred to LEAs, by their parents or by their schools .... This guidance does not assume that there are hard and fast categories of special educational need. It recognises, as LEAs will recognise, that each child is unique and that the questions asked should reflect the particular circumstances of that child. (DfEE, 2000, p 60)

This new Code emphasises the importance of following examples of good practice and the

Thresholds document (attached to the Code) has a number of case studies for this purpose.

In an earlier study of good practice, Armstrong (1995) concentrated on the process of statutory assessment at Stage Four, analysing the categorising of 29 children with emotional and behavioural difficulties in 3 LEAs. He argued that

> for some parents, their attempts to pursue particular outcomes by participating as 'partners' in the assessment procedures may actually contribute to their disempowerment. In consequence, parental participation may legitimize outcomes where an underlying and fundamental conflict is masked by an apparent parent-professional consensus. (Armstrong, 1995, p 4)

This interpretation of the process suggests that parents have been co-opted by professionals under the rubric of participation to legitimise the "destinations" of their children, having participated in an unequal professional/lay relationship. The Warnock framework, while intended to facilitate the delivery of a more effective education for children with special educational needs, involving more participation by parents, was

> underpinned by a belief in professional benevolence based upon the professional's role as 'expert'. Despite its rhetoric about partnerships with parents, the principle concern of the Report is that of elaborating a model of good professional practice founded on a belief in disinterested rationality as the basis of professionalism. (Armstrong, 1995, p 17.)

From this quotation, as well as other commentators, it seems that "partnership" is still an unequal relationship, with little chance of the professionals relinquishing their power. The issue for the professionals here has become one of ensuring that the service or the opinion that they deliver is such that they cannot be charged with negligence. Going along with the views of others, teachers or parents, or indeed the local authority, their employer, may well conflict with professional ethics. This is a dilemma which is rarely discussed but which I shall examine in the light of the Phelps Case, decided 27 July 2000 in the House of Lords. It means that the ideal of partnership is often overshadowed by other issues and when it breaks down altogether the problem may only be resolved by litigation.

Institutions: The Special Educational Needs Tribunal

The 1993 Act made better provision for dealing with the breakdown of these partnerships, through the setting up of the mechanism of the Special Educational Needs Tribunal (SENT) (Part III of the Education Act 1993.) This was intended

> to overcome a perceived problem of delay in the former system under which parents were first required to appeal to a committee of the local authority and then, if dissatisfied, to appeal to the Secretary of State. (Oliver & Austin, 1996, p 89).

The Special Educational Needs Tribunal is probably the first judicial body in England to have the power to direct a local authority to provide specific services for an individual. It is possible to see this Tribunal as part of a whole range of administrative mechanisms which have been set up to redress grievances in respect of decisions by public bodies, but it is the first endeavour in the area of education to establish an independent judicial body with the expressed intention of making justice more accessible to parents. The objective, according to Baroness Blatch, was that it should be

> a new system that is quick, simple, impartial and independent; a system in which informality is the key." (Hansard, HL. Vol 545, col 1168 28 January 1993, quoted in Harris (1997) p3)

Harris (1997) concludes that the Special Educational Needs Tribunal is an improvement on the arrangements that preceded it. Most parents in Harris' survey thought that the tribunal "had done its best to make them feel at ease and to make the environment as relaxed as possible, despite the underlying tension on both sides" (1997 p 194) and the parents in my sample confirmed this. Evans (1998) found that LEA officers were generally positive about the SENT, and that they acknowledged that it had identified loopholes in provision, and enabled them to make a case for staff training or improvement of services. Unlike the earlier appeal committees, it is independent of the education authorities, with

lawyer chairing the committee and the process being part of the main legal system with a right of appeal to the High Court on points of law. The emphasis on parental rights has been one of the factors leading to an increase in litigation, and the 1993 Act allows parents to request a statutory assessment of their child's special educational needs when the local education authority does not agree that it is necessary. In 1994/5 out of a total of 235 appeals to the Special Educational Needs Tribunal 49 were against the refusal of the local education authority to assess, about 20%. The figures for 1995/6 were 173 out of 391, about 44% Parents can also appeal against an local education authority's decision not to issue a statement after a statutory assessment of the child's needs, and in 1994/5 there were 62 appeals on these grounds (26%) and 1995/6, 139 (35%.)(Harris, 1997, pp164-5) Parents may also appeal in relation to the contents of a statement and against amended statements, or against LEA decisions which fail to name a school or proposals to cease to maintain a statement.

Warnock's view (1996) of the working of this system is that the outcome has been "if not disastrous, at least very bad." She feels that the committee should have foreseen that,

> since only that provision mentioned in a statement was mandatory, there might come a time when a local authority would perforce have to cut back on all other provision that was not mandatory, in order to fulfil its legal obligations to children with statements.(p 57)

Since it was impossible to legislate that only 2% could have statements, it seemed to Warnock that it was hardly surprising that the number of statements increased as parents (and teachers) began to see the issuing of a statement as the only way to get guaranteed provision for their child. Warnock argues that there is too great a distinction between the children whose needs are legally defined by a statement, and those (an estimated 18%) whose needs are the responsibility of the school, rather than the local authority. She fears

that schools may not have the resources to meet the needs of these children.

Her view is that the whole system has become "increasing litigious"(p 57) and she sees the setting up of the Special Needs Tribunal as "mere tinkering." (p 58) Although she made these comments before the Code of Practice was well established, her criticisms are still valid.

Harris (1997, p 193) concludes that

> almost everyone who has had any involvement with the Special Educational Needs Tribunal believes that it represents a considerable improvement on the appeals arrangements that it replaces,

with the proviso that there are two groups whose access to the tribunal seems to be limited, (p 195) ethnic minorities and children, in the sense that it is the parents who bring the case and the children rarely give evidence. These points will be explored in another chapter when I consider the information gathered from interviews and other documented records.

Mechanisms: judicial review

The purpose of judicial review is

> to correct public wrongs and to ensure that government and other public bodies act in accordance with principles of legality, reasonableness and procedural fairness. (It is) therefore concerned with the assertion of a general public interest in the legality and integrity of public decision-making rather than of private or individual rights. (Bridges et al, 1995, p 15)

The process of judicial review still plays an important role in areas of concern which are not the subject of an appeal to the Special Educational Needs Tribunal, such as

- delay in undertaking an assessment, in line with the statutory time limits set out in the 1995 Regulations,
- failure to make arrangements or to deliver the provision specified in the Statement,
- non-educational provision which falls outside the jurisdiction of the SENT, which

might be occupational therapy or physiotherapy (but these can be seen as part of the educational provision)

The statutory responsibilities of LEAs towards defining special educational needs and the contents of statements have been clarified by the courts through the process of judicial review. Greater awareness of the possibilities of legal redress for grievances and assertion of statutory rights has led to a dramatic increase in the number of cases coming before the courts. In 1992-93, for example, 120 judicial review applications were sought, mainly disputes over the allocation of resources to meet a child's special educational needs. (Buck/Harris 1998 p 25) Many of these cases were concerned with whether a child with learning difficulties should be placed in an LEA mainstream or special school or an independent school, and the question of who should meet the considerable financial costs. Legal aid is available for judicial review, but will depend on the income and financial status of the parents. Judicial review proceedings can be brought in the name of the child who will generally qualify for legal aid. (Buck/Harris 1998, p27) Harris notes that victories (at judicial review) have been concerned with procedural deficiencies "rather than guaranteeing a different outcome in respect of the substantive issue under dispute,"because this is all a judicial review can do in tribunal cases. The judges are concerned with procedural fairness in the "Wednesbury unreasonable" sense. "Wednesbury unreasonableness" has come to be a basic principle of Judicial Review, based on the decision in *Associated Provincial Picture Houses Limited v Wednesbury Corporation*, [1948] 1 KB 223, where Lord Greene held that

> ...although the local authority have kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority would ever have come to it." Bridges, et al (1995) p15.

Has the public authority acted reasonably; has it considered relevant matters and ignored irrelevant ones? Has it acted legally, and not gone beyond its power? (*ultra vires*, a legal term for exceeding the powers conferred by legislation.) Has it acted legally, by not fettering its discretion? If the court finds a violation of any of these conditions it may order a *writ of certiorari* to quash the bad decision , but may not necessarily issue a *writ of mandamus* forcing the public authority, for example, to make a statement for a child. Harris believes that there is increased resort to contract and tort litigation which has heightened public awareness of the potential benefits of mounting legal challenges in general against education providers, as well as causing LEAs, governors and schools to think twice about the lawfulness of any planned action.

Summary

In this chapter I described how legislation has been increasingly involved in changing policies and practice, through not always exactly as had been intended, and how there is now an important legal element in the educational discourse, especially where Special Educational Needs are concerned.

I showed how educational theorists have tended to neglect the growing legal discourse, but I noted how the language of *rights* and *duties*, in the legal sense, have become part of the debate. I then looked at the processes which have been set up as part of the statutory framework, including the Code of Practice, which although it is advisory and not legally binding, has nevertheless become an important influence on professional interpretations of children's needs.

The chapter ended with a brief look at the mechanisms of the Special Educational Needs Tribunal and Judicial Review. The next chapter will analyse the *duty of care*, *negligence*

and *reasonableness*, legal concepts used by the courts in determining the outcome of disputes between parents and LEAs, thus acting as precedents in the field of special educational needs policy.

Chapter Four

Further Legal Aspects of Special Educational Needs; The Duty of Care

This chapter continues the theme of the legal discourse by looking in more detail at the involvement of the Courts and the legal concepts of the *duty of care*, *negligence* and *reasonableness* as they apply in educational matters. As I am not a lawyer, my discussion of legal points is essentially as a layperson, but this is important because legal decisions have a profound effect on policy and practice, and are part of the discourse of democracy, involving lay-people as well as lawyers.

Public law

As we have seen in the previous chapter, the law of education has been changing and growing as a result of legislation. The growth of education law can be seen as part of the huge growth in *public* or *administrative* law. Public law does not necessarily deal

> with individual rights, although these may be involved, but with whether public functions are being lawfully carried out: put it another way, it has to do with wrongs rather than with rights. (Sedley, in Bridges 1995, p v.)

Education law was developing as a separate discipline since before the 1944 Education Act, and was, until recently, generally manifested as the expertise of lawyers employed in local government, since education was, with the exception of private (public) schools and universities, mainly a function of local government. The balance has altered with changing legislation and growing involvement of central government in education, as well as the reduction in the powers of local authorities with local management of schools and Grant Maintained Status. Although the latter no longer exists, the present Government seems set to continue to reduce the role of LEAs as providers of education, the latest example being as I write, extra money, ear-marked for schools to decide how to use it.

As a result of this changing balance, litigation has increased, and lawyers in private practice have needed to develop a seemingly new area of specialization. With this new area there is a developing legal discourse which has yet to be fully explored in relation to the other discourses about special educational needs.

As this dissertation has progressed it has become apparent that it is necessary to examine this relationship and the way it affects those children who have special educational needs, their parents and those who work with them. The debates about *need* and *inclusion* refer to human rights, and the law might be seen as the most important way of safeguarding those rights in a parliamentary democracy. The theme of parents' involvement in decisions which affect their child's right to education has its basis, as we have seen, in general ideas of human rights and theories of law. One law textbook describes adjudication as

> a social process of decision which assures for the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour. (Lloyd, 1990, p 1099)

In the UK the courts cannot question the legitimacy of Parliament, but they can decide on the manner in which the State exercises its powers, when this is brought into question. The judiciary have the last word on the interpretation of the law and indeed the parliamentary draughtsmen are all experienced lawyers. Thus the courts can decide when a statutory body fails in or exceeds its statutory obligations.

I have discussed the way the legal duty of the State to educate children developed during the nineteenth century, and how the Warnock Report (1978) lent support to the principle of inclusion, that children with special educational needs should be educated mainly in ordinary schools, a principle which has increasingly received international recognition, culminating in the Salamanca World Statement of 1994 (quoted in DfEE 1997.) The 1981

Act promoted the principle of parental partnership, especially for children with special educational needs. Although the 1944 Act determined new categories of schools and children, and the 1970 Act made Education Authorities responsible for the education of *all* children, the 1981 Act brought the issue of special needs provision firmly into the legal arena, formally altering the terminology and procedures and changing expectations. As already noted, it effectively divided children with special educational needs into two categories, those with a Statement of Special Educational Needs, (whose needs have the protection of the law) and those whose needs would be provided for in a mainstream school without the need for a statement (who have no legal protection.). But parents, and professionals in schools and LEAs, do not always agree on what provision is best and whether it can be provided within the limited resources available and thus disputes are unavoidable. Since legislation had legitimised the rights of parents of children with special educational needs it was inevitable that more parents would seek redress through the courts.

Legal remedies

As I showed in the last chapter, until the Special Educational Needs Tribunal was set up the only way to correct public wrongs and ensure that statutory bodies carried out their educational duties and obligations in accordance with principles of reasonableness, legality and fairness was to initiate a Judicial Review or to take out a private action in the courts. Private law deals with violation of personal rights and a public body can be involved in such a dispute where, for example, it is claimed that a contract has been broken or someone has been injured by negligence. The system of judicial review was long-drawn out and difficult for parents, and the setting up of the Special Educational Needs Tribunal

in 1993 was an attempt to "provide an accessible and effective means of resolving disputes between parents and LEAs..." (Harris 1997 p1) A private action for negligence or breach of statutory duty is another option, but this is an expensive and difficult path to tread.

As we saw in the last chapter one of the most important concepts in legal educational decision-making seems to be that of *reasonableness*, as defined in *Wednesbury*. Local authorities and teachers must ensure that their decisions are reasonable, and this is often very difficult when there are competing demands for scarce resources; for example, providing specialised education for a disabled child at a private school may divert resources away from mainstream schools. In some cases procedural matters assume over-riding importance, and failure of a local authority to have regard to the procedure laid down in the Code of Practice, or to keep parents properly informed, can result in extra or unforeseen expenditure. (See Case Study One "K")

Section 11 of the Tribunals and Inquiries Act 1992 allows appeals to be brought against decisions of the Special Educational Needs Tribunal to the High Court on points of law.

Harris (1997 p 187) quotes McCullough J [1]

> The court must ask whether the tribunal, in making its decision, applied the correct principles of law, whether it failed to take into account any material factor, whether it took into account any immaterial factor and whether it reached a decision which was irrational, in other words one which no tribunal could reasonably have reached.

In Fisher v Hughes [2]

> the applicant successfully sought disclosure of the chair's signed notes of the SENT's proceedings and a transcript on grounds that communications at the hearing had been vitiated by the chair's interruptions, unavailability of a fully competent interpreter to assist a profoundly deaf lay representative, and alleged

---

1 Russell v The Royal Borough of Kingston upon Thames and Hunter (1996) 6 November QBD, (unreported) transcript p9.

2 Fisher v Hughes (Chair of the Special Educational Needs Tribunal) and the London Borough of Hounslow [1998] ELR 475, QBD

> problems of a blind tribunal member to identify the several speakers. (ELAS 1999 p 5)

Fisher also succeeded in a second procedural action [3] to prevent the chair of the SENT including in the bundle of papers for consideration by the freshly-constituted tribunal those papers which related to the earlier proceedings. These papers were not evidence and it was considered that they would be prejudicial as they would remain in the memories of the members of the new tribunal if they had seen them.

I quote these cases because they show how the courts reach their decisions, using previous decisions and precedent, but taking account of the particular circumstances of individual cases.

The Duty of Care and the law of negligence

The concept of reasonableness in relation to decisions by LEAs has already been mentioned. Failure to take reasonable care not to cause foreseeable damage can result in liability for negligence. However a defendant may inflict loss on another person by his/her unreasonable conduct without being liable to compensate them. In English law a person cannot be liable for damage caused by his carelessness unless s/he is under a duty to take care not to cause the damage. Since 1990 the courts have relied on the *tripartite test* (the modern version of the "neighbour" principle) used by Bingham LJ (in Caparo Industries PLC v Dickman [1990] 2AC 605), so that three requirements must be satisfied if a duty of care is to exist. These are *foreseeability, proximity* and that it is *just and reasonable* for such a duty to exist. *Foreseeability* was defined by Lord Atkin in the famous case of Donoghue v Stevenson [1932] AC 562 HL thus

---

[3] R v Special Educational Needs Tribunal ex parte Fisher 22.4.99 unreported but quoted in ELAS (1999)

> You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour.

Lord Atkin continues with the idea of *proximity*;

> Who, then, in law is my neighbour? .... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or which are called in question.

There are two kinds of policy factors which help to determine whether or not it just and reasonable to impose a duty of care. The first is what may be regarded as fair and just between people who act in a certain way and those who suffer in a certain way because of their actions. It may not be just and reasonable for the former to be liable for negligence because of the very large number of claims that might be made against them. The other category of policy factor is what may be beneficial to the interests of the public, for example if it will promote safe practice. As we shall see, these two considerations were vital for the decision of the House of Lords in the Phelps case. (HoL 2000)

Until 1998 public services, especially the police, had considerable immunity from legal action under the first of these two principles. This immunity sprang from the exclusionary rule formulated by the House of Lords in the Hill Case (Hill v Chief Constable of West Yorkshire Police [1989] AC53) The rule was based on the view that the interests of the community as a whole can best be served if the police are able to make decisions in the battle against crime without the risk of actions for negligence. Thus one person may have to suffer in the interests of the wider community. This principle could be applied to all the public services, and, until the Osman Case in the European Court of Human Rights, was held to be a "water-tight defence to a civil action against the police." (The Times, 5 November 1998, p 49) In Osman the court held that the exclusionary rule

> constituted a disproportionate restriction on their (the Osmans') right of access to

> a court in breach of article 6.1 of the European Convention on Human Rights.(Times as above)
>
> Article 6.1 provides " in the determination of his civil rights .... every one is entitled to a hearing by an independent and impartial tribunal established by law.

Thus the Osmans

> while they might or might not have failed to convince the domestic court that the police were negligent in the circumstances, they were nevertheless entitled to have the police account for their actions and omissions in adversarial proceedings.

This case, along with the cases to be discussed next, will have an impact on claims in respect of the negligent provision of education by publicly-funded statutory education authorities.

In a number of cases starting in 1908 with Wilford v. West Riding of Yorkshire, [1908] 1KB 685, the courts have had to decide whether a child or the parents had a right of action where education was either not being provided or being inadequately provided. In the cases of E (a minor) v. Dorset County Council, Christmas v. Hampshire County Council and Keating v. Bromley London Borough Council [1994] 3 WLR 853; [1994] 4 AER 640; 92 LGR 487, the Court of Appeal unanimously rejected the claim that damages could arise from a breach of statutory duty. On appeal to the House of Lords, [1995] WLR 152, these education cases were joined with two cases brought by adults who had been children in the care of a local authority (X v Bedfordshire and others) and the issues of breach of statutory duty and the existence of a cause of action for negligence were explored. Lord Browne-Wilkinson stated that "the cases were concerned with the enforcement of public law rights by way of declaration and injunction and do not establish any private law claims for damages for breach of duties imposed by the Education Acts," (quoted in Friel and Hay (1996) p 10.) These cases were concerned with the issues of liability and negligence,

and were test cases in the sense that they would act as a precedent for other similar cases, the legal doctrine of *stare decisis*, "a decision must stand."

The three education cases (named above) were considered by the House of Lords, together with the two cases of child abuse which involved the same principles. In the latter the plaintiffs claimed they had been injured by public authorities in the carrying out of statutory functions imposed on them for the purpose of protecting children from abuse. In the first abuse case it was claimed that the local authority had failed to obtain care orders. In the second case (M v Newham London Borough Council) it was claimed that the local authority was vicariously liable for negligent professional advice given by the psychiatrist and social worker employed by them. The education cases were based on similar premises and claimed breach of statutory duty and damages for negligence.

The Education Cases: No Duty of Care? Immunity of Statutory Bodies?

In the first case (E v Dorset) the claim was that the LEA had failed to provide for the pupil's special educational needs and there had been negligent advice by the local authority's education psychology service. E had "specific learning difficulties causing him difficulties in literacy and numeracy, often called dyslexia." (HL,[1995] ELR p 444) He had a statutory assessment early in 1987 and his statement was issued in December of that year. E's parents were dissatisfied with the LEA's provision and decided to send him to a private, fee-paying boarding school which specialised in teaching children with dyslexia. They paid the fees. They appealed under s 8 of the 1981 Act which allows an appeal to a committee of the local authority, but the appeal committee accepted that E could be appropriately placed in an ordinary maintained school. A new statement named a different maintained school. The parents then appealed to the Secretary of State who rejected that

appeal in January 1990. At judicial review the revised statement was rejected by the High court and referred back to the Secretary of State to be reconsidered. The Court of Appeal dismissed an appeal against that decision in May 1991. In July 1991 a new statement named another maintained school chosen by the parents and E. was still at that school in 1995 when the case came to the House of Lords.

E's parents claimed on his behalf that the LEA was under two direct duties of care, first to perform the statutory duties imposed on them by the 1981 Act, that is, to make a proper statement and to make proper provision for his special educational needs. Second, since the LEA provided a psychology service to advise parents, they had a duty of care to provide appropriate advice, and were negligent in having provided improper advice. A third claim was that the authority was vicariously liable for any breach of a personal duty of care to use professional care and skills in their assessments, owed by the psychologists and officers of the LEA. The claim was struck out by the House of Lords.

In the second education case (Christmas v Hampshire) it was claimed that the headmaster(sic) employed by the LEA had failed to refer the child for formal assessment or to an educational psychologist, and that the authority's advisory service had failed to assess and ascertain the pupil's special educational needs, "whose symptoms were consistent with dyslexia." ([1995] ELR p 406a) Lord Browne-Wilkinson said that the question was whether it was right to "superimpose on the statutory machinery for the investigation and treatment (sic) of the plaintiff's special educational needs a duty of care to exercise the statutory discretions carefully." ([1995] ELR p 446) The noble Lord acknowledged that his view had changed from time to time. He said it was plainly foreseeable that if the powers were exercised carelessly a child with special educational

needs might be harmed in the sense that he would not obtain the advantages that the statutory provisions were designed to provide for him. But, he argued, a common law duty of care could only arise in relation to an authority that decided an issue so carelessly that no reasonable authority could have reached that decision. Why should "such a grossly delinquent authority escape liability?"(p 446) However he reached the conclusion that other factors outweighed these considerations.

The first factor the judge referred to was that the 1981 Act specifies the

> close participation of the parents who are themselves under a duty to cause the child to receive 'efficient full-time education suitable to his ability and aptitude.' (p 446)

The involvement of the parents in the process of decision making and their right of appeal against decisions they think are erroneous was sufficient remedy and allowing the parent or child to bring a claim of negligence would be to duplicate remedies, (something the law frowns on as being unnecessary.) Lord Browne-Wilkinson said that the number of cases that could be brought for breach of duty of care would be very small because it would have to be shown that the decision was so careless that no authority could have reached it. But he was worried that if a common law duty of care was held to exist "many hopeless (and possibly vexatious) cases" would be brought, which would involve LEAs in a great amount of expenditure in their defence. He believed that if there was no other remedy available this price might have to be paid "in the interests of justice." The alternative remedy might be a claim against the LEA on grounds of vicarious liability for negligent advice on the basis of which it uses its discretion. To a non-lawyer this may seem like a very fine distinction indeed, but it is of fundamental importance in the decision-making of the court.

Lord Browne-Wilkinson considered this second duty of care, the allegation that the

authority's advisory service was negligent

> in failing to ascertain that the plaintiff had a specific learning difficulty, failing to assess the nature of his learning difficulty, failing to diagnose dyslexia and failing to refer the plaintiff or advise his parents to refer him to an educational psychologist.

It was claimed that this negligence caused him to suffer injury through lack of appropriate treatment and thus he failed to achieve his potential and his opportunities were restricted. This duty of care, it was argued, did not arise from the LEA's statutory machinery under the 1981 Act. Rather it was owed by a headmaster (sic) and educational advisor to a pupil under the common law. Counsel for the LEA submitted that it was inconsistent to have a common law duty of care owed to children with special educational needs when a parallel statutory system had been set up to take care of this. Lord Browne-Wilkinson

> could see no legal or common sense principle which requires one to deny a common law duty of care ....just because there is a statutory scheme.." (p 450)

If the child were at a private school or had a private consultation with an adviser the statutory scheme would be irrelevant. [4] There would be a direct duty of care arising from the contractual relationship.

It is accepted that a school and its teachers have a duty to safeguard the children's physical well-being but there had not been a case where a teacher or other professional had been held liable for negligent advice about educational needs. Lord Browne-Wilkinson said that because education is the purpose for which the child goes to school, responsibility must be assumed for both education and well-being. The headteacher and any advisory teacher would owe a duty to the child to exercise the skills and care of a reasonable head or

---

4 This same point was discussed in the House of Lords during the Phelps hearing (see below) whilst I was there and several of the Lords asked the Queen's Counsel to reiterate the argument.

advisory teacher. The advice given would have to be in accord with the views that might have been entertained at the time by reasonable members of the teaching profession. They would not be in breach of a duty of care if they held a reasonable view of dyslexia as shared by responsible members of the teaching profession. As already noted, the test of reasonableness relies on the Bolam v Friern Hospital Management Case, [1957] 2 AER 118, at 122, which states that

> A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

The LEA argued that the damage claimed to flow from the negligent advice was not recoverable in law. The plaintiff's barrister alleged that

> the failure properly to treat the dyslexia caused psychological damage sufficiently serious to constitute an identifiable mental illness.

In the third case (Keating v Bromley) it was claimed that the LEA had failed to provide efficient schooling and had provided inappropriate education in a special school when he did not have any serious disability and should have been educated in an ordinary school. It was also claimed that the LEA had failed to pay attention to the plaintiff's mother's repeated requests that he should have a place in an ordinary school. All three claims were struck out by the Lords.

Phelps v the London Borough of Hillingdon

Liability in negligence involves the failure to take reasonable care not to cause foreseeable damage, but the fact that a defendant's failure to take reasonable care *has* resulted in foreseeable damage does not necessarily make him liable. He must also have been *under a duty* to take care not to cause the damage. Thus an educational psychologist might have a duty to take care not to cause damage to the children on whose behalf s/he advised the

local education authority, but the main duty would be to the authority, the employer. In this context the conflict between the needs of an individual child and the allocation of scarce resources becomes pertinent, and educational psychologists, even if they are not actually "gate keepers," are generally aware of the need to avoid committing their authority to excessive expenditure. A statutory authority is obliged to use its resources wisely.

Further problems with the concept of duty of care arise when it was not the action of the defendant that caused the damage but s/he could have mitigated it or if the damage is economic loss rather than physical damage. These issues have become part of the educational discourse and will help to determine the direction of policy with regard to inclusion and the future of Statements. They are also an important part of the discussion of the Phelps case which I shall consider next.

I have followed this case since 1997 when Mr Justice Garland awarded Pamela Phelps damages against Hillingdon Local Education Authority for failing to diagnose and treat her dyslexia, and photographs of Pamela embracing her counsel, who happened to be Cherie Blair QC, appeared in the national press. (The Law Lords refer to Miss Phelps as Pamela throughout the judgements so I shall do the same.) I contacted her solicitors to try to interview her, but she did not wish to be interviewed. Nevertheless the details of her case are in the public domain, and since she has now won in the House of Lords, it is necessary to look closely at the case and its implications for policy and practice in the field of Special Educational Needs. I shall also briefly refer to the other three cases which came before the House of Lords at the same time, Anderton v Clwyd County Council, In Re G. (A Minor) and Jarvis v Hampshire County Council. A more detailed narrative of the cases is set out in Appendix 5.

The issues raised in these cases are similar, and they were considered to be so important

that the Law Lords adjourned the hearing on the first day in order that seven Law Lords could be available to hear the case and give an authoritative final decision on the issues. I attended some sessions of the hearing as well as the final announcement by the Law Lords in the House before the publication of this land mark decision on 27 July 2000.

Issues

The cases raise the following educational, psychological and legal questions.

1. Educational

   (a) Whether Specific Learning Difficulties/Dyslexia is an educational condition requiring specialised and different teaching and learning approaches

   (b)whether children with such difficulties can be taught alongside (in a small group with) children with moderate learning difficulties.

2. Psychological;

   (a)Whether learning difficulties can be the result of social or emotional problems.

   (b)Whether dyslexia is a medical or congenital condition and what is the appropriate "treatment."

3. Legal;

   (a)The nature of the damage claimed; does the failure to ameliorate a constitutional disability make it an injury and can it be compensated in law?

   (b)Whether an EP, or indeed a teacher or SEN officer, as an employee of a LEA, has a duty of care to the children s/he may see in the course of his/her work as part of the LEA's Service, and whether the LEA is vicariously liable for any negligence. Or (c) whether the LEA is immune from a duty of care and liability for negligence on the basis that its statutory powers enable it to make choices involving resources and priorities, and therefore someone treated adversely as a result of those choices

> has no action for damages.

All these points will be dealt with in the course of the following discussion, but not in the order set out above because they overlap and are not sufficiently analytically distinct from each other.

The cases can also be analysed according the concepts of need involved, for example, the *felt* needs of the parents may lead them to begin litigation, leading to *expressed* needs, and the courts will apply notions of *comparative* and *normative* need when considering the existence of a duty of care.

Lord Clyde, in his contribution to the judgement, focussed particularly on the

> importance of the provision of an education appropriate to the particular *needs* of children (House of Lords, 4 p 2) (my italics)

and the possible duty of care owed by the employees of local education authorities to students of whatever age on the meeting of their special educational needs. He felt that it was unlikely that there would be

> a flood of claims, or even vexatious claims, which would overwhelm the school authorities... On the contrary it may have the healthy effect of securing that high standards are sought and secured.. (House of Lords, 4 p 5)

Phelps; A landmark decision for education policy

Phelps was the first case of its kind to succeed in the High Court but there are many similar cases whose outcome would depend upon the result of this one, given the legal rule of precedent or *stare decisis*. For this reason the case went to appeal and the original judgement was overturned. As already noted, the case raised questions of law relating to the existence and scope of a duty of care of an educational psychologist in the employment of an LEA, as well as the nature of the damage for which compensation was claimed. The Court of Appeal held that an educational psychologist employed by a local authority to

whom a child had been referred for assessment by the authority *did not owe a duty of care* to that child. Her duty was to her employers unless it was made clear that, in addition to that duty, she had assumed personal responsibility towards the child. The professionals in this case did not have the equivalent of a fiduciary relationship with a client as in contract law, as no consideration (something of value) had passed between the client and the professional.

The other important issue considered by the Courts is whether failure to mitigate the consequences of dyslexia is an injury, since dyslexia seems now generally agreed to be a congenital condition or an educational deficit, and not itself an injury. I shall discuss the question of the nature of dyslexia when it arises in the context of the narrative. As a result of these contentious points the case went to the House of Lords in March 2000. The House of Lords reversed the decision of the Court of Appeal, by the unanimous decision of seven Law Lords. Unanimous decisions are comparatively rare, especially with a panel of seven, and the only other sitting of seven Law Lords was the recent one of the second hearing of the Pinochet case. The decision in Phelps was that the LEA was vicariously liable for the negligence of the educational psychologist who (the Lords decided) had a direct duty of care to the child and her parents, as well as to the school and the local authority.

The X v Bedfordshire case established that there can be no cause of action based on the careless performance of a statutory duty but the plaintiff could establish that there is a common law duty of care arising from the imposition of a statutory duty. The Phelps decision modified this principle, that statutory bodies in general have immunity from liability for damages on the grounds that their decisions are made in the exercise of statutory discretion. Lord Nicholls, in his consenting judgement in Phelps, stated very

clearly the principal objection to a general duty of care for teachers and other professionals.

It is

> the spectre of a rash of 'gold digging' actions brought on behalf of under-achieving children by discontented parents, perhaps years after the events complained of .... So, it is said, the limited resources of education authorities and the time of teaching staff will be diverted away from teaching and into defending unmeritorious legal claims. Further, schools will have to prepare and keep full records, lest they be unable to rebut negligence allegations, brought out of the blue years later. For one or more of these reasons, the overall standard of education given to children is likely to suffer if a legal duty of care were held to exist. (House of Lords 2000, 3, p 9)

However, Lord Nicholls was not persuaded by these fears and did not think that they

> provided sufficient reason for treating work in the classroom as territory which the courts must never enter. (House of Lords 2000, 4, p 1)

He felt that there should be a claim when something had gone badly wrong, with serious consequences for a particular child, but that the courts

> with their enhanced powers of case-management must seek to evolve means of weeding out obviously hopeless claims as expeditiously as is consistent with the court having a sufficiently full factual picture of all the circumstances of the case. (House of Lords 2000, 4, p 1)

The nature of dyslexia

The case incorporates all the arguments and difficulties which arise in this kind of case and has many features which are familiar to anyone who has worked in this field. The very existence of such a condition as "dyslexia" is still not universally accepted, despite claims that a gene for dyslexia has been discovered. A complete dissertation could be written on the subject, and I do not have time to do more than touch on the subject. Steven Pinker, in his discussion of genetic language abilities and the "K" family, refers to

> dyslexia as a difficulty in reading that is often related to difficulty in mentally snipping syllables into their phonemes (1994 pp 322-4)

and later in his glossary as

> difficulty in reading or learning to read, which may be caused by brain damage,

> inherited factors or unknown causes. (pp 475-6)

There has also been some research from Southern Illinois University which claims that babies can be tested for dyslexia at birth. (Times August 19 1999)

The term "specific learning difficulties" covers a broader spectrum and some professionals, following the views first put forward by Tizard, (1972) (See Chapter One) prefer not to differentiate on grounds of IQ and want *all* children with learning difficulties, whatever the diagnosis, to receive help. There are several different issues here and various positions held by particular individuals and groups. For instance there is disagreement about the questions of whether it is possible to make a differential diagnosis of dyslexia which sets it apart from other language or literacy difficulties, and what assessment methods make it possible, for example a *discrepancy* between scores on IQ tests and literacy attainment, or low scores in tests assessing particular sub-skills such as auditory working memory and or phonological processing. A further contentious issue is the evidence (or lack of it) that children so diagnosed will be able to benefit from a particular teaching regime that is different from a programme that will improve the literacy skills of other children with delayed development in this area.

Nevertheless the Judges (in all three courts) used the term "dyslexic" as if it has always been a perfectly acceptable term, with a generally agreed meaning and definitive "cure" or, at least, some form of remedial treatment to deal with some of the symptoms. The term may be more widely accepted today, but it is still far from being a homogenous or non-controversial description, even though it now appears alongside SpLD on Form 7, the official return schools make to the DfEE annually. The only consensus there seems to be is that

> it is extremely difficult to identify different categories of children who are behind

> their peers in learning to read. .... the report of the British Psychological Society (1999) Working Party on Dyslexia, Literacy and Psychological Assessment .... adopted a definition of dyslexia that had no exclusionary criteria (i.e. identifying children as dyslexic is not related to children's perceived ability levels.) (Solity, p 48)

Fourteen years ago things were very different. Miss Cherie Booth QC based her arguments for Phelps on the case of X (Minors) and in his judgement on that case Lord Brown-Wilkinson was aware of this controversy when discussing the duty of an EP to

> exercise the ordinary skill of an competent psychologist and if they can show that they acted in accordance with the accepted views of some reputable psychologist at the relevant time they will have discharged the duty of care, even if other psychologists would have adopted a different view. (X (Minors) p 763E)

This was an unambiguous use of the "Bolam test" principle referred to in Chapter Four (p 97) and could have been used in the Hillingdon defence. These issues were briefly touched on in court but Lord Slynn (in his judgement of 27 July 2000) accepted the contention that Pamela

> as is now known, since birth has been dyslexic. (House of Lords, 2000, -1, p 3)

He continues

> Dyslexia is normally a congenital condition defined by the World Federation of Neurology (1969) as "a disorder manifested by difficulty in learning to read despite conventional instruction, adequate intelligence and socio-cultural opportunities. It is dependent upon fundamental cognitive disabilities which are frequently of constitutional origin" It is agreed that at all material times methods of psychological assessment have been in use which provided guidance as to whether a person might be dyslexic and that the techniques for mitigating the effects of dyslexia by a multi-sensory and structured approach were known. It is, however, accepted that the extent to which the effects of dyslexia can be ameliorated varies widely. (House of Lords, 2000, -1, p 3)

The initial high profile of the Phelps case was in part due to the success of the British Dyslexia Association in putting its case. The media attention after the first judgement led to solicitors being inundated with enquiries from parents with dyslexic children. I discovered in the course of my research that one London firm had to leave their answer

phone on and change its message, telling callers they could only deal with cases submitted in writing.

The Times (p 7, 24 September 1997) reported that the British Dyslexia Association hoped that "Miss Phelps' success would lead to a review of dyslexia screening by all education authorities." Certainly it has done so in the case of the London Borough of Hillingdon Education Department. Their chief educational psychologist was kind enough to give me an interview and a copy of the folder they have produced for primary school class teachers to make sure that children with "specific literacy difficulties, (dyslexia)" receive appropriate help. Nevertheless this document appears to subscribe to the *discrepancy* theory with its definition,

> Where a child has had sufficient opportunity to learn and their difficulties cannot be explained by physical or sensory impairment or by emotional or behavioural difficulties, she or he may be described as having specific learning difficulties.. (Hillingdon, 1997, no page numbers)

and the definition uses the term dyslexia only once, in brackets, in the heading, making it look somewhat tentative.

The Times' supplementary headline "Recovery rates are good if problem is spotted early" heads an article which puts the British Dyslexia Association's point of view and seems not to recognise that there may be an alternative, that are many reasons why children fail to become literate and that there may be no simple solutions to the multiplicity of their problems.

Mr Justice Garland's judgement (in the High Court) was that the "educational psychologist employed by the London Borough of Hillingdon mistakenly blamed emotional problems." Much was made of the fact that at seven she was "*already* reversing the letters *d* and *b*, a classic sign of dyslexia." It might have been more appropriate to use the word

still instead of *already*, since many children reverse these letters when beginning to learn to write but soon learn the correct orientation. Pinker's glossary definition of dyslexia (see above) continues

> Contrary to popular belief, it (dyslexia) is not the habit of mirror-reversing letters.. (p 476)

Garland J continued, "one more test would have established the real problem." But the Bangor Test, to which he refers, does not produce a definitive diagnosis, it only gives an indication that there might be difficulties. The accompanying instructions make this very clear. (Miles, 1995) Any professional worker can use the test, which is

> offered as a *contribution* (Miles' italics) towards further understanding of the subject's difficulties, not as a means of definitive diagnosis." (Miles 1995)

However in the House of Lords the Judges accepted the "expert" evidence about the usefulness of the test and promulgated a principle which has now been given the sanction of the House of Lords and is legally unchallengeable.

Garland LJ had also accepted the evidence and opinion of Dr Gardner, Hillingdon's expert witness, that given Pamela's problems he would have carried out more tests to seek and explanation for the large gap between her chronological age and her predicted reading age. Thus the defendants' own witness effectively scuppered their case.

Although Pamela did not allege specific breaches of the Education Acts, Lord Slynn drew attention to the fact that Pamela was not assessed as required by the 1981 Act and did not have a Statement of Special Educational Needs and thus the authority had actually failed to fulfill its statutory duties. Nevertheless he did not think that this particular failure should be remedied by damages. He and his fellow Law Lords did however accept that

Pamela had established the direct duty of care on the part of the EP and vicariously on the part of Hillingdon LEA.

Further Implications and discussion

There are implications for *normative* and *comparative* need. It is not only Guardian newspaper readers (Letters 1 August, p 15) who might suggest that £45,650 could provide two more teachers for the more disadvantaged members of society who are least likely to resort to litigation. In practice what will happen is that LEAs will have to pay larger insurance premiums to cover themselves against claims of this nature. Another Guardian letter writer on the same day says that the ruling will be "another nail in the coffin of local authorities" and is concerned about retrospective cases such as Phelps where time has passed (more than ten years) and witnesses and records are not available. This writer also predicts that

> the system will become more unequal. Some individuals will win large amounts of compensation and law firms will become richer, at the expense of those who need the resources now. (As above, p 15)

An Education Law Association Bulletin Editorial notes a sensible suggestion from Councillor Graham Lane (Newham Borough Council and the Local Government Association)

> that an appropriate remedy in such cases would be all-found and fast-track further education, to put things right for the litigant whom the courts have determined to have missed out. (ELAS, 2000, p 1)

The editor continues

> Elected members and education officers are used to the cry at public consultation meetings (on more or less any subject) "What about the children? They have only one chance." The second sentence there is a wonderful example of one to which the honest answer is completely unusable in context, because it might imply cavalier disregard, but of course there are numerous second chances, if people can be enabled to take them.

Further and higher education for mature students can provide a second chance for those who may have "failed" at an earlier stage in the educational process. The misery of children who fail during their school years may be entirely erased by success later on, but that does not excuse society from attempting to get the balance right from the beginning. This brings us back to the point where the satisfaction of one individual's need may be at the expense of others, depriving them of the satisfaction of their equally valid needs, and to the notion of *comparative* need. Economic theory recognises this with the notion of "opportunity cost;" the use of a resource for one purpose means denying it for another purpose. The opportunity cost here will be met by those needy children whose parents do not press for statements, which raises the further issue of equity with regard to the division of children into two categories, those with, and those without, Statements. Differential esteem and pressure may influence professional judgement. This will be discussed later in the context of the case where one child's parents used their professional knowledge and position to obtain an interview with the Director of Education. This is not to say that the Director saw them *because* of their professional standing; rather that their position gave them the knowledge and confidence to go straight to the top of the bureaucracy. Thus the suspicion is that statements are becoming a means by which articulate parents get access to additional resources for their children whatever the extent of their need. (Gray, 1997) This problem applies particularly where parents resort to legal resolution of their difficulties. It is only the parents, the active parents, with the necessary tenacity and energy, or perhaps the good fortune to find an advocate to act for them, that are able to take this course of action. After "Phelps" it may be that more parents will turn to litigation and more lawyers will be willing to act for them. In a somewhat facetious article in the ELAS Bulletin already referred to, Haward encourages

the litigious to start sharpening their knives, preparatory to dismembering the carcase so thoughtfully provided for their lawyers' sustenance ..... How about asustained assault on schools, say? Something to make life, at last, totally impossible for heads? Any enterprising lawyer with a tame client on hand to supply him or her with a pretext and a living could do a lot to rock the whole framework of SEN provision by rigorously exploring the implications of the LEA's statutory responsibility for *all* needy types, not just those who have graduated beyond Warnock's first two stages into the promised land of assessment.

It is tempting to speculate that this writer may have suffered at school before he joined the legal profession and may have a grudge against teachers, since he suggests that his readers might

> enjoy a little harmless fun at the expense of harassed headteachers and thereby contribute to their in-service training ....

by insisting that schools teach imperial weights and measures alongside the metric system.

The serious point in this article is the fear that the "floodgates" could be opened, and Lord Nicholls' examples and his confidence that the courts will be able to cope with the numbers of cases could be ill-founded.

In Phelps the teachers were completely exonerated from any blame, because they followed the advice of a professional called in to give expert advice, the educational psychologist. At an ELAS meeting it was pointed out that if a solicitor asks for advice from a barrister who gives him bad advice, on which he acts, the solicitor might be liable. Thus an action might occur where teachers might be liable without being able to pass the buck. If, as the proposed new Code suggests, all teachers are to be Special Needs teachers, this might happen. On a personal level, the Phelps case was a triumph for Pamela, but a disaster for Miss Melling, the EP concerned, whose reputation was impugned. She has suffered a great deal and many will see this as an injustice.

On a more general note there are serious implications for the role of educational psychologists, who are already apprehensive about the way they are used as psycho-

metricians, gatekeepers of the Statutory Assessment process. Parents and schools see Statements as a way of obtaining extra resources, with the Code of Practice Stages as a ladder with a Statement as the ultimate prize, (Croll and Moses, 1999) and in my experience there is pressure from teachers for EPs to spend most of their allocated time in school on assessment of individual children with a view to proceeding to a statutory assessment. Mackay (2000) and Wedell (2000) both express concern about the role of EPs in that process. The dilemma is whether or not the EP should be

> called in to clarify problems when school-based strategies have failed .... or working at more strategic levels in LEAs, eg, in identifying shortfalls in resources or systems. (Webster & Hoyle, 2000, p 95)

As Wedell points out, this conflict is the result of the misapplication of the Code of Practice.

> There has been the misconception that primary care agents' concern has to accumulate through the prior stages of the Code before EPs can be consulted pupil... This totally frustrates EPs from being able to carry out a preventive role. Their work changes to becoming an "educational undertaker" through the Statement procedure instead of being part of the spectrum of expertise available to a school. (Wedell, 2000, p 43)

So there is tension between the role of testing and measuring, (now so popular in this "audit society") for the purposes of diagnosis and classification, based on a *medical/individual deficit* model of SEN, and the preventative and interventionist role based on the *social/environmentalist or interactionist* model, leading to an inclusive view of education. It is important that the needs of the many are not neglected because of the needs of a few who claim a greater proportion of the available resources.

Summary

In this chapter I have discussed the issues that arise from the decisions of the House of Lords in a number of cases culminating in the Phelps decision of July 2000. The nature of

dyslexia was touched on briefly in the course of the discussion, as well as the implications for the role of EPs and the liability of teachers and other professionals. There can no longer be an assumption of immunity for statutory bodies where a duty of care is concerned. Failure to mitigate the difficulties caused by an inherent problem such as dyslexia could be held to have caused an injury. LEAs and the psychologists, teachers and other professionals they employ will be liable for negligence if this can be proved.

In these cases parents have gone beyond the educational administration of special educational needs by invoking common law. These are the legal aspects of SEN which are now an essential part of the discourse but may still be incomprehensible to most parents, if not to teachers. The next chapter is concerned with the methodology of my research and the way I set out to discover the experiences and views of ordinary parents.

Chapter Five

Methodology

In this chapter I consider the rationale for my research and look again at the research questions in the light of the educational literature and the legal cases relevant to disputes concerning the duty of care and the right to resources for special educational needs. Then I consider the possible theoretical framework or appropriate paradigms. I look at the methodologies that I might have used and how I selected a research method. Finally I describe my research procedures and data collection.

1. Rationale and research questions

In my introduction I described how I began with four research questions which came from my professional interests and review of the relevant literature. In summary, these were

1. Whether parents see their children's needs differently from professionals, such as teachers, psychologists, doctors and lawyers.
2. Whether there is a conflict between lay and professional understandings, and legal principles.
3. Whether there are satisfied parents with children whose needs are met at Stages One to Three of the Code of Practice.
4. How resources are allocated and what is the limit on discretionary decision-making.

These questions seemed to be far too broad for one researcher with limited time and resources and so I have reduced the scope of the questions and narrowed my field of enquiry. This happened as part of the research procedure itself so that the data collection determined the limits of the questions. In my preparatory reading of the education literature a new question evolved, generated by the presence of constant references to legal

aspects of special educational needs. These references were seldom developed in detail. This new question concerned the match or mismatch between the academic and legal definitions of need and their approximation to parents' notions of the need of their children. As well as an over-view of academic educational texts, this involved an examination of legal concepts and a look at some significant case law including the cases that have been settled by the House of Lords recently.

2. Theoretical framework or paradigms

Setting out to formulate a research topic is like undertaking a journey through a field which Bassey maintains is a "complex tangle of beliefs, aims, methods, languages and intellectual structures." (Bassey, 1995, p vii) This tangle has to be constructed into a coherent framework and used to back up the process of enquiry. The choice of topic is often a significant issue of intellectual interest that could have implications for policy and practice, as well as being a product of the researcher's own experience and values. The process will be worthwhile if it is credible, scholarly and elegant.

An important part of the research task is not just to understand and describe the problem but to suggest ways forward and to "monitor effectiveness." (Robson, 1993 p 7.) As Robson argues, there must be a rationale for the research, a demonstrable, urgent necessity for an investigation into individuals or groups and their problems and concerns, as well as the systems and organizations in which they find themselves. I had no difficulty with finding an area for investigation that satisfied this criterion; the 1997 Green Paper's commitment to partnership with parents, as above, which relies on effective communication and whether academic and legal definitions of need approximate to parents' notions of need.

All research implies some kind of evaluation, a different agenda from purely auditing and describing a phenomenon. It is also always political (as Scott and Usher point out, 1999 p 1.) Educational research can be compared with other kinds of research, for example, *operational research*. This was a concept developed during the war to assist in the analytical study of the anti U-Boat campaign and the delivery of simple solutions to tactical problems of air attack and size of convoys, by Patrick Blackett, who later won the Nobel Prize for Physics. (Cummings, 1997, p 17) There are two methods of scientific research, which are used as models in philosophy and the social sciences; whether one should proceed from the general to the particular (deduction) or vice versa, proceeding from particular facts to a general conclusion (inductive method). The first is the "a priori" procedure,

> to attempt to find general solutions to certain rather arbitrarily simplified problems..... to select out of the numerous variables ....certain important ones which are particularly suitable for quantitative treatment, and to ignore the rest.

The second is

> "to find, both by experimental and by analytical methods, how a real operation would be altered if certain of the variables .... were varied. .... Some of these can be given a quantitative measure but some can only be expressed qualitatively .... The common sense procedure is to use the result .... of some past operation under known conditions to predict the result of a future operation under new conditions."
> (Cummings, N., 1997, p 17)

Of course this is a comparatively recent reworking of a problem that is as old as philosophy and mathematics. For example, mathematicians like to begin with first principles and use logical proofs to proceed from known first principles to the unknown, taking nothing for granted. Singh (1998, p 146) quotes a story which demonstrates this.

> An astronomer, a physicist and a mathematician were holidaying in Scotland. Glancing from a train window they observed a black sheep in the middle of a field. "How interesting," observed the astronomer, "all Scottish sheep are black!" To

> which the physicist responded, "No, no! Some Scottish sheep are black!" The mathematician gazed heavenward in supplication, and then intoned, "In Scotland there exists at least one field, containing at least one sheep, at least one side of which is black."

It seems to me that it is fashionable to view almost every phenomenon in terms of a continuum rather than in distinct categories. Sheep, for example, might range from pure white, through various permutations of black and whiteness, including one-black-sided-ness, to pure black. So indeed do researchers in whatever field. Early sociologists and social scientists, such as Durkheim, (1985,1964) Weber and the Webbs, used what they considered to be a scientific method, an empiricist approach, and modelled themselves on mathematicians, biologists and physicists. Beatrice Webb's

> special aim (was) to understand the condition of the working class in the way of housing, by digesting the evidence of other people; testing and supplementing it by my own observation and experiment. (Webb, 1926; Penguin Edition 1971, p 277)

Empiricism is the view that knowledge derives from experience. The astronomer's statement was based on his previous experience of sheep in general, and his observation of that particular sheep. The physicist had a different paradigm, that statements derived from experience are true until they are proved false or exceptions are discovered. The mathematician was the true positivist, who would say that he was taking nothing for granted, not even the supposition that sheep are usually the same colour on both sides. Positivism is a form of empiricism which bases knowledge on perceptual experience and assumes that the experience is external to or independent of the impartial observer.

At the other end of the continuum, ethnography is a form of anthropology which attempts to provide systematic description of individual human societies, generally recognising that the role of the observer is an integral part of, or can have a profound influence on, the observed behaviour. The preconceived notions or theories of the researchers are

admitted to have an effect on the way the phenomenon is observed and described. For anthropologists, the benefits and costs of participant observation have dominated methodological issues in the discipline.

Both positivism and ethnography have their uses. It is a false dilemma to reject either positivism or ethnography as a research method in the field of education. Awareness of the traditions of positivism ensures that the researcher respects the "facts," proceeds in a coherent manner, checks the validity and reliability of sources and is aware of the deductive /inductive approaches. Respect for ethnography ensures that the small scale observation of a research problem takes into account the subjective interpretation of events and participants' accounts, and understands contextual variables (Weber's "verstehen," 1949) within the dynamics of the research. Thus in spite of the contradictions between positivism and ethnography, both approaches have a part to play.

On the shoulders of giants

Bassey (1996, p 77) urges caution when using authorities to support one's arguments, calling it "genuflection", but in any academic exercise where knowledge and "facts" are disputed, it is axiomatic that one needs to acknowledge the sources of ideas. Newton acknowledged his debt to the scientists who preceded him by saying,

> If I have seen further it is by standing on the shoulders of giants. (ODQ, 1979, p 362.)

This metaphor originated with Bernard of Chartres, who said that

> we are like dwarfs on the shoulders of giants, so that we can see more than they, and things at a greater distance, not by virtue of any sharpness of sight on our part, or any physical distinction, but because we are carried high and raised up by their giant size. (ODQ, 1979, p 41)

We may jump from one set of shoulders to another in order to get the best view but we

have to acknowledge our debt to those intellectuals and writers who have influenced our ways of thinking. This is my rationale for having devoted the preceding chapters to theoretical issues raised by other writers and researchers, as well as a chapter on the law. The relevance of these approaches is particularly important in analysing the components that would be involved in any study of way the Green Paper's (1997) commitments can be fulfilled. These are the conflicting definitions of need, the legislative principles and the interpretations of the same by the Courts, hence my reflections on the nature of legal discourse and the way it contrasts with other ways of looking at special educational needs, for instance the medical, sociological and psychological discourses. These are the categories used by Corbett (1996) in her discussion of what she considered to be the generally deprecating attitude towards children and adults with special educational needs. I have looked at these categories in greater detail in my chapter on "needs." (ChapterTwo) In a legal judgement, discussion of individual past cases contributes to the formulation of general principles, with a view to making a decision on a particular case. The adversarial method which allows both sides to put their case is part of the same tradition. It is perfectly possible for people to hold totally opposing views in good faith, which is one of the reasons why studies of people and their attitudes are fraught with difficulties, as described by Bott (1957) The established methods of sociology, social anthropology and psychology are no longer quite so straight-forward as they seemed to be when they were young disciplines and the young Beatrice Webb's desire to tell things how they are seems to be very naive in these days of sophisticated computer analysis of statistics and text. As Bott (1957) says

> It is hard to decide what to study and how to begin in a very complex situation where there is much variation and any particular piece of behaviour is influenced

by a multitude of factors. (p 8)

Bott saw her task as the development of hypotheses rather than the testing of them and although she started out with some preconceived notions, she and her team attempted to clarify them as far as possible at the start.

My early training as an historian gave me an interest in documentary evidence and a healthy scepticism for the written word. I am also aware of the main body of sociological literature, for example, the seminal works of Durkheim (1895) and Weber (1905) as well as contemporary writers such as Giddens (eg 1976). This awareness must necessarily inform the methodology of any social research, appreciating the traditions of both positivism and ethnography. Thus, on the possibility of multiple conflicting personal realities, Durkheim, who believed "social facts are things,"(1895/1964 p 14) talked of research which would

> "by successive approximations...encompass little by little, this fleeting reality which the human mind will never perhaps be able to grasp completely." (1895/ 1964, p 46)

The nineteenth century intelligentsia were impressed by the accomplishments of the scientific method but the classical theorists (Marx, Durkheim and Weber) are now perhaps found wanting in their analysis of the problems of the transition to the modern world. Their master keys are seen as no longer sufficient to unlock the secrets of modern society. Giddens observes that the

> social observer cannot make social life available as a phenomenon for observation independently of drawing on his knowledge of it as a resource whereby he constitutes it as a topic for investigation. (1976, p 160)

Giddens also

> sees social theory as a means of clearing up particular queries that arise in relation to the generic problems of the social sciences. Cassell (1993, p ii)

The traditional empiricist has, according to Giddens, been replaced to a large extent by the participant observer, and Elvin sees the purpose of research as

> not to establish generalisations so much as to illuminate through a felt experience. (Elvin 1975, p 194)

Thus the researcher's own biographical stock of knowledge (Berger & Luckman, 1967) cannot be disregarded. Working in many different environments over many years as researcher, community centre worker, foster parent and teacher has given me an abiding interest in the philosophy of social justice and altruism. Thus I bring to this research a background of various disciplines and theoretical structures.

3. Possible research strategies

My theoretical and philosophical background has of course influenced my choice of research strategies. There seemed to be three possible approaches, "experiment," "survey" or "case study."

The experimental approach is concerned with manipulation and change. As I have already noted in my discussion of operational research, this involves the selection of samples from known populations, with different experimental conditions for each sample, noting possible variables. The procedure involves changing one variable at a time to see the effect, keeping other variables the same, usually testing a hypothesis, and using a control group; what is known as a randomised control trial. It seemed to me that this was not appropriate for my purposes although my conclusions might lead to suggestions for further research along these lines involving ways of changing attitudes or terminology.

The survey approach, meaning the collection of information from samples of people in a standardised form, to compare responses of individuals or their organisations, generally involves the use of closed questions by either oral or written questionnaire or highly

structured interview. This approach attracted me at first, but as I describe later, it proved to be difficult to get the response I needed. It would be mainly quantitative.

The third way, case study, implies the selection of a small number of cases, in a limited field or situation, and is particularly suitable for a small-scale research project with one researcher, such as my own. There needs to be information about context, which will require a range of data collection including observation, interviews, (un-structured or semi-structured) and documents. This involves the notion of triangulation, or checking data obtained from one source (for example, interview) by referring to other sources (such as written records.) It might also include participant observation. Its purpose is to explore what is going on, to assess, to revise or develop existing accounts of similar phenomena. It would be mainly qualitative with perhaps some quantitative background data to put it in perspective. The technique of using case studies to illustrate particular points seems to be increasingly popular, the proposed new Code of Practice (2000) being a recent example. I have considered the implications of Post-Modernism (which I see as a reaction against the principles and practices of modernism, itself a self-conscious break with previous genres) as a Paradigm. I do not think it is easy to find standard or typical examples, nor is it possible to make a clean break with the intellectual traditions of the past.

4. Selection of research method

My original plan was to begin with some quantitative data, to discover the proportions of children with SEN in one particular LEA. Quantitative research enables a researcher to make generalisations to a greater degree, but again, there is a form of continuum here in the sense that there is a fuzzy line at the point where a quantitative change becomes a qualitative change.

I considered the possibility that I might be able to do some interventionist research in my own school, by selecting some parents and discussing in depth how their children's SEN might be met in different ways, with a view to changing or influencing the outcome. The ethical and confidentiality problems of doing this proved insurmountable as well as politically problematic.

I decided to use a case study approach, because, as I already have said, this is a small scale research project with only one researcher. I hoped to be able to make some limited generalisations and recommendations from my particular findings. A qualitative approach enables one to explore individuals' views in detail. The difficulties of selecting and contacting people for the research is only the first obstacle to be overcome. The practical problems here will have considerable repercussions for the outcome of the research. The people who were interviewed were selected and contacted from several different sources. A quantitative approach would have enabled me to collect and analyse a greater amount of data, but where feelings and attitudes are involved one needs to be wary of the validity of asking people to describe their experiences on a scale of one to five. It seems to me that there is a profound conceptual difficulty in applying quantitative techniques to qualitative data, a difficulty which seems to have been almost forgotten in the present climate of perpetual audit and obsession with value for money.

There is a significant difference between counting the number of replies to a questionnaire which asks for an evaluation on a scale of one to five (from excellent to unsatisfactory, for example) and counting the number of correct answers to a closed question. Too often both kinds of data are treated as if they are the same. It is also difficult to study situations where there are problems because there is so much emotional concern about what has gone

wrong and what might be done to put it right.

As already noted, (p 17) Warnock (1978) estimated that something like 20 % of children, at some time in their education, might be expected to have some kind of special educational need. This was of course a fairly rough guess and the committee was aware that it might vary considerably according to socio-economic and other factors, from area to area. Thus I began with the notion that there may be children whose special educational needs, despite the legislation and the CoP, are inadequately addressed. This was partly due to the continuous dialogue I have in school with class teachers who claim that not enough is being done for the needs of some of the particular children in their care, (usually more than 20% with SEN in each class, in an inner-city primary school.) In spite of this it seems apparent that there are many children whose needs are met and whose parents are satisfied. There are particular difficulties in locating and selecting these satisfied parents for interview. I originally had a cascade model in mind as I considered how to structure my research; that is, for every case that went to the tribunal, I hoped to examine a number of similar cases where the child's needs had been met without difficulty or contention, as well as others whose needs were met without the necessity for a statement. This proved extremely difficult. I hoped that a questionnaire to SENCOs about their "successes" might reveal some way of locating parents who would be willing to be interviewed. Although this approach had to be abandoned, with three exceptions which will be explained later, this is an area where further research is essential, to "add to the stockpile of what works and what does not" (Wolfendale & Bastiani, 2000, p 4) and to contribute to evidence-based practice.

As already indicated, I selected the case study approach as the most appropriate for a study

of this kind. As Robson (1993) argues (p 51) the case study approach has been around for a long time, in both the medical and legal systems. Strategies for dealing with case studies in other disciplines are useful in suggesting solutions to those pitfalls in methodology, for example, over-generalization from individual cases.

This approach is supported by Robson thus

> Case study is a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real life context using multiple sources of evidence (p 52)

where a case is studied in its own right, not as an example from a population. The word empirical implies experimentation and observation, which are scientific techniques but, as Robson observes,

> claiming that a case study is a scientific enterprise...generates antagonism from both scientists and humanists....(p 6)

In his discussion of the concept of science. Robson quotes Francis Bacon and his 17th century contemporaries who insisted that to

> "understand nature we must consult nature"

All scientific enquiries begin with small studies and rather than spending time discussing the question "is case study scientific?" I preferred to concentrate on the need to achieve a demonstrable reasonableness and a trustworthy reliability. Loosely following Robson's checklist, (p 9) I hoped to be solving problems as well as gaining knowledge, predicting effects rather than finding causes, and looking for results that withstand intellectual challenge rather than relationships between variables. My intention was to observe, interview, analyze, interpret and report. My approach was to be scientific in the sense that I recognize the need for rigour and principles, to follow agreed practices and to be sensitive to ethical implications. It would be empirical, in the sense that it would rely on

the collection of evidence about what is going on about the particular, the specific case. It would be focused on a process or event in context, where the boundaries between the process and the context may not always be obvious. It would use several different methods of data collection, such as interview and observation, as well as discussion with public officials and use of documents, law reports and statistics. The latter may have more of a place in large scale investigations, but nevertheless they are interesting background material.

I am aware of the difficulties of self-evaluation, but maintain that a conscientious teacher is inevitably also a researcher. The challenge is to put that research into a plausible framework and relate the particular to the general. Bassey's two stage format for research is useful.

> What is happening... now? ..... How can we improve it? (p 55)

Robson (p 56) rehearses the argument that research must depend on statistical analysis and quantitative data but admits that

> all perception is to an extent shaped by the preconceptions and purposes of the observer..... Perceptions (are) actively created rather than passively received. (p 58)

If science is based on what a person can see and hear and touch, it must be a contradiction to deny a place for that person's opinion or preferences and speculations. Scientific "laws" and theories are merely describing the state of present knowledge which will be continually changed and modified in the light of new investigations. Thus Robson claims that "ultimately there is no fully proven scientific knowledge," no fool-proof method of deriving the scientific from the "facts" of experience. He concludes that (p403) where research is mainly qualitative "there must be credibility, transferability and dependability, as well as

confirmability,... an audit trail." Thus field notes and documentation must be carefully kept as the basis for analysis and summaries, as well as notes on the original proposal, and the intentions and expectations of the work as it progresses. Theory will be "grounded" in (emerge from) the data, (Glaser & Strauss, 1967) and any interpretation will be in terms of the particulars of the case rather than generalizations. Robson's view on case studies (p 149) is that their main purpose is exploratory, "trying to get some feeling as to what is going on in a novel situation where there is little to guide what one should be looking for." I focussed on aspects of satisfaction or otherwise, trying to find out whether it comes from the procedure, substance, description of needs, provision, resources or outcome. Case studies are also increasingly used to illustrate situations and methods of dealing with problems.

5. Procedures and data collection

i. Preliminary approaches

My procedure involved the collection of data about numbers of children with SEN in a particular LEA, and identifying suitable cases, such as parents who have appealed to the SEN Tribunal, and others who have been satisfied with the way their child's needs have been met.

Thus I wrote a letter to the Director of Education of a local LEA asking permission to interview the SEN Inspector and the Officer in charge of Statements with a view to interviewing parents who had challenged the LEA at the SENT as well as others who were satisfied with the way their child's SEN had been met in mainstream schools. This was based on the assumption that there was good practice in the Authority's schools that needed to be recognised and celebrated in the face of so much denigration of teachers.

The Director delegated the answering of my letter to one of his assistants who, as far as I can discover, sent a copy to the senior Educational Psychologist (who was about to move to another post) and did nothing else for several months. If I had been a researcher fresh from College I might have had a polite refusal at this stage. But in the past I have been an active Chair of Governors of a large comprehensive school, so that my name is pretty well known. So that when, after some months, I rang to complain that I had had no reply, the Director himself sought me out at an INSET meeting to apologise and to give my research his approval. (I discuss this point further under ethical issues.)

The officer in charge of the statementing procedure and the Special Needs Inspector were very encouraging and gave me the names of parents to contact. As a result I was given the names of all the parents who had appealed to the SENT in one year and was able to interview five of them. To balance this I wanted to interview some parents whose children's needs have been met at Stages One, Two and Three of the Code of Practice.

ii. An Abortive SENCO survey

Whilst waiting for the Director to reply I piloted a questionnaire (attached) asking SENCos about their role as arbiters of need, their successes in terms of the Code of Practice, and how they saw their purpose in school, hoping that this dialogue might reveal a way of selecting *satisfied* parents. In my own school we regarded the removal of a child's name from the Special Educational Needs Register as a success, which would be reported to the Governors as such. Thus I thought that I would be able to canvass other SENCOs' views and obtain from them the names of satisfied parents who would talk to me about their experiences. I hesitated to interview parents in my own school lest I raise their expectations that more might be done for their child. The dynamics of the situation made

it very tricky to ask for anything that might upset the status quo, especially as there were a small number of parents who were quite vociferous but were not prepared to make any effort to work with the school or to understand the Code of Practice. They were, frankly, unco-operative and critical, obstructive and sometimes even offensive, yet loyal in the sense that they did not consider for one moment taking their children away from the school, and indeed had children in the school for many years. This small group of parents were responsible for some of the most difficult and deprived children. They did not (with some exceptions) always get their children to school on time, or make sure that reading and homework was done. They criticised the teachers in front of the children and then wondered why their children were disrespectful to their teachers. Some of these children, nonetheless, did so well with the help that they had in school that their names were removed from the SEN Register.

This "anecdotal" evidence is an explanation of why I decided it would be best to find names of parents to interview outside my own school; to this end I sent out thirty letters and questionnaires (See Appendix 2) to primary schools in inner and outer London, asking SENCOs about their successes. I asked them to indicate the number of children who had moved *down* the stages of the Code of Practice, as an indication of success. Those who replied to my questionnaire and those to whom I spoke did not see this as a success. I had three replies indicating that the only successes they believed in were the getting of Statements, and the accompanying resources, for their children, and two which said that they were two busy to fill in any more questionnaires. Only one questionnaire was completed. At SENCO meetings, where discussion took the form of informal focus groups, I was able to approach SENCOs personally and canvas their opinions. Without

exception they saw their role as champion of the individual child and the school, attempting to obtain extra resources for the school by means of Statements. Although I must confess to a certain sense of personal fulfilment as a SENCo receiving a final Statement for a child, nevertheless I was surprised at the tenacity of many SENCos who maintained that the only way "out" of the Code of Practice is "up."

None of these SENCos was prepared to be formally interviewed or recorded, and they were particularly anxious that their views should remain anonymous and unidentifiable. They did not wish to put me in touch with parents of children who had had "successful" school-based interventions, for reasons similar to my own misgivings about my own school. Some of them shared my fear that such interviews might raise parents' expectations and lead to dissatisfaction. This might be seen as a direct example of "street-level bureaucracy." The SENCos are only too well aware of the limits of resources, even in terms of identifying need, and they were reluctant to encourage parents to challenge their perceptions of need. Parents might be encouraged to press for a Statement only if it seemed likely that the child's needs would meet the LEA's criteria. SENCOs also mentioned their reluctance to suggest extra resources to parents which might not be available. Several mentioned the difficulty of referring children to the Speech Therapist and Occupational Therapist, because of long waiting lists for assessment with the likelihood that there would then be another waiting list for therapy. SENCOs, it seemed, tread a tight rope between those parents who feel sure that their child has difficulties and needs help and those who deny any problems and refuse any assessments. It was in my informal discussions with these colleagues, and during INSET about the Code of Practice, that I became aware of the increasing role of the law in the special needs discourse. Some

of the anxiety of the SENCos could be attributed to their concern that they might become embroiled in a legal case. Most of them were vaguely aware of the first Phelps judgement in the High Court. Thus even a personal approach to SENCOs failed to elicit replies to the questionnaire. They were worried that their Head Teacher might not give permission for such research for similar reasons. Perhaps I should have been more assertive about obtaining more formal backing from the Director or indeed some funding, but the exercise was an object lesson in the pitfalls of research.

This may indicate something about the perceived status of SENCos as not being a part of middle management in the school, as well as being evidence that legislation and government policy are not always implemented in the intended way. It also suggests that in-service training is not always successful in changing entrenched attitudes. Perhaps I should have approached Headteachers directly through the Director of Education in order to interview parents at Stages Two and Three.

iii. Selection of cases

At this stage I had decided that I would concentrate on parents who had begun to be involved with the legal process, which is why I asked for names of those who had appealed to the SENT. I was also aware that triangulation would be easier because there would be written records as well as the testimony at interview.

As result of a personal approach to a headteacher I was provided with more names, and this resulted in useful discussions with a SENCO who was particularly interested because he intends to do an EdD himself.

For these reasons my case studies do not constitute a sample in the accepted sense, and they represent only themselves. Nevertheless here is a collection of individual stories

which illustrate the diversity of the special educational needs experience and contribute some pointers to the way policy and practice might be improved.

iv. Interviews

I decided that my data collection would be mainly by semi-structured interviews and use of documents and records, rejecting the idea of a formal questionnaire because of the lack of response to my pilot project. As already described, the LEA gave me names of people who had appealed to the SENT and others whose children have statements. I sent them an initial letter asking if they would participate in the research, stressing confidentiality and anonymity. This letter and the list of possible questions for the interviews are included at Appendix 3. Constraints of time have meant that this is a small scale enquiry, and the interviewees were necessarily self-selected in that only those who responded positively to a letter of introduction could be interviewed. This could lead to speculation about the motives for their positive response. I tried to find this out in the interviews.

I introduced myself as a parent and teacher, and covered the same questions with each family, allowing people's views and feelings to emerge, but keeping control of the interview and bringing the discussion back to the point when there was a digression. I recognized that the interview was bound to deal with the subjective views of the interviewee, so in spite of the general questions and guidelines, I generally allowed the interviewees to determine the content and direction of the conversation. As Robson says, this is not easy, and it demands tact, experience, flexibility and skill. (Robson, 1993, p 240) My long experience as a school governor interviewing for staff appointments was helpful here, as well as my experience of working with parents and observing a particular educational psychologist at work, all of which has made me aware of the importance of

putting people at their ease and winning their confidence. I used a tape recorder for some of the interviews but not all because I have found in the past that it can alter the balance of the interview and make the interviewees, and myself, more self-conscious. I have also in the past had difficulties in hearing and transcribing taped interviews because of background noise and poor quality reproduction, especially in homes where there are small children or noise from traffic or television. One of the parents asked why I didn't use the tape recorder, but merely turned down the television when I explained about background noise. Even when I taped the interviews I was careful to take detailed notes, pacing the interview so that I could record what the interviewee had said and frequently repeating it back to make sure I had recorded it correctly. When I have taped interviews, I have been delighted to discover the accuracy of my note-taking when checked against the taped version. Nevertheless I have to admit that some detail, in the form of laughs and intonation, are lost without a tape recording, but then it is also difficult to record body language and facial expression which also add to the richness and depth of the material. Often interesting details are revealed as I am leaving the venue and after the note-book and tape recorder have been put away. These have been recorded as soon as possible afterwards in the car or train going home. I have always transcribed the notes as quickly as I could and checked them where possible against the recording.

I have not regarded the initial transcript as sacrosanct, and have given each respondent the opportunity to read what I have written, being interested in their construction or reconstruction of the events and enabling them to readjust their past and present understandings. This discussion owes a great deal to Scott and Usher's chapter on interview methods. (1999, pp 108-116) In each case I have sent a draft of their "story"

with covering letter and stamped addressed envelope for the return with comments. Three were returned with corrections of detail, six were confirmed by telephone (two by answer phone messages) and one did not reply at all. I have also sent the drafts to the special needs officer at the LEA and checked all the details with him face to face. Cross-checking in this way is necessary because where there has been disagreement between parents and the LEA there are sometimes two versions which need to be given equal weight in spite of the decision of the Tribunal. At all times I stressed the confidentiality of the interviews, and checked contentious points by letter or phone call. I informed all the respondents that they would be anonymous in my report but several parents assured me that they would be happy for their names to be published because they were proud of their efforts on their child's behalf, and they wanted other parents to benefit from their experiences.

I was able to see the records in the Special Needs section of the LEA for purposes of triangulation. I am very grateful to the department for finding me a desk and helping me to locate files, as well as confirming details when necessary. It was hard to equate their sympathetic knowledge of the children and their parents with an idea of a faceless bureaucracy.

Thus I am not looking for patterns or generalizations but rather at the "skilled performances of social actors." (Scott and Usher, 1999, p 113) The research could be replicated by using identical methods and interviewing the same group of people, but even as the research has proceeded, positions have changed, children are a year or two older and new issues have arisen in their personal lives. Their stories continue to unfold.

v. Other sources

The local authority statistics officer was most helpful in supplying numbers relating to SEN

in the borough. I interviewed a parents' advocate employed by a charity, and an LEA parent liaison officer. Both of these gave me an hour of their time for which I am very grateful.

vi. Legal aspects

I have spent time investigating some of the most important cases that have come before the courts recently, notably Phelps v The London Borough of Hillingdon. Although this is not "original" research in the sense that it is "new" data, I maintain that the interpretation and the discussion of these cases is an original contribution to the educational literature and debate about the rights of parents and children with Special Educational Needs, especially in view of the Human Rights Act 1998, which came into force on 2nd October 2000. This states

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (Article 2 of the First Protocol of Part II, p 42-37)

To assist me in this interpretation I interviewed the Principal Educational Psychologist of the London Borough of Hillingdon and discussed the case with him. This should be seen as an important part of my research strategy as this interview took place before the House of Lords decision and it provided me with insight into the LEA's position on what was to become the leading case of its type. It became important to me to attend some of the sessions of the hearing of this case at the House of Lords as a form of triangulation, and to gain as complete a view as possible of the issues and the way the courts handle and interprete contentious educational issues. These hearings were significant for the insights they gave into the interface between legal reasoning and educational philosophy than the

symbolic reading of the final decision, by the senior Law Lord, in the House which I attended, on 27 July 2000. I have analysed the contents of the written judgements of all the "duty of care" cases in Chapter Four.

I have also attended several meetings of the Education Law Association, when the case was on the agenda. A solicitor who specialises in education law, who acted for Phelps, has given me a great deal of help but all her clients except one were reluctant to be interviewed. As already noted, Miss Phelps and her family declined to be interviewed, which was disappointing because their evidence would have triangulated the evidence of the EP, the solicitor and the case transcripts. Although I cannot claim that the descriptions of the cases in Appendix 4 are "original" research because they are closely based on the transcripts, nevertheless the linking of the evidence of the case studies I carried out with the evidence of the legal cases is an approach which is original and has not been done before.

Ethical Issues

The research ethics that guided this study were based on confidentiality, accuracy, impartiality and objectivity. The purpose of the research has to be clearly stated from the beginning, for reasons of honesty and trustworthiness. It is important to maintain confidentiality and anonymity where individuals are concerned, and as far as possible this applies to organisations and local authorities. Permission has to be sought to view documents and interviewees must be given the opportunity to review what they have said and check its accuracy. It is necessary to respect the confidence and trust placed in the researcher by the respondents. Although this is a descriptive, analytic, non-interventionist piece of research, several parents expressed the view that, by listening to their story, I

might initiate change, either in the way they would proceed in the future, or in the way the LEA would act. I had to be careful to emphasise my impartiality and independence, despite the fact that I was employed by the LEA.

This project owes no allegiance to a funding body, and is not therefore subject to what Scott and Usher (1999) call the demands of "performativity" or "audit." At times, I believe, this put me at a disadvantage in that I did not have the kind of authoritative support which could have been symbolically useful for my SENCO survey. The research is none the less located in the real and the specific, and is post-modern in the sense that it does not rely on any all-encompassing methodology. It shows an awareness of the limitations and implications

> of the ideal of a free, open and uncoerced exchange of views ... present in research settings, constructed as they are in terms of vested interests, inadequate exchanges of information, and differential amounts of power between participants..... (adapted from Scott and Usher, 1999, p 132)

In order for the research to proceed, I had to take account of the power structures (visible and invisible) in which I was working, waiting for permission from the Director of Education. I therefore used a personal approach to the Educational Psychology Service, and at same time rejected the SEN Inspector's suggestion that I might interview parents in my own school. I have already indicated the ethical dilemma involved in this approach. I was also reluctant to use my erstwhile "political" position to influence my access to other research data. Although I felt it would be unethical to use my position in this way I was not entirely successful because my identity was known.

The problems of "action research," or researching in one's own place of work, are mainly to do with difficulties of partiality and personal involvement. It can be problematic to distinguish between observation and anecdote, and triangulation can be hard to

accomplish. Nevertheless, all teachers are to some extent researchers, noting which approaches are successful and which children flourish under which circumstances.

"The act of producing knowledge" is "inextricably linked" with

> issues to do with the rights, responsibilities and activities of participants in the research...

and

> being sensitive to the needs of participants, even if those needs are not fully recognised by those participants, assuring anonymity to them so they cannot be identified ... and creating a consensual relationship with participants which means that those participants are not compelled to provide .... data. (Scott and Usher, 1999, p 134)

As for Miss Phelps and her parents, I respected her solicitor's view that the whole process of going to court had been so traumatic for them that they did not wish to be interviewed. Although I saw them in the lobby after the House of Lords judgement I felt it would be wrong to approach them. Nevertheless the press later managed to interview both Miss Phelps and Miss Anderton and both of them have, by going to court, exposed their cases to public scrutiny. They have foregone the right to anonymity in the interests of justice. These are ethical positions which have profound epistemological implications.

Summary

My starting point was the four research questions out of which I distilled one question which reflected my developing interest in the way the law was becoming involved in education. There seems to be a mismatch between the various definitions of need, and the rights and obligations which enable needs to be met.

I looked at possible theoretical frameworks, paradigms and research methods and decided that a case study approach would be appropriate, proceeding largely by the inductive method. In utilising the case study method I kept in mind the idea that social and

educational research relies on history and sociology for its paradigms. I also take account of the view that history is merely a set of stories, that what really happened is not completely verifiable, and reality cannot be entirely recreated by language. Like the picture that Magritte painted of his wife, labelled "This is not my wife," history can be seen as an illusion, a construct, imposing causality on events that are unconnected chaos, dependent entirely on personal perspective; life is a lottery, with no logic. This can be contrasted with the Whig interpretation of history as progress (Carr, 1962) and the view that rational enquiry and the scientific method are the primary means of solving problems in society. This leads to the notion that educational research ought to have some purpose. Bassey's definition of purpose is that educational research should

> critically... inform educational judgements and decisions in order to improve educational action. (1996 p 39)

He is quite emphatic about the high ideals he has for this purpose, the advancement of knowledge;

> a way of safe-guarding democracy by ensuring that .... (it) .... is based on rational critical and humane explanations of what has happened, what is happening and creative thinking about what could happen in the future .... (1996 p vii)

But Bassey, like other writers on educational themes, fails to comment on the importance of the law (both statute and case law) in safeguarding democracy, and educational research cannot neglect this important area. Indeed justice is an essential part of the very concept of democracy and all voices, even minority voices, have a right to be heard and listened to, even if ultimately their point of view cannot be accommodated in the scheme of things.

Chapter Six

Data Summary

I now turn to the interviews with parents that I undertook to try to gain some insights into the questions I posed at the beginning, and to see how far the academic and legal definitions considered in the various discourses approximate to those parents' notions of need. I shall summarise the findings in a general way and then analyse them in detail in Chapter Seven. A table of the results will be found on p 153 following this chapter. Detailed descriptions of the interviews with each parent will be found in Appendix 4.

Method of contact

I interviewed six care-givers, all parents, whose names were given to me by the LEA's Special Needs Officer in charge of statements. Five of these had appealed to the SENT in one year and were self-selected in that they replied to my letter. I interviewed a further three other carers (one was actually a grandparent) who were introduced to me by schools and one parent with whom I was put in touch by a lawyer. Ten interviews were conducted altogether. I took careful notes on all ten occasions, as already described, (Chapter Five) and was able to tape five of them. They all lived within five miles of my home so I was able to travel by car or public transport without difficulty.

Gender, age and family circumstances

Eight of the ten children were male. Four were in the primary sector, four in secondary and two, post-sixteen. I interviewed five mothers by themselves, two of whom had spouses who were at work when I visited. I met one father on his own at the Institute of Education (his suggestion.) All the other parents welcomed me into their homes. They all offered me cups of tea or coffee. Five of them did not wish me to use the tape recorder.

Three of the parents I interviewed were single parents, and of those only one had no contact at all with the other parent. In one case where I interviewed the grandmother as the main carer, the grandfather left for work as the interview began. Their daughter was divorced from the child's father but lived with a new partner.

Four parents preferred to be interviewed without their spouses and where both parents were present (3 cases) generally one took the lead and the other added the occasional comment. One child had no siblings, six had a younger sibling or siblings, and three had an older sibling. In one case the child's younger sibling had more profound difficulties and was in a residential school.

Five of the families live in privately owned accommodation and five in social housing. Two families were "professional" (a consultant surgeon married to a nurse and a managing director married to a physiotherapist.) Another father was a "para-legal" and another owned his own contract-cleaning business. One couple both worked in the hotel and catering trade, mother as a manager, and father, a chef. Two single parents were unemployed and living on benefits, and the third had a responsible job as manageress of a restaurant.

Only one parent admitted that she found reading and writing difficult, and another described how she taught herself English by going through the letters and Statements with a dictionary in her own language. She said that until this happened she hardly read at all in her own language, having left school at sixteen in her own country with only very basic skills. She was one of the two parents who said they had educated themselves largely as a result of their involvement in their struggle to get a better deal for their child, and another mother was anxious to continue a course that had been severely disrupted by having a child

with special educational needs. English was the first language of five of the parents, and three of the children were born in their mother's home country, arriving here as babies or before primary school. Of the five for whom English was a second language, one was Spanish, one was Turkish and three were African, (Ga, Somali and Lingala.)

Seven of the families called themselves members of an ethnic minority although in one case the mother said (laughing aloud at her own comment) that in her family the husband called himself the "ethnic minority" because the fact that she was Jewish meant that the children were also Jewish, and their father wasn't. All the families I interviewed whose names had come to me because they had appealed to the SENT in one year were from ethnic minorities and in each case they had won the appeal. This is a significant finding, given the policy concern that ethnic minorities might be failing to get access to justice in this way. As already noted elsewhere, Harris expresses concern about this. (Harris, 1997, p 195)

The LEA officer said that they were proud of their record in dealing with the needs of ethnic minority pupils with learning difficulties.

Access to advice and help

All the parents (six) who had had contact with a voluntary organisation for advice and help were full of praise for the help they received. They were less enthusiastic about the attitudes of teachers and doctors and one parent said she had had no help at all from the GP or the health visitor and had to seek out medical help elsewhere. Other parents felt that the LEA officers were not helpful enough, but several expressed the view that of course they (the officers) were only doing their job, and that of course they had to be careful about how they used resources. In spite of this none of the parents appeared to have any doubts about their child's entitlement to resources. Only one parent had read any of the

legislation, and another had read the Code of Practice, but most of them relied on advice from either a voluntary organisation, a relative or a friend. Some had made contact with the parent liaison officer employed by the LEA and where there had been an appeal to the SENT they regarded this officer as having been on the other side. Four parents felt they had been shamefully treated by the LEA in one way or another, and one said that the LEA officer had "lied" about the admission of their child to a special school, pretending that it was a temporary measure when they fully intended it to be permanent. Nevertheless the parents who had been to the SENT were generally happy with the outcome; they had won. (The three parents who lost did not wish to be interviewed and replied saying this.) Thus the quality of access to advice, and the understanding and use of that advice, is different and unequal, and parents are at a disadvantage when faced with the professionals who are meeting or disputing their claims, not an unexpected finding.

Nature of difficulties and educational history

Of the three children without statements one had school phobia, one had speech difficulties and one had specific learning difficulties (dyslexia) which were originally attributed to emotional and family problems. Of the children with statements, one had multiple difficulties (hemiplegia,) one had specific learning difficulties and five had moderate learning difficulties, two of these were defined as "having autistic traits" and three, "behaviour difficulties." These details were confirmed by reference to the files, which showed that one of the latter had severe juvenile arthritis and Raynaud's disease, a circulatory disorder of the outlying parts of the body, (Thompson, 1976) a point that his father did not elaborate at interview, although it must have been part of the basis of his behaviour problems.

Four of the parents suspected something might be wrong with their child at a very early age, and at least two of them were assured by professionals that all would be well. Two of the parents reported difficult births and three referred to late milestones in child development. All but one of the parents said that at some stage they were made to feel that they were fussy parents, or at least they felt that the professionals viewed them in this way. I found no evidence in the education files to suggest that this was not the case. I did not feel I could ask to see medical records to discover whether problems had been identified earlier and not accepted by parents. There is some evidence that parents go through stages of anger, denial and a process similar to mourning, not necessarily in that order, before coming to terms with their child's needs. (Hornby, 2000) The account they give of the early years may therefore be at variance with that of professional records. Nevertheless for my purposes I was interested in their own views and understandings of the situation at the time of the interview, accepting that their versions would be to some extent subjective and partisan.

Two interviewees felt that teachers made unjustified assumptions about the antecedents of the child's difficulties and failed to take appropriate action for that reason. This is similar to the claims in Phelps, which I discuss in Chapter Eight. Three of the children were diagnosed as having special needs before they went to school, and two of these did not get a statement until they were seven. Two more received help during their primary school years but did not get a statement until they were in Year Six.

All except one started their schooling in a mainstream school, and only one of those schools was in the private sector. It seems that this private school did no better than the maintained ones in identifying the SEN and supporting the parents, although when the child

moved on they did admit that the parent had been right from the beginning.

Six of the children had specialist input during their time at primary school, such as speech and language therapy, help from the child development team or (in one case) child and adolescent psychiatry, and the others relied on the GP and health visitor for support when the children were small. Only one of the parents who appealed had private educational psychological reports, and this was before the SENT was set up.

The grandmother whose child's placement in mainstream without a statement seems to be going well had had private reports and private extra tuition for the child, which she said might be renewed in the future if it was felt to be necessary. As a middle class professional family they had the resources to fund this help without too much financial difficulty, supplementing the extra help which had been provided at an LEA primary school. The other family who used the private sector throughout suffered considerable hardship, having to reduce their standard of living by having a smaller house and car, and getting into debt.

Five parents had input from social services, varying from contributions to residential schooling (two cases) to funding a carer during the day. These parents were generally happy with the help they received, although one was critical of the way the two departments, education and social services, each appeared to be trying to make the other responsible for a larger share of the cost of residential schooling.

The two pupils with learning difficulties who were in residential schools were both girls with younger brothers. In both cases the mothers reported that the boys were above average in intelligence and achievement, and although they were affected emotionally by their sisters' disabilities, nevertheless they both managed to do well at school, fulfilling their parents' hopes for them and also bringing comfort and joy to their stressed families. One

of these boys, aged twelve at the time, was instrumental in helping his mother to contact the DfEE and the SENT by writing to the Prime Minister about his sister's problems. This boy was at a Catholic voluntary aided school. In the second case the younger brother had gained a place at a minor public school and was enjoying a successful school career as a day boy.

At the time of writing only one family (whom I contacted through a lawyer) was considering further litigation. This mother was waiting to see the outcome of Phelps v Hillingdon, and is considering pursuing a case for educational negligence, to try to recoup some of the financial cost of her daughter's education.

Terminology

Several parents were aware of the connotations of different labels. One opened the conversation by saying that her husband worked "with the deaf, I mean hard of hearing" and then went on to say later she preferred "learning difficulties" to "retarded" or "backward" and "dyslexic" to "specific learning difficulties" if it described the person's difficulties appropriately. Another parent disliked the term "slow learner" "because it implies the child will get better slowly, and often he or she can't learn." This parent also dislikes the label "autistic" for a child, preferring the term "showing some autistic tendencies." Most of the parents commented on the way they had got used to the jargon and they all used it to some extent, mostly as above, using the currently acceptable terms for disabilities. Few of them appeared to know the term SENCo and four parents asked for clarification when I used the term, "Oh you mean the special needs teacher." Similarly the parents whose children had individual support from the LEA primary learning support service were generally unaware that this was a LEA centrally funded service, not paid for

by the school. Even the parent who had been a governor for several years admitted that she wasn't entirely sure of the way special needs was funded in her school. This came as no surprise to me, having attended a course for SEN Governors, where we shared experiences which were similar.

Summary

Most of the parents I interviewed had considerable dealings with the professionals who were involved with their children. Only one of my interviewees was contemplating legal action and she was the one whom I had contacted through a lawyer. She was also the only one who had lost at the SEN Tribunal. In view of the Phelps decision in the House of Lords (27 July 2000, see Chapter Four & Appendix 5) this parent will probably go ahead with her case. As far as I know none of the others were considering legal action, although several of them might feel they have a case if they read the reports of the Phelps case in the press.

The following table shows the data that was collected and the next chapter is an analysis of the content and process of the case studies.

Table of case studies

CaseStudies	1(K)	2(Y)	3(L)	4(O)	5(T)	6(X)	7(E)	8(M)	9(E)	10
Method of contact	LEA	LEA	LEA	LEA	LEA	LEA	Lawyer	School	School	School
Parent interviewed	Mother	Father	Both/F	Both/F	Mother	Mother	Mother	G'ma*	Both	Mother
2 parent family?	Single	2	2	2	2	Single	2	0	2	Single
Accommodation	LA	Own	LA	LA	Own	LA	Own	**	Own	LA
Gender	F	M	M	M	M	M	F	M	M	M
Primary/Secondary now	16+	Sec	Prim	Prim	Prim	Prim	16+	Sec	Sec	Sec
SEN	MLD	Beh/ Med	Aut/ MLD	Aut/ MLD	Hemipl MLD	SpLD	MLD	SpLD	Speech & Lang	School phobia
Statement?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Age at diagnosis	18 m	6 yrs	Birth	3 yrs	11wk	5yrs	18m	9 yr	4yr	5 yr
Age at Statement	7 yrs	9 yrs	7 yrs	5 yrs	2	10 yr	11yr	None	None	None
Did Parent know first?	Yes	No	Yes	No	N/A	N/A	Yes	Yes	Yes	
Prof Med help	Yes	Yes	CDT	CDT Asthma	Yes	C&A Psych	No	No	Yes	Yes
Parent advocate	Yes	Yes	No	Yes	Yes	BDA	No	BDA	No	No
Friend's help	No	Yes	No	No	Yes	Aunt	No	No	No	Yes
Self help	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Social Class	3/4	3/4	2/3	3/4	1	?3	2	1	2/3	4
Ethnic origin	Spain	Africa	Africa	Africa	Eng/J	Turk.	***	Eng	Eng	Irish
Position re sibs	1/2	1/3	1/1	1/4	2/2	1/2	1/2	1/3	2/2	2/2
Eng First lang ?	Span	Ga	Somali	Lingala	Yes	Turk.	Yes	Yes	Yes	Yes
Mainstream Prim	Yes	Yes	Y then	No	N/A	Yes	No	Yes	Yes	Yes
Mainstream Sec	No	Y at 1st	N/A	N/A	N/A	Yes	No	Yes	Yes	Yes
Residential school	Yes	No	No	No	N/A	N/A	Yes	No	No	Hosp
Private?	Yes	No	No	No	N/A	N/A	Yes	No	No	No
Special School	MLD	MLD	MLD	MLD	Yes	N/A	Yes	No	No	Hosp
Soc services involved?	Yes	No	Yes	No	No	Yes	No	Yes	No	No
Residential	Yes	No	No	No	No	N/A	Yes	No	No	No
SENT	Yes	Yes	Yes	Yes	Yes	N/A	Yes	N/A	N/A	N/A
Win/Lose	Won	Won	Won	Won	Won	N/A	Lost	N/A	N/A	N/A
Further litigation	No	No	No	No	No	No	Yes	No	No	No

Key
- * Grandparents have residence order, divorced mother lives nearby with new partner.
- ** Grandparents own home, mother lives insheltered Local Authority housing.
- *** Mother and children Jewish, father not.

Chapter Seven

Analysis and Interpretation of Findings

In this chapter I expand the discussion and assessment of the data relating to the ten case studies described in Chapter Six and link it with the theoretical background. The table on the preceding page summarises this data. The data was supplemented and triangulated by interviews with LEA officers and reference to the LEA records. The parents' individual details and comments are described in Appendix 5, so that their voices can be heard. I now relate this material to my original questions and the concerns raised in the academic literature. I look at the data in the context of the *models of SEN* and the *language codes* used by parents, and return to the taxonomy of need as described in Chapter Two. I then deal with the legal issues as they relate to the case studies and link this research to the House of Lords cases. (See Chapters Three and Four.)

The role played by professionals such as the SENCOs and EPs and the way they are viewed by parents is discussed in the context of the notions of *street level bureaucracy* and discretionary decision making in the distribution of resources, as well as the *duty of care* as a legal obligation. This leads to an examination of the "abortive" SENCO survey in the light of the issues raised by the case studies. I make a tentative classification of parental characteristics, suggesting a continuum from active to passive parenting.

I then discuss other issues that emerged from the data; for example, how social class and ethnic grouping manifested themselves in an unexpected way. I had not considered family pathology as an element and I took for granted the importance of record-keeping, but the case studies drew attention to these matters. I conclude this chapter with a reference to the role of intermediaries such as parent partners or school home liaison workers. This discussion is developed in the final chapter.

Original Questions & New Aspects

As already stated, I wanted to assess the possibility of a mismatch between *the academic and legal definitions* of need and *parents' understandings* about need. This involved the examination of parallel language "codes" and discourses, and the notions of parent participation and inclusion as referred to in the academic literature and discussed in Chapter One of this Dissertation. New aspects of the questions emerged from the literature. Could parents' views of need be categorised according to the taxonomy, (normative, expressed, felt, or comparative) discussed in Chapter Two? Were parents and professionals aware of the legislation (Chapter Three) and the role of the courts in righting wrongs, and did they think about the problems facing LEAs? Would parents have knowledge of the *duty of care*, or any idea of *negligence* and the concept of "Wednesbury " *reasonableness*, as discussed in Chapter Four? Another part of my original enquiry was to discover parents' views on the role of the SENCO and other professionals' power of *discretionary decision-making*, especially with regard to *resource allocation*.

Models of Special Educational Need

My reading of the academic literature as described in Chapter One, as well as my experience as a SENCO, meant that I approached the interviews for the case studies with questions that implied some preconceived notions. For example I was looking for some significant evidence to contribute to the tentative definition of special educational needs that I had synthesised from those sources. I was looking for examples of the use in practice, by parents or professionals, of the different models of need that appear in the literature. The medical/psychological or parent/child deficit model, where need is seen as a result of a condition of the individual, seemed to be in conflict with the sociological/environmental model, which suggests that the difficulty is produced by the

inadequacies of the environment, which caters for the needs of some children but not others. The inclusive movement aims to broaden the scope of the environment to enable all children, however diverse and different their needs may be, to be included.

Looking at the way parents viewed and understood their child's needs, it was clear that most of the parents felt that the need emanated from the child's difficulties, a deficit model, and most of them had come to terms with the idea that their child would never be "normal" in the sense of being "like ordinary children," a term used by several parents. This may not be a very profound understanding of causation but it could be an aspect of coming to terms with their "common sense" perspective of their child's problems, thus overcoming the hurdle of so-called "denial." There were exceptions. The grandmother whose daughter had such profound difficulties hoped that her grandson would be normal having overcome his dyslexia. She did however dismiss the idea (suggested by the primary school) that his difficulties were entirely due to family problems. She had encouraged her daughter to lead "as normal a life as possible, (and that meant having babies)" even though she, the grandmother, had to continue being supportive in difficult circumstances.

Two other parents (J& L) felt that the difficulties were partly due to outside factors. One was the child who stammered and learnt to overcome his stammer by adjusting to and manipulating his environment. The other was a school refuser, whose mother hinted that his difficulties originated in something unspecified at primary school, and did not believe that family breakdown alone could have contributed to his state of mind. I did not feel it was appropriate to probe further.

Another parent (X) blamed the school for concentrating on behaviour problems and for not recognising that her son had literacy difficulties which, she surmised, could have been dealt with early on, thereby improving his behaviour. This view was encouraged by the fact that

her second son had Reading Recovery, which led to an improvement in his behaviour. Thus her supposition, which might or might not be true, was that both children had the same problems, which could have been minimised by a suitable environment. Thus this parent did not entirely accept the professional diagnosis of her child's difficulties, but was unable initially to challenge it or participate fully in discussions for two reasons, her severe illness and the stage of her learning English. In this case, as in others, the parent described clearly how teachers projected a view that the child's needs were individual and deficit-based, requiring special conditions that they were unable to provide without extra resources, such as input from the school educational psychologist and attendance at the Child and Adolescent Psychiatric Clinic. This could be seen as a displacement of blame or cost shifting, whereby professionals attempt to empower parents by referring them to a specialist agency and at the same time shift the economic, professional and personal cost to others. It is an example of the attempted "empowerment" referred to in Corbett's comment, (1998a) which I quoted in my Introduction (p 3.) There was a failure of communication between professionals, parent and child, which meant that the professionals' view of the situation was dominant. They tried to empower the mother by sending her to the Clinic and indeed she admitted that the resulting strategies were helpful in controlling the boys at home. Nevertheless she felt later on that the basic problem (of literacy) had not been sufficiently addressed and she was unhappy about this failure since she felt this was the special expertise of teachers.

None of the parents appeared, at this stage, to blame themselves for their child's difficulties, although the parents of children diagnosed as dyslexic all admitted to a feeling of relief at the diagnosis, as though absolving them from total responsibility. This feeling of self-blame, as well as the attribution of blame to parents by others such as teachers and

other professionals, (a *deficit parenting* model) was not emphasised in either the interviews or the records of these cases except, as noted above, in the case of X (Case Study Six) where the mother said that the teachers blamed her for the boys' bad behaviour. Also the grandmother of M suggested that the primary school initially blamed family circumstances for M's difficulties. In the case of Phelps v London Borough of Hillingdon, blame was initially laid firmly on the parents by the Child Guidance Clinic, and this "judgement" influenced all the subsequent professional interventions.

Discourses and Language "Codes"

Parents were generally aware that they had had to acquire a "new" language in order to communicate with professionals. Five of the parents I interviewed had to master English as an additional language, and then take on the specific language of special educational needs. It would be hard to ascertain whether these "English as an additional language" speakers used "restricted" or "elaborated" codes in their home languages, but certainly they had to learn an new elaborated code to some extent. Most of the parents, as I have already noted in the previous chapter, commented on the "jargon" and used it with varying degrees of success, showing particular awareness of the importance of labels, and generally using the currently accepted versions. X's mother was aware of some stigma attached to being seen at the psychiatric clinic. O's father stated that he had never heard of "autism" in his country, which seemed to imply that in his view it did not exist there. Thus he appeared to disregard it as a diagnosis for his child's difficulties and concentrated on his asthma and high intelligence. So he did not use the professional medical/psychological label of autism and concentrated on finding a suitable environment that would nurture his child's talents as well as minimising the effect of his asthma. This seemed to be the orientation of several parents. Most of them were confident that they had a good idea of what was best for their

child and did not entirely trust the professionals who had advised them. This may be why the six who challenged the system did so. Unfortunately I was unable to interview many satisfied parents with children who had less severe needs. Three parents that I interviewed had found individual professionals whom they trusted but with one exception (E) they were still sceptical about professionals in general. None of them mentioned going to a large meeting of professionals; most remembered small meetings with one or two people at a time. Nevertheless nearly all said that at times they did not understand what the professionals were saying.

In several cases the parents took particular pains to learn as much as they could about their child's difficulties and the ways the system might be used to ameliorate them. But they also, in most cases, eventually relied on a lay advocate of some kind, mostly with some kind of semi-professional background, not necessarily medical or educational, to help them through their difficulties. This advocate would have demonstrated commitment to them in significant ways, such as making phone calls, writing letters, attending meetings, helping to prepare the case for the SENT or, in one case, taking the child to school. In four cases this significant person was the parent advocate from the charitable body grant-aided by the local authority. In two cases there did not appear to be one particular person who was mentioned; in these cases one mentioned the Child Development team and the other relied on her own resources as a dynamic assertive person. Two parents had particular support from the British Dyslexia Association, and relied on the personal help of that organisation's representative. The function of these advocates was to steer the parent through the maze of professional language, administrative arrangements and decision-making for their child. They helped to explain the administrative system, interpreted the available choices, predicted the consequences of decisions, and in most cases offered friendship and comfort.

The help parents received seemed sometimes to have relied on a chance happening or a fortunate coincidence, for example the help of a Sunday school teacher or an aunt. In Miss Phelps' case her brother read an article about dyslexia in a newspaper which prompted her family to contact the British Dyslexia Association and ultimately to think about litigation. All this points to the need, now being formally recognised, for parent partnership, learning mentor and school home liaison schemes. I shall consider these developments in my final chapter.

The Taxonomy of Need

Returning to the taxonomy of need discussed in Chapter Two, all the parents I interviewed had children with special educational needs as defined by the Code of Practice (1994) so their *felt* needs were also *expressed* in the sense that they had been articulated, and they were also *normative* in that they had been recognised by professionals. Although some parents accepted that there are other children with *comparative* needs, most of them were too single-minded or overwhelmed by their own difficulties to be able to generalize from their experiences. Only three, Y(2), E(7), and M(8), appeared to have any vision that the successful resolution of their child's SEN might have policy implications for others. This latter is a common feature found in the Ombudsman's reports (Commission for Local Administration in England, 1999) where complainants aver that they are not challenging the system just for themselves but so that in future people in their position will not suffer in the same way. Similarly many pressure groups are set up for altruistic reasons and some of the best known advocates for children with SEN (for example Lord Rix and Phillippa Russell) themselves have disabled children. In most of the cases *felt* need had become *expressed* need because the parents I interviewed had all got to the stage where they were sufficiently aware of their children's needs to demand that those needs should be satisfied.

The statutory organisation of the satisfaction of these needs is supposedly based both on *comparative* need, "a significantly greater difficulty in learning than the majority of children of the same age" and *normative* need, "a disability which either prevents or hinders the child from making use of the educational facilities....etc," (CoP, 1994) and as we saw in Chapter Two there has been considerable debate about the possibility of ensuring that provision can be similar throughout England and Wales, despite the permissive nature of the Code of Practices, both "old" and proposed. Nevertheless parents, despite occasional mention of "ordinary" or "normal" children, did not generally articulate a view of *normative* need, and relied on professional definitions. They were to some extent aware of *comparative* need, especially those whose children had been to special schools, where they had seen children with difficulties which were different if not greater than those of their own children.

The Function of the Law: Legal Awareness

I said in my Introduction and in Chapter Three that legislation has raised the expectations of parents in many areas of education, not least in special needs. The parents I interviewed were aware of the role of the courts in righting wrongs, but at a very general level for most parents.

The literature discussing theory and practice in special needs rarely if at all refers to the *legal* concepts underpinning the implementation of the legislation. As we have seen there is a great deal of emphasis on the rights of parents and children as the practical consequence of democracy, *rights* being used in a philosophical rather than a legal sense. There is little discussion in the education literature of the existence of a duty of care, or the concept of negligence, where an education authority has failed, without a reasonable explanation, to meet the needs of a child. None of the parents I interviewed mentioned

a duty of care as such, but they nearly all had a view of the obligations of the education authorities and the professionals they had met, albeit rather vague in most cases.

The parent who was waiting for the judgement in the Phelps case was the best informed about the legal position, partly because of her husband's para-legal background, but also because she was in frequent contact with the solicitors, who were actively working on her case. The only other people who talked about "authorities breaking the law" were the parent advocate from the charity and the SENCO who put me in touch with some of the parents in his school. Both these interviewees believed that the LEA frequently acted unlawfully and failed in its allocation of resources. A specific instance was the allegation that the authority put a limit on the number of "statemented pupils" allowed in any one mainstream secondary school. I mention this because it shows an awareness that the law is involved but also scepticism about administration. The LEA would be breaking the law if it refused to implement a successful challenge to this policy, if indeed it were its policy. Schools and local authorities have admission policies for practical reasons which if challenged would need to pass the test of "Wednesbury" reasonableness.

The parents in my study only became acquainted with the law because of their circumstances. It emerged quite strongly from the interviews that only two parents T (5) and E (7) had an idea of any *duty of care* owed by the LEA. Both these parents were well-educated, (the wife of a "para-legal" and the wife of a consultant surgeon) and living with their husbands. Although both had a working view of the LEA's obligation to meet their children's needs, (a duty of care) this view was not sophisticated enough to bring into the discussion the first two components of the *duty of care*, proximity and foreseeability. However, they, along with all of the others, had a strong sense of the third component, that of fairness and justice. This does not mean that those without a conception of the *duty*

of care were also without an emerging sense of their child's rights and the obligations of the LEA, indirectly acknowledging proximity and foreseeability at least by implication. This was particularly so with the Parents of K(1) and Y (2) whose persistence on their child's behalf became a form of self education in the administration of the SEN process. The definition of Special Educational Need in the Education Acts and the Code of Practice refers to *individual* need, and parents also are concerned only with the individual and specific needs of their child. This is mirrored in the way individual cases go through the courts, righting individual wrongs, or, perhaps, correcting anomalies. But democracy and justice mean that these cases will be true to a principle that is enshrined in either statute or case law. Thus the particular case will demonstrate the general principle to be applied in all like cases. The way cases are dealt with ought to be the same whether they are in "Bermondsey or Belgrave Square." (Lord Lloyd in HoL Judgement, R. v Gloucestershire CC.... ex p. Barry, 1997) Nevertheless in this case the Law Lords decided (by a majority of three to two) that resources of a local authority (social services) should be taken into account when assessing the provision of services to a disabled person. A more recent case in the Court of Appeal has made a similar point, that the duty of a health authority to provide after-care facilities for mental health patients might be limited by budgetary considerations. (R v Camden & Islington Health Authority, Ex p K, 2001.) Most parents showed some awareness of the difficulties of local authorities. But the Phelps decision has implications beyond the actions of LEAs; individual EPs and SENCOs have a duty of care towards the pupils for whom they are responsible, and they could be held liable for negligence. This leads into the next point which is about decision-making.

The power of discretionary decision-making; the role of the SENCO.

Parents were aware of the power of headteachers and other professionals and described

their efforts at soliciting their support. Some felt that professionals had not used their influence sufficiently or had discriminated against their child unnecessarily. Several praised individual teachers highly but were critical of others. In some cases parents may have over-estimated the amount of discretion a teacher or other professional had in giving their children extra resources. Even the medical consultant was confident that the director of education himself could ensure that his requests were met, while the director's briefing document for the meeting specifically mentioned financial constraints as a reason for the shortage of therapy for the child, and suggested that a member of the medical profession should understand about "budgetary constraints on public services."

Parents' awareness of the hierarchy in schools varied according to their experience. Most of them did not use the term Special Needs Coordinator; even those whose children were in mainstream school, a point that reinforces my supposition that the role of the SENCO is still not sufficiently established to have credibility with parents, even though it may be the SENCO who has the "street level" power to decide which children have priority to be referred to outside agencies such as the EP. This might be compared with the issues raised by my SENCO Survey, the "failure" of which showed that some SENCOs are anxious about their status, feel that they are overworked, and worry that they cannot provide adequately for *all* the children with special needs in their schools. One LEA has taken this on board in its latest advice on the role of the SENCO, thus;

> It is wholly counter-productive for the school to assume that the SENCO holds all responsibility for SEN provision her or himself. Provision for children with special educational needs is likely to be most effective when **everyone concerned** - governors, headteacher, senior management team, teachers and the non-teaching staff - are all committed to and actively involved in meeting children's needs. They will need the SENCO to provide direction and guidance. (CLEA 2000, p3)

The SENCO role was created to relieve headteachers of the burden of coordinating all the

agencies which might be involved, as well as providing specialist advice for classteachers and parents, but not necessarily to give extra teaching for every child with special needs. Four of the parents I interviewed had had considerable dealings with the SENCO, even if they were not aware of the title, and it is frequently the SENCO who has the main contact with parents, arranging meetings to keep parents informed, and to discuss IEPs or other help. This contact with parents is indeed seen as a fundamental part of the role but since they are part of the school's machinery for distribution of resources parents did not see them as impartial. Indeed it is hard for them to be so. In any disagreement between school and parents the SENCO is almost inevitably in the front line on the school's side. The promotion of parent partnership schemes and school-home liaison recognises that there is a need for an impartial significant person to promote understanding between parents and schools and to mediate when disagreements arise. The parent advocacy charity involved in several of the cases was praised highly by all those who had used it.

Inclusion and Allocation of Resources

The increasingly prescriptive nature of the National Curriculum seems to indicate that this Government, like its predecessors, believe that there should be not too much room for individual interpretation or variation from the norm. The literacy and numeracy hours ought, it seems, to suit all but those with the severest special needs. From the perspective of those who advocate inclusion, these initiatives ought to be sufficiently flexible to accommodate all children, and the role of the EP should be to advise class teachers on strategies for inclusion, rather than to spend most of their time doing psychometric tests on individual children in order to justify extra resources for those children.

According to the inclusive ideal the environment should be adapted to suit each child's requirements. The parents I interviewed had wanted this to happen, and where it had

broken down they attempted to find a suitable alternative environment for their child. Inevitably this involved extra resources, especially in the cases of those who appealed to the SENT. In the present climate of opinion, which favours inclusion rather than separateness, it was interesting to encounter several parents who wanted their children to attend special schools, and were prepared to make sacrifices and fight battles to enable this to happen. Although they knew that the provision they wanted for their child would cost the LEA more than other options they felt it was their right and were delighted when the SENT decided in their favour. Only one parent expressed a clear view about the dilemma of scarce resources; others felt they had obtained what was their due. Only one expressed surprise that people (two particular teachers) had bothered to take so much trouble on her son's account, and seemed to be very grateful for the effort. One couple were appreciative of the help of an external agency (the Centre for Stammering) but had no idea how it was funded. All the children except one had statements of SEN and I had no evidence from my case studies of the legal difference in status between statemented and unstatemented pupils except from the parent advocate, who said that, in his opinion, all children with SEN, however minor, should have their provision protected by law. This is an area for further research.

A Continuum of Parenting

After the first few interviews it became apparent that some parents were more active in facilitating their child's education than others. There seems to be a continuum from *active* participants in the educational process at one extreme to *passive* recipients of the process at the other. The *active/passive* categories might be seen as "ideal types" in the Weberian sense (Weber, 1949) but obviously no one parent possessed all the characteristics. Nevertheless it would be possible to place them roughly along the continuum according to

the majority of the traits which emerged from the interviews and the documentation, as well as from the discussions I had with LEA officers and parent advocates.

Parents might have some of the following characteristics of *active* participants:

1. Knowledge and insight about their child's condition, difficulties, early education and *felt* need.
2. Commitment to take on partnership in deciding their child's educational future.
3. Motivation to optimize resources for the child; some awareness of *duty of care*.
4. Fearlessness in challenging administrative authority, notion of *expressed* need.
5. Constant re-evaluation of what the child is receiving and monitoring the child's progress; *normative* need.
6. *Active* parents are able to generalise their experiences, and become aware of the difficulties of others, initially joining support groups for their own benefit, but later being determined to help others; *comparative* need.

On the other hand parents might be said to be *passive recipients* if they have

1. A feeling of powerlessness and a lack of knowledge and insight into their child's problems, *felt* need only.
2. Anxiety and helplessness rather than commitment to partnership.
3. Lack of motivation and ignorance of availability of resources.
4. Deference to educational and administrative authority.
5. No concept of evaluation, but belief that there are "correct" solutions" which are the province of professionals and their judgements, no notion of *duty of care*.
6. Inability to see beyond their own situation, or perhaps, lack of energy to take up a cause on others' behalf.

Eve n the most active and well-informed parents sought help from pressure groups or other advocates and the less active, in most cases, relied on some kind of advisor or third party.

Several other themes emerged from my case studies and the legal cases, some of which I discussed in my introduction, and others that I had not anticipated. I had expected that the issue of *funding* would be important, and that the language of Special Educational Needs in terms of *labelling* would be significant in determining the *distribution of scarce resources*. In all the cases this was a crucial factor. I also expected that *administrative considerations* would be important and that the Code of Practice as an bureaucratic convenience would have its drawbacks as well as advantages. I had not expected the

division of administration and *unclear accountability*, for example between education, health and social services, to be quite as prominent. In several cases it was a major consideration. *Parental choice* was another theme and as already noted this has implications for the concept of *Inclusion* since the two are not always compatible. All the six parents I interviewed that had appealed to the SENT wanted their children to go to a special school. Only in one of those cases did the LEA claim that the child should go to a mainstream school. Parents had little idea of the wider issue of *inclusion* and their opinions were, not unnaturally, based on their own experiences.

Analysis of *class, income group and ethnic status* produced an unexpected result. I expected these factors to be influential but, from Harris' comments noted earlier, (Harris, 1997) I was surprised to discover how many of my respondents were second language speakers and the way in which some of them had, so to speak, educated themselves as a result of having a child with special educational needs. When I mentioned to the LEA officer that all the appellants to the SENT in one year appeared to be from ethnic minorities, he said that the authority was very proud of its record in facilitating participation of ethnic minority parents in the education of their children. On the other hand those legal cases (only one of my case studies, but also the House of Lords Cases) that were taken further than the SENT all had middle class plaintiffs, and three out of the four that went to the House of Lords were concerned with dyslexia. This may reinforce the view of dyslexia as a mainly middle class phenomenon, although it is also possible that reading and writing difficulties are not seen in quite the same way in families where parents have problems themselves, and these parents may be less likely to take action, especially if the initial approach to a solicitor has to be in writing.

All the cases could be discussed in terms of *family pathology*. The ordinary stresses and

strains of family life can be increased to an intolerable level by any kind of disability, but it is remarkable how, in many cases, the family finds unexpected sources of strength, and manage to cope and survive, albeit at incredible cost in time, energy, and financial terms. I found little evidence of *denial* amongst the parents I interviewed. Nevertheless one failed to tell me the medical diagnosis for their child, and another made no connection between the father's alcoholism and desertion and the child's difficulties. A third parent said he knew something was wrong with his child but had never heard the term "autistic" because it "didn't exist" in his country. This does not mean that denial did not happen, rather that they may have come to terms with the situation to the extent that they were "in denial" about their original denial and felt that they had always known about their child's problems. In my work as a SENCo I was concerned by the number of children with SEN of various kinds whose parents also had SEN, or at least found reading and writing difficult. Some years ago, as a beginning of a research project, I made a collection of notes from most of the parents in my class. A third of these notes (9 out of 29) could be said to be about at Level Two of the National Curriculum. Although this is to some extent "anecdotal" evidence, the experience made me particularly mindful of the possibility that some of the parents that I interviewed for the present research might have learning difficulties themselves. Two of the children whose carers I interviewed had mothers with learning difficulties. One of these children was fortunate to have grandparents to take his mother's place, and in the other case it was not made clear why the mother could not read, and as already noted, I did not feel it was appropriate to explore the matter. In the first case the special needs of the mother impacted significantly on the extended family, and in the other the mother's reading and writing difficulties may have been a significant factor. All the other parents I interviewed, regardless of their level of education or stage of learning

English, appeared to be articulate and capable once they had accessed the help of another person or organisation. Although this was only a small number of parents, this supports the view that if even well educated and articulate parents, who are knowledgeable, and use elaborated language codes, require an advocate or significant person to help them access resources for their children with special educational needs, how much more necessary must this be for parents who use restricted language codes and have not had the benefit of a good education.

In the Phelps case the professionals at the CGC decided early on that Pamela's difficulties were *psychological* and due to *family problems* and therefore did not consider that the problem might be *educational*. I use italics because it is still debatable where the boundaries might be drawn between the medical/psychological and the educational, or if indeed it is necessary to define boundaries at all, provided professionals speak to one another. There is no record of any case conferences in the Phelps case. In my experience as a SENCo, doctors or GPs are rarely able to attend case conferences, because the times usually clash with surgery times, but nonetheless they often feel able to suggest in writing that a child "shows signs of dyslexia" or "should be statemented." I have also found that psychologists and therapists are usually able to come, but in Pamela's case, communication appears to have been only in writing. This brings us to the issue of records and information.

Keeping records and obtaining information

In all the cases *keeping* of *records* and obtaining *information* was important for the protagonists in different ways and relates to my original idea that communication between parents and professionals is fundamental but also fraught with hazards. Several of the parents kept exhaustive records of their entanglements with the authorities although it was not always clear whether they had done this from the beginning or had realised the

usefulness of records at a later stage. All the parents felt that at some stage they had been "in the dark" and that they had made considerable efforts to make themselves better informed. All of them had relied on some other person, not necessarily a professional, to help them through difficult periods, especially the process of appeal to the SENT.

The legal cases draw attention to the importance of record-keeping. For example, Pamela Phelps' school records had been destroyed by the LEA when she was 21 and the remaining records were scanty. It is doubtful whether survival of the psycho-metric records of her assessment by Miss Melling (the EP) would have thrown any further light on the matter. The case was based on Miss Melling's professional interpretation of the results and it is still a matter of debate whether the "discrepancy" theory is valid and whether dyslexia should be treated differently from other literacy difficulties. Pamela's records at the CGC were intact, however, and presumably her medical record as well although it was not produced in evidence for her school days. This brings us to a general point about actions for damages, which need to focus on proof and evidence. It is necessary to focus on a specific point where something went wrong in order to apportion blame and pursue an action. But in most cases, as in Phelps, there are so many factors which contribute to a situation that it is extremely difficult to single out one to be held responsible. An education authority has overall responsibility for a child's education, but as this dissertation has shown, the number of professionals who may be involved in that education, both within and outside the LEA, can be very large indeed. In Phelps the House of Lords accepted that one single failure on the part of one professional had significantly prejudiced Pamela's career, although there was considerable evidence before the court to suggest that others had either contributed to that failure, or had also failed to ameliorate her "congenital" condition.

Summary

The parents I interviewed provided considerable evidence of the energy required to pursue a successful "career" as the parent of a child with special educational needs. They described a range of emotions from disbelief (denial) to despair, but it was clear that there were also moments of elation and satisfaction, if not joy. Whilst my conjecture about the conflict of understandings was generally borne out by the data, the evidence of the case studies was that this conflict could be resolved with the help of an intermediary, a significant other who would be sympathetic and supportive. Similarly, although the effort required was enormous, some parents were able to access the discourse of special educational needs and play a real part in the process. Nevertheless parents on the whole had a scanty knowledge of the law and needed support which they found in a variety of ways. The parents who appealed to the SENT were in fact denying the usefulness of "street-level" decisions, requiring a ruling at a higher level. Parents were aware of resource allocation, in the sense that they mostly wanted extra resources of one kind or another for their children, but few of them articulated the view that more for their child might be depriving other children of resources.

Parents had little awareness of the *duty of care* owed by professionals such as teachers, SENCOS or EPs although they had a general notion that professional expertise was something to be accessed as much as possible for their children. Although it is possible to categorize all the interviewees as mainly *active* or *passive*, all the parents were, without exception, committed to their children, and none seemed to be in any way neglectful or careless. Indeed one could not help but be impressed by their tenacity and perseverence in the face of extraordinary difficulties.

Chapter Eight

Conclusion

In this final chapter I return to the theoretical underpinnings of the research which were developed in the earlier chapters, in the light of my original research questions and the three main concepts that emerged from the literature. I review the appropriateness of my chosen research paradigm, and appraise the effectiveness of my research methods, predominantly case studies. I then discuss the issues of generalisability within case study research and look at the "failed" SENCO survey. This leads to a discussion of Parent Partnership and similar schemes, as a means of resolving the dilemmas highlighted by the research. In this context the role of the professional and the concept of the Duty of Care is highlighted. The ethical issues in the research are examined and I conclude by discussing the ways in which the study makes a contribution to scholarly and professional knowledge.

Theoretical Underpinnings

In drawing together the themes and the results that come out of this research, it is necessary to emphasise the underlying theoretical perspective developed by the researcher in two ways, first "by standing on the shoulders of giants," using and adapting theoretical perspectives developed in the literature, and second, in the context of reflective and reflexive experience for many years as a teacher and SENCO. This personal perspective grew out of a perceived disparity between the models of special educational needs used by professionals and published in the literature, and the understandings of parents of children with special educational needs. As the research progressed another discrepancy emerged; this was the lack of congruence between the educational debates about need and the legal debates as revealed in case law. The theoretical approach is thus essentially eclectic, drawing on many traditions of scholarship. In particular it is based on those theories which

emphasise the necessity of professional and lay language sharing common understandings for the benefit of the client (child) and the enhancement of the professional discipline. Dissonance arises from lack of shared meanings and understandings. Lack of resources, (ideas as well as revenue) compounded by social class and status differences, cause imbalance in relationships between professionals and lay-people and can, at worst, encourage client deference and dependence. Nevertheless, where such differences and imbalances are relegated below the purpose of the relationship, that is, meeting the child's needs, there can be empowerment and partnership. The experience and reflections of others which are recorded in the literature, and my own experience and reflections, as well as my original research which was organised for this purpose, illuminate these aspects. Underlying the research is the idea that education practice must be based on theory, which is turn is modified by reference to practice, by means of research, and feeds into education policy.

In Chapter One I reviewed some of the literature which influenced the development of the concept of Special Educational Needs and determined the way I approached the research. In Chapter Two I looked closely at the concept of need and the various interpretations that might be put on it. This led to an examination of the various models of SEN in the literature and in practical usuage. Chapter Three discussed the legal definition of SEN and the legislative framework. The various mechanisms set up to implement the legislation were appraised and Chapter Four explored the relevant legal cases and the implications for decision-making. These Chapters provide the theoretical underpinnings for the study.

The choice of subject matter for this dissertation was suggested by a concern with the fate of children who have learning difficulties of various kinds. This concern was joined by an intellectual curiosity which structured the research questions and methods used in the

preparation of this dissertation. As a teacher and Special Educational Needs Co-ordinator I became involved in the process by which such children are caught up in the SEN process, prompting me to ask whether they are able to access an education which meets their needs. My work with parents, attempting to enable them to contribute to their children's education, made me acutely aware of the unequal life chances associated with special educational needs. It is no joke that gambling metaphors have been used in this field. Special Educational Needs, perhaps more than any other part of life, is a lottery with the odds heavily against those who are the weakest.

Research Questions

Being interested in the meanings of words and the way those meanings change over time and in different contexts, my attention was drawn to the conflict of understandings and the different discourses that are used in the context of special educational needs. My four original questions about (1) parents' views of their children's needs, (2) legal authority in decisions about SEN, (3) discretion at Stages One to Three of the Code of Practice and (4) resource allocation, became subsumed under one over-riding question, which is whether academic and legal definitions of special educational needs approximate to parents' notions of their children's need. This question was prompted by Bernstein's distinction between "restricted" and "elaborated" language codes, and the idea that the "language" of SEN is another code which has to be deciphered in order to access the system.

The legal aspects seemed to be as important as the academic and I began to see that not only is there a missing discourse in the education literature on special educational needs, but there is also a missing element in the legal discourse. Lawyers acting for parents and pressure groups find it hard to communicate with educationalists; and politicians and the

DfEE often fail to communicate with both. The proposed new Code of Practice is still not "parent-friendly," but this must be the subject of further research.

Three concepts: Inclusion, Need and the Duty of Care

Three concepts emerged from the literature and were reflected in the research data. The first, *inclusion*, was a continuing theme in the literature, and hovered like a spectre during the interviews, without being referred to specifically. In Chapter One I discussed the way academics, both educational and legal, looked at special educational needs, and it was clear that *inclusion* was the over-riding principle for the latest model of SEN, fuelled by notions of equity, justice and civil rights. It was also clear that this is a fiercely contested area and one only has to attend meetings of education lawyers or pressure groups (as I do frequently) to see that those who advocate *special*, meaning *separate or different*, provision also claim to be in touch with these notions.

The second, the concept of *need* itself, has a long and conflict-ridden history in the social science literature, and it has been rejected by economists as meaningless in comparison to effective demand. Within the sociological and social policy literature the concept is also problematic, and opinion is divided as to its utility as an absolute or relative measure for policy purposes. Philosophically the concept has been found a home with more phenomenologically-minded scholars, allowing need to be defined subjectively and relatively, and thus giving policy makers serious operational and economic problems. With regard to Special Educational Need, the underlying theoretical concept seems to be one of *learning difficulty* which seems to be a qualitative rather than a quantitative concept, but which nevertheless has quantitative consequences, in the sense of resource implications. Although I have no legal training or background in jurisprudence, the research opened up a third problematic theoretical area, with an examination of the obligations and duties of

teachers, SENCOs and other professionals such as educational psychologists, as well as educational administrators. This revealed the issue of whether they have a common law *duty of care* to meet the needs of pupils, and whether they can be sued for negligence for failing in that duty.

The emergence during the research of the importance of these concepts led me to interpret interviewees' replies within both their understanding of *need* as well as their understanding of the obligations of the education system towards meeting their child's needs. Using Bernstein's theory it was clear that parents' success in learning and understanding the necessary elaborated language codes impacted on their ability to be involved in getting satisfactory provision for their children. Since the users of these elaborated codes are essentially the professionals, (teachers, SENCOs, EPs, parent partnership officers or lawyers) it was necessary to consider how their practice was influenced by policy as defined by legislation and guidance (from both central government and LEAs) as well as its interpretation by the courts. The theory of "street-level bureaucracy" underpinned this part of the enquiry, being the notion that professionals have considerable autonomy and discretion at "street level" in making decisions about allocation of scarce resources. The tension between local autonomy and central directives was a continuing theme.

Appropriateness of the chosen research paradigm

The chosen research paradigm was essentially qualitative using the techniques of case study, by interview and reference to documented evidence. There were two reasons for this, intellectual and practical. Since "understanding" is an essentially qualitative term it seemed intellectually appropriate to approach the problem in a qualitative way. Awareness might be measured on a scale of one to ten, but such a measure would be simplistic because awareness is dependent on many variables and exists on many levels. . I also examined

documentation of legal cases in some detail because the principles involved were relevant to my theme. There is an interesting intellectual parallel between case studies for the purpose of this kind of research and legal cases which decide and illustrate a point of law. Thus I included an examination of some relevant legal cases in my research strategy and followed them through the higher courts.

Before and during the course of the research I had regular contact with many parents of children with special educational needs outside the case studies and this gave me a vast amount of evidence (albeit impressionistic and anecdotal) to compare with the case studies. Although the experience of the researcher can be an advantage, I nevertheless decided against action research and tried to avoid anecdotal evidence wherever possible, unless it could be substantiated by the literature. The practical reason for choosing a case study approach was that a single researcher with limited time and resources could not collect and handle sufficient data to make a quantitative exercise worthwhile, even if it were appropriate. Since I was interested in parents' understandings, opinions and feelings, I favoured a face to face detailed approach rather than the more impersonal style of questionnaire.

Effectiveness of the use of case studies

A case study approach allows a researcher to explore a subject in considerable depth, something that is not so easy with questionnaires, which tend to have closed questions or answers which have to be scaled, for example, from one to five. It does however restrict the number of respondents that can reasonably be handled, and there is a problem with selection if there is to be an attempt at a representative sample. I would suggest that this is a problem of scale rather than structure. A small group of cases can be representative of none but themselves but studying them in the light of other research and reflective work

can lead to greater understanding of the problem under review. Semi-structured interviews yield a wealth of informative data from a range of perspectives but it is important not to make inferences beyond the information given by the interviewees. For purposes of triangulation it is necessary to refer to documentary evidence wherever possible, as well as making sure that the interviewees have a chance to check what the researcher gained from their involvement. This suggests a three-sided approach. The metaphor of triangulation is interesting. It is a technique from navigation and surveying which involves drawing a line between two known points and determining the position of a third point by measuring the angle it makes with the base line. For the purposes of research in the social sciences it involves looking at a position from at least two vantage points and then cross-referencing to produce a connection directly linking them. Like all metaphors it has its limitations, but none the less the concept of double checking one's research results is important.

Issues of Generalisability

In a small research project of this kind it is necessary to be extremely cautious in making generalisations, although one might discern recurring patterns or similarities. Every parent's experience is unique, albeit with some common elements. They have a huge range of expectations and values which have to be respected. These can also be documented. In listening to these parents and getting a sense of "voice" I was mindful of the issues of "who is listening to whom, why, and above all, in whose interests." (Clough & Barton, 1998 p 129) Several of the parents, as I already noted, hoped that, by telling me their story, some thing might be done to prevent others having the same difficulties. I cannot claim that this will be so, but at least the voice is there, a discovery of part of "the great ocean of truth" referred to by Newton, who is reported to have said

> I do not know how I may appear to the world, but to myself I seem to have been only like a boy playing on the sea-shore, and diverting myself in now and then finding a smoother pebble, or a prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me. (Bartlett, 1932, p 140)

Gathering the perceptions of parents and looking at the way they as individuals were supported by professionals, as well as examining the legal framework, can contribute to the debate about special educational needs and stimulate action and further research without necessarily making generalisations.

The SENCO Survey

The use of case studies was supplemented by an attempted survey of SENCO practice and attitudes, and despite its "failure," conclusions, if somewhat tentative, could be drawn from it. The pilot survey (as already noted) was intended to canvass the views of SENCOs and to be a means of introduction to parents with children at Stages One, Two and Three of the Code of Practice. It was partly successful in that it revealed that many SENCOs felt themselves to have insufficient time to deal with such research, and it demonstrated their views on the COP. I was able to discuss the questionnaire with SENCOs at SENCO meetings. Their view was that they generally saw the COP Stages as a ladder, with the attainment of a Statement (and extra resources,) for as many children as possible, as their main objective. This was in spite of considerable in-service training and written advice to convince them that the key to co-ordinating SEN in mainstream schools was the management of existing expertise already within the school and liaising with outside agencies at Stages One, Two and Three of the COP. As I said in Chapter Six, SENCOs are part of the professional hierarchy and are not seen to be impartial by parents. Only one of the SENCOs I contacted felt confident enough to put me in contact with parents of children at Stages Two and Three of the COP. This particular SENCO did not use an

individual deficit model of special educational needs, but believed that the school environment was all important for the development of the children in his care. There is some evidence from both the case studies and the legal cases for the notion that concentrating on solutions rather than on blame and guilt can have remarkable results..

The *duty of care* is not a sterile legal abstraction, but a real obligation placed on LEAs and professionals to act reasonably in the assessment, diagnosis and disposition process. It has particular implications for the role not only of SENCOs but also that of educational psychologists, a debate to which I have only briefly referred, whether their role is as consultants for parents of individual children, making psycho-metric diagnoses, or as consultants for schools, teachers and LEAs, in the prevention of learning difficulties, in promoting early intervention and encouraging inclusion. The latter role might be seen as a more cost-effective way of using their professional expertise.

Although in some cases parents complained of unprofessional behaviour, I found a good deal of good practice, noticeably in the bureaucratic machinery of the special needs administration of the LEA, but also mentioned were support assistants and SEN teachers, as well as parent advocates. Not only is there now a clearly stated *duty of care* laid on all LEAs but the resource issues, funding the consequences of this decision, will mean depletion of LEA budgets by increased insurance premiums (an implication suggested to me by the principal EP at the London Borough of Hillingdon,) as well as the cost of putting in place protective mechanisms, such as extra screening and prevention processes, and parent support mechanisms. All these have direct financial implications and an indirect opportunity cost. This leads to a consideration of possible solutions to the dilemmas of conflicting understandings.

Parent Partnership Services; School-Home Liaison.

Most parents do have a working definition of their children's special educational needs and this can and should be taken seriously by professionals in the field. Differences need to be settled quickly, for reasons that are as old as history and the essence of democracy. It is better, though, if differences do not appear in the first place, and therefore, it seems, there is a need for some kind of intermediary service. The earliest home-school initiatives were set up to help teachers understand the pressures of children's family environment which affected their performance in school, and to encourage parent participation in school activities. (Coventry Family Education Unit, 1994)

The rapid growth of parent partnership, home school liaison and learning mentor services testifies to this need for another dimension to the education process, an intermediary between parents and children on the one hand, and the professionals on the other. Wolfendale and Cook (1999) investigated Parent Partnership Services in 26 LEAs out of 119. A recent contact list provided by City of Westminster LEA (21 August 2000) names 160 Services. Although these initiatives have been set up with specific purposes, there is evidence that they are beneficial beyond the limits of their remit. Parent Partnership Services were initially conceived out of a concern that there were too many appeals to the SENT. It was hoped that they would minimise conflict and reduce the number of appeals. The London Diocesan Board for Schools "School Home Liaison Project" was set up to reduce the number of exclusions and improve attendance by tackling unauthorised absences.

Wolfendale and Cook found that the Parent Partnership services were seen as beneficial not only to parents of children with SEN but to many other parents as well (p 95.) Similarly, the evaluation of the London Diocesan Board for Schools "School Home

Liaison Project" (Hallam and Castle, 1999) found that "relationships between school and home have been enhanced and parents with particular problems have received support which would not otherwise be available." (p 26) The East London Schools' Fund had a wider brief, to provide a more immediate and direct way of reaching parents than was available from the Education Welfare Service. (Malek, 1996) The ELSF school-based workers are involved in a variety of activities supporting teachers and pupils. They liaise with agencies and in some schools visit every incoming student at home. They are also developing a network of learning mentors, as are a number of LEAs using funds ear-marked for the purpose.

Parent Partnership Services are aimed at helping parents by providing them with a "named person," as suggested by the Code of Practice. Wolfendale and Cook found that this title was only used by 38% of those they contacted, while 41% called themselves "befrienders" and 32% used other titles (1999, p118.) Another interesting finding was that only a small minority of these people were without some kind of training. So the question that arises is whether or not these initiatives are imposing another layer in the culture of professionalism, professional "befrienders". This could be seen as a middle class intervention into working class culture, but it might also be argued that to become educated is to become middle class. If these *befrienders* are to be trained, they need to retain or develop the ability to relate to the parents they are "befriending." They will need to be literate, but able to explain documents and structures at the levels appropriate to their "clients" without being patronising. As we saw, nearly all the parents I interviewed had, either formally or informally, been helped by some kind of befriender. Wolfendale and Cook suggest there are ethical and economic imperatives for developing these services; ethical, in that parents and children are entitled to well-informed non-judgemental support,

for reasons related to equal opportunities and human rights; economic, in that it saves money in the long run, being a low cost operation, and pre-empting expensive legal action. The idea of *equality of opportunity* means opportunities for all children, with or without special educational needs, with or with out Statements, with or without articulate parents, to have access to education. Schools and LEAs will have to take account of the implementation of the Human Rights Act 1998, already referred to, from October 2000. This Act provides a framework for some parents to insist on services being delivered, and there are likely to be further challenges in this area, so any initiative which pre-empts litigation is to be welcomed, for economic reasons as well.

> Soldiers finde warres, and Lawyers finde out still
> Litigious men, which quarrels move .... (John Donne, Patrides, 1974, p 57)

Ethical Issues in the Research

As I noted in Chapter 5, when discussing my methodology, there are serious ethical issues to be taken into consideration in undertaking this kind of research. These are matters of confidentiality, accuracy, impartiality and objectivity. There are the initial problems of gaining access to information and names and addresses of individuals who are to be invited to be involved in the research. The purpose of the research has to be as clearly stated as possible at the outset, for reasons of honesty and trustworthiness. The most important is the question of confidentiality where individuals are interviewed. They must be given an assurance that their identity will not be revealed in the research report, and as far as possible this applies to local authorities as well. They must also give consent for any written documentation to be viewed. All people interviewed must be aware of the nature and purpose of the research, and must be given the opportunity to review what they have said and check its accuracy. In a semi-structured interview the interviewer must have an

agenda of possible questions, but needs to be sensitive to the needs of the subject and allow the free flow of conversation with as few prompts as is consistent with exploring the subject under review without irrelevant deviation. It is necessary to establish rapport with the interviewee and avoid being patronising or judgmental. It is also important not to put words into their mouths, to ask open rather than closed questions if possible, and to record the interview as accurately as possible either by taping it (with permission of course) or by taking notes and reading them back at frequent intervals during the interview to ensure authenticity. Thus one hopes to remain objective and not to become involved in the problems of the interviewees. There is a fine balance to be maintained between sympathetic listening and impartial interpretation. At the same time the research was guided by a respect for justice, democratic principles and human rights. These were the ethical guidelines that informed my research.

Contribution to Scholarly and Professional Knowledge

The research and theoretical discussion in this thesis contribute to the discourse of Special Educational Needs by drawing together the ideas of inclusion, need and the duty of care. These concepts have been analysed and related to each other in a fresh and unusual approach, which unpicks the relationship between them and parents' notions of SEN. I have said that there is a missing element in the education discourse, in that commentators on SEN have neglected the area of case law which is becoming increasingly important in shaping the way needs are viewed and met. At the same time lawyers, who are increasingly involved in education cases on behalf of parents and pressure groups, do not always listen to educationalists. The "new" Code of Practice is the DfEE's attempt to make the SEN structure more "user-friendly," but attempts to simplify the language have not been very successful. The objection of the lawyers to the use of "set out" instead of "specify" has

been noted.

Although this new Code was only published when I was writing the concluding chapter of this dissertation, I have incorporated some references to it in the main body of the text where relevant. I have attended various meetings to discuss the proposals as part of the consultation process, in various forums, at school, at a NASEN conference, and at a meeting of ELAS. These discussions have further reinforced my notion that lawyers and educationalists scarcely talk the same language. The point at which teachers and lawyers meet is about the necessity for *statements*. I have already noted that the SENCOs I interviewed as part of my survey wanted every child with learning difficulties to have extra help, and did not agree that their classroom colleagues would necessarily have the expertise to cope with all these children by means of differentiation. Lawyers share this view of the necessity of statements because *statementing* is a statutory process and, as I have said, this gives the child the protection of the law to safeguard provision and resources. SENCOs would like the extra resources, but not necessarily ear-marked for a particular pupil, and indeed it seems that this is proposed under the New Code. But the DfEE, LEA administrators, and educationalists who advocate inclusion, would like to ensure that needs are met without statements, hence the emphasis on early assessment and intervention.

For the purpose of the research I tracked what was to become a landmark case on the *duty of care* owed by education professionals, Phelps v London Borough of Hillingdon. It was useful to compare aspects of the cases that went to the House of Lords with my own case studies. It was also necessary to take a lay-person's look at the jurisprudence of the *duty of care* as I followed the *Phelps* case to its conclusion in the House of Lords in late July 2000. This case will have profound implications for every child, parent, teacher, EP and

LEA in the country As I stated earlier, the decision allows pupils and students to claim damages from educational professionals (teachers and EPS for example) for negligent teaching or "unreasonable" decisions In order for a claim to succeed, the claimant must prove specific identifiable mistakes, demonstrate that the professional has fallen below a generally accepted standard for the profession, (the Bolam test) and that there has been physical injury (or failure to ameliorate the results of an congenital condition) caused by the negligence of the professionals

This study considers the idea of parent participation and involvement in the area of special educational needs in the light of the legal practice and precedents. There is a clear indication of the need for *befrienders* of some kind for many parents in order that they can participate in their children's education. More generally it has brought together the educational and legal discourses in the debate about special educational needs. It is to be hoped that this debate will promote a new inclusive agenda for special educational needs based on understanding of the duty of care, universal rights and social justice.

> For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth, that let no man expect; but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for. (John Milton, 1644, Areopagitica; Oxford Dictionary of Quotations, p 351)

> The meaning of a word in the English language is not a question of law. The proper construction (interpretation) of a statute is a question of law. (Lord Reid in Brutus v Cozens [1973] AC854, 861.)

> And now a child can understand, this is the law of all the land....
> The ink is black, the page is white, together we'll learn to read and write....
> (Primary School Song, David Arkin.)

References

Ainscow, M & Tweddle, D (1980) Preventing Classroom Failure, Chichester, John Wiley.

Ainscow, M (1989) Special Educational Needs, Towards a Whole School Approach, London, David Fulton & the National Council for Special Educational Needs.

Ainscow, M (1991) Effective Schools for All, London, Fulton.

Ainscow, M (1997) "Towards Inclusive Schooling." British Journal of Special Education, Vol 24 No 1, pp 3-6

Ainscow, M (1998) "Exploring links between special needs and school improvement." Support for Learning Vol 13, No 2, pp 70-75

Aldridge, T (1996) Special Educational Needs Tribunal, Annual Report, 1995-96, Education Law Reports

Allan, J (1999) Actively Seeking Inclusion, Pupils with Special Needs in Mainstream Schools, London, Falmer

Armstrong, D (1995) Power and Partnership in Education, London, Routledge.

Armstrong, D & Barton, L (2000) Policies, Contexts and Comparative Perspectives, London, David Fulton

Audit Commission (1992a) Getting in on the Act, London, HMSO

Audit Commission (1992b) Getting the Act Together, London, HMSO

Aubert, V (1969) Sociology of Law, Harmondsworth, Penguin Books.

Bartlett, J (1932) Familiar Quotations, London, George Routledge.

Barton, L (1988) The Politics of Special Educational Needs, Lewes, Falmer.

Barton, L & Clough, P (1995) Making Difficulties: Research and the Construction of Special Educational Needs, London, Paul Chapman.

Bassey, M (1995) Creating Education Through Research Newark, Kirklington Moor Press.

Bastiani, J (1993) UK Directory of Home-School Initiatives, RSA.

Bastiani, J & Wolfendale, S (Eds) (1996) Home- School Work in Britain, Review, Reflection and Development, London, David Fulton.

Berger, P & Luckman, T (1967) The Social Construction of Reality Harmondsworth, Penguin Books

Bernstein, B (1990) The Structuring of Pedagogic Discourse, London, Routledge.

Beveridge, Sir W 1942) Report of the Inter-departmental Committee on Social Insurance and Allied Services Cmd 6404 London HMSO

Booker. R (1998) "Descriptors of Special Educational Need: Arguments for a National Framework." Support for Learning. Vol. 13. No. 1. Feb.

Bott. E (1957) Family and Social Network. Roles, norms and external relationships in ordinary urban families. London. Tavistock Publications.

Bowles. S & Gintis. H (1976) Schooling in Capitalist America Basic books, New York.

Bradshaw. J (1973) "A taxonomy of social need" in McLachlan. G. Problems and Progress in Medical Care. Oxford University Press

Bridges. L et al (1995) The Applicant's guide to Judicial Review London. Sweet and Maxwell.

Bromley. P M & Lowe. N V (1992) 8th Ed Bromley's Family Law London. Butterworth's.

Bronfenbrenner. U (1979) The Ecology of Human Development. Cambridge, MA: Harvard University Press

Buck. T (Ed) (1998) Judicial Review and Social Welfare (Chapter on "Judicial Review and Education" by Harris. N) London

Burgess. T et al (1980) Fifteen Thousand Hours: a Discussion. University of London, Institute of Education

Camden. (London Borough of) Education Department, Special Needs Branch, (1995) Criteria for Statutory Assessment Camden Local Education Authority (CLEA), London.

Camden LEA. (2000) The Role of the SEN Coordinator (SENCO) in Camden Schools. CLEA.

Cameron. J and Sturge-Moore. L (1990) Ordinary Everyday Families. Under-Fives Project, Mencap. London

Carr. E H (1962) What is History? G.M. Trevelyan Lectures Cambridge University Press.

Carr. W and Kemmis. S (1986) Becoming Critical. London. Falmer.

Cassell. P (1993) The Giddens Reader. London. Macmillan.

Centre for Studies on Integration in Education (1986a) Caught in the Act: What LEAs tell Parents under the 1981 Education Act. London. CSIE

Centre for Studies on Integration in Education (1986b) Mainstreaming in Massachusetts. London, CSIE

Chapman. L and Ware. J (1999) "Challenging traditional roles and perceptions: Using a transdisciplinary approach in an inclusive main school" Support for Learning Vol. 14 No 3 (1999) NASEN

Chasty. H and Friel. J (1993) Children with Special Needs. Assessment. Law and Practice: Caught in the Act Jessica Kingsley Publishers. London and Philadelphia.

Christensen. C & Rizvi. F eds (1996) Disability and the Dilemmas of Education and Justice. London. Open University Press

Clarke. C . Dyson. A. & Millward. A . Towards Inclusive Education, London, Fulton.

Clay. M . (1979) The Early Detection of Reading Difficulties (3rd Ed.) London. Heinemann.

Clough. E . Clough. P & Nixon. J eds (1989) The New Learning. London Macmillan.

Clough. P & Lindsay. G (1991) Integration and the Support Service: Changing Roles in Special Education. Berkshire. NFER-Nelson Publishing Co.

Clough. P & Barton. L (1995) Making Difficulties Paul Chapman. London.

Clough. P & Barton. L (1998) Articulating with Difficulty: Research Voices in Inclusive Education London. Paul Chapman

Cooley. M (1998) The Archivist. London. Abacus

Corbett. J (1996) Bad Mouthing: The Language of Special Needs. London. Falmer.

Corbett. J (1998a) "Voice in Emancipatory Research" in Clough. P. & Barton. L. Eds. (1998) Articulating with Difficulty. Research Voices in Inclusive Education London, Paul Chapman

Corbett. J (1998b) Special Educational Needs in the Twentieth Century London, Institute of Education Cassell

Court of Appeal (1998) Pamela Helen Phelps. Plaintiff/Respondent. and The Mayor and Burgesses of the London Borough of Hillingdon. Defendants/ Appellants Case No QBENF 97/1404

Cowne. E (1996) The SENCO Handbook. David Fulton. London.

Cox. C B & Dyson. A E (Eds) (1970) Black Paper 3. Critical Quarterly.

Croll. P & Moses. D (1998) "Pragmatism. Ideology and Educational Change. the Case of Special Educational Needs." British Journal of Educational Studies Vol. 46, No. 1, pp 11-25.

Cummings. N (1997) Operational Research Newsletter November 1997, London, The Operational Research Society

DES. (1992) Parents Charter. Children with Special Educational Needs. London DES.

DES. (1992) Special Educational Needs. Access to the System. a Consultation Paper, HMSO.

DFE. (1994) Code of Practice on the Identification and Assessment of Special Educational Needs. London. Central Office of Information

DFE. (1995) Special Educational Needs Tribunal. How to appeal. London, DFE Publications Centre

DfEE. (1997a) Excellence in Schools. London. DfEE.

DfEE (1997b) Excellence for all children. Meeting Special Educational Needs, London. The Stationery Office

DfEE. (1997c) The SENCO Guide. London. DfEE

DfEE. (1999) Statistics of Education. Schools in England 1999. The Stationery Office.

DfEE. (2000) SEN Code of Practice on the Identification and Assessment of Pupils with Special Educational Needs and SEN Thresholds. Good Practice Guidance on Identification and Provision for pupils with Special educational Needs. Draft Code and Guidance, Ref. No. 0120/2000. DfEE

Donne. J (Ed Patrides. C A) (1985) The Complete English Poems of John Donne, London, Everyman

Douglas. J W B (1964) The Home and the School. London. MacGibbon and Kee.

Doyal. L and Gough. I (1984) "A theory of human needs." in Critical Social Policy, No 10, pp 6-33

Durkheim E (1895/1964) The Rules of Sociological Method London. The Free Press/ Collier MacMillan

Dworkin R (1977) Taking Rights Seriously . Boston. M.A.. Harvard University.

ELAS. Education Law Association (1999) Bulletin No 24 September 1999 ELAS.

ELAS. Education Law Association (2000) Bulletin No 28 August 2000 ELAS.

Elvin. L (1975) "The Place of Educational Research" ORE Vol.1, No.5.

Evans. J . Everard. B . Friend. J . Norwich. B and Welton. J (1989) Developing services for children with SEN. London. HMSO

Evans. J (1998) Getting it Right. LEAS and the Special Needs Tribunal. London, NFER

Finnis. J M (1980) Natural Law and Natural Rights. Oxford. University Press.

Florian. L (1998) "An examination of the practical problems associated with the implementation of inclusive educational policies" Support for Learning Vol. 13 No. 3, pp 105-108.

Ford. D (1996) Reversing Under-achievement among Gifted Black Students, New York, Teachers College Press

Friel. J and Hay. D (1996) Special Educational Needs and the Law. London, Sweet and Maxwell

Freire. P (1973) Pedagogy of the Oppressed. Harmondsworth Penguin.

Galloway. D . Armstrong. D and Tomlinson. S (1994) The Assessment of Special Educational Needs. whose problem?. London. Longman.

Garland. The Hon Mr Justice. (1997) Pamela Helen Phelps V the Mayor and Burgesses. London Borough of Hillingdon. Handed Down Judgement, High Court of Justice, Q BD

Gersch. I S . Casale. C and Luck. C (1998) "The Waltham Forest SEN Conciliation Service; one approach to reducing tribunal appeals" Educational Psychology in Practice. Vol 14 No 1. p11-21

Gibson, S (Unpublished) Middle Management and the SENCO Report, PhD Research in progress, Oxford Brookes University

Giddens A (1976) The New Rules of Sociological Method London, Hutchinson

Glaser, B G & Strauss, A L (1967) The Discovery of Grounded Theory: Strategies for Qualitative Research New York, Aldine Pub Co .

Grant, G (1999) "Education, the life course and research" in The British Journal of Special Education Vol 26, No 2, pp 71-75

Gray, P (1997) "The Birmingham Criteria for Statutory Assessment," Educational Psychology in Action Vol 12, No 4, p210-11

Griffiths, A (1999) "All together now, " (an interview with Graham Lane, Chair of Newham Education Committee) in Special! Spring 1999.

Griffiths, J A G (1991) The Politics of the Judiciary, 4th ed. London Fontana.

Guishard, J (1998) "The Parents' Support Service. Brief family work in a school context," Educational Psychology in Practice, Vol 14 No.2, p 135-139.

Hall, J (1999) Resolving Disputes between Parents, Schools and LEAs: Some Examples of Best Practice London, DfEE

Hallam, S & Castle, F (1999) Evaluation of a School-Home Liaison Project- London Diocesan Board for Schools (1996-1999), Institute of Education, University of London.

Harris, N (1993) Law and Education, London, Sweet & Maxwell.

Harris, N (1997) Special Educational Needs and Access to Justice, London, Jordan Publishing.

Hillingdon Local Education Authority, (1997) Identifying and Supporting Children and Young People who may have Specific Learning Difficulties (Dyslexia), A Guide for Teachers, London Borough of Hillingdon

Her Majesty's Chief Inspector of Schools (1996) The Implementation of the Code of Practice for Pupils with Special Educational Needs London, OFSTED

Holden, C , Hughes, M & Desforges, M , (1994) "Parents and Entitlement; a fair deal for all?" Educational Review Vol 46, No 2, pp

Hornby, G (1995) SENCO's Handbook, London, Routledge.

Hornby, G (1999) "Inclusion or delusion Can one size fit all?" Support for Learning Vol 14, No 4 pp 152-157

Hornby, G (2000) Improving Parental Involvement London, Cassell

House of Lords (2000) Phelps (A.P.) V Mayor Etc of the London Borough of Hillingdon etc Session 1999-2000, Publications on the Internet, Judgements.

Inner London Education Authority (ILEA) (1985) Equal Opportunities for All? (The Fish Report) London, ILEA

Ignatieff. M (1984) The Needs of Strangers London. Chatto and Windus.

Joynson. R B (1989) The Burt Affair London. Routledge

Kerzner. Lipsky. D and Gartner. A (1997) Inclusion and School Reform Baltimore Paul Brookes Publishing

Kingsolver. B (1998) The Poisonwood Bible. London. Harper Collins (1999 Edition Faber)

Lindsay. G & Thompson. D eds. (1997) Values into Practice in Special Education. London, David Fulton

Lipsky. M "Toward a Theory of Street-Level Bureaucracy" in Hawley, W. and Lipsky, M. eds. (1976) Theoretical Perspectives on Urban Politics Prentice Hall, New Jersey.

Lloyd. Lord. of Hampstead & Freeman. M D A. (1990) Lloyd's Introduction to Jurisprudence London. Stevens & Sons

Malek. M (1996) Making Home-School Work. National Children's Bureau.

Mason. J (1996) Qualitative Researching. London. Sage

McCormick. R (1982) Calling Education to Account. London, Open University/ Heinemann Educational Books

Miles. T R (1983) Dyslexia. The Pattern of Difficulties. St Albans, Granada Publishing.

Mittler. P & Sinason. V (1996) Changing Policy and Practice for People with Learning Disabilities. London. Cassell

National Curriculum Council (1989) Curriculum Guidance 2. A Curriculum for All. Two. York NCC

Nevitt. D A (1977) "Demand and need" in Heisler. H (ed) Foundations of Social Administration. London. Macmillan

Norwich. B (1994) Segregation and Inclusion. English LEA Statistics 1988-92. Centre for the Study of Integration in Education

Norwich. B (2000) "Educational psychology and special educational needs: How they relate and where is the relationship going?" In Educational and Child Psychology. (2000) Vol.17(2) pp 5-15

Nuttall's (1926) Standard Dictionary of the English Language. London. Frederick Warne.

ODQ (1979) Oxford Dictionary of Quotations. Oxford University Press.

OFSTED (1996) Promoting High Achievement for pupils with SEN in Mainstream Schools London. HMSO

OFSTED (1997) The Implementation of the Code of Practice for Children with Special Educational Needs. London. HMSO

OFSTED. Primary Education 1994-8. London. The Stationery Office.

Oliver. S and Austen. L (1996) Special Educational Needs and the Law. London. Jordan Publishing

Pinker. R A (1995) "Golden Ages and Welfare Alchemists" in Social Policy and Administration. No 2. pp78-90

Pinnell. G S . DeFord. D E & Lyons. C A (1988) Reading Recovery: Early Intervention for At-Risk First Graders. Education Research Service. Arlington. Virginia, USA.

Rehal. A (1989) "Involving Asian parents in the statementing procedure- the way forward," Educational Psychology in Practice 4. pp 187-97

Roaf. C & Bines. H eds (1989) Needs. Rights and Opportunities: Developing Approaches to Special Education. London. Falmer

Robson. C (1993) Real World Research. London. Blackwell

Roos. P. (1978) "Parents of mentally retarded children. Misunderstood and mistreated" in Turnbull. H R & Turnbull. A P (Eds) Parents Speak Out. Columbus OH, Charles H. Merrill

Russell. P (1996) "Parent's Voices Developing New Approaches to Family Support and Community Development" in Mittler. P & Sinason. V. Ed. (1996) Changing Policy and Practice for People with Learning Disabilities. London. Cassell Education.

Rutter. M . Tizard. J & Whitmore. (1970) Education. Health and Behaviour. London, Longman.

Rutter. M . Cox. A . Tupling. C . Berger. M.. & Yule. W (1975a) "Attainment and adjustment in two geographical areas I The prevalence of psychiatric disorder." British Journal of Psychiatry. 126. pp 493-509

Rutter. M . Yule. B . Quinton. D . Rowlands. O . Yule. W. & Berger. M. (1975b) "Attainment and adjustment in two geographical areas. III Some factors accounting for area differences." British Journal of Psychiatry. 126. pp520-33

Rutter. M et al (1979) Fifteen Thousand Hours London. Open Books.

Sallis. J (1979) "Beyond the Market Place a Parent's view". in McCormick, (1982) above.

Scott. D and Usher. R (1999) Researching Education. London. Institute of Education. Cassell.

Scottish Education Department (SED)(1978) The Education of Pupils with Learning Difficulties in Primary and Secondary Schools. A Progress Report by her Majesty's Inspectorate. HMSO Scotland. Edinburgh

Singh. S (1998) Fermat's Last Theorem. London.Fourth Estate.

Skeat. W W (1887) A Concise Etymological Dictionary of the English Language. Oxford, Clarendon Press

Smith. G (1988) Social Needs. Policy Practice and Research. London Routledge.

Solity, J. (1999) "The early reading research: Applying psychology to classroom practice," in Educational and Child Psychology, (2000) Vol.17 No. 2, pp 46-65.

Thomas, G. (1997) "Inclusive schools for an inclusive society" British Journal of Special Education, Vol. 24, No. 3 pp 103-107.

Tizard, J. (1972) Children with Specific Reading Difficulties, London HMSO.

Thomson, W. A. R. (1976) Black's Medical Dictionary, 31st Edition, London, Adam & Charles Black.

Tocqueville, A. De, (1994) Transl. Lawrence, G. Democracy in America London,

Wade, B. & Moore, M. (1993a) The Promise of Reading Recovery, London, Education Review Publications, Headline Series No. 1.

Wade, B. & Moore, M. (1993b) Experiencing Special Education, Open University Press.

Warnock, M. (1960) Ethics since 1900 Oxford University Press.

Warnock Report (1978) Special Educational Needs, Report of the Committee of Enquiry into the Education of Handicapped Children and Young People Cmnd 7212, London HMSO.

Warnock, M. (1985) "Teacher Teach Thyself" (The 1985 Dimbleby Lecture). The Listener, 28 March.

Warnock, M. (1996) "The work of the Warnock Committee" in Mittler, P. & Sinason, V. Ed. Changing Policy and Practice for People with Learning Disabilities, London, Cassell Education.

Weatherley,R.A. (1979) Reforming Special Education, Policy Implementation from State Level to Street Level MIT Press Cambridge Massachusetts & London England

Webb, B. (1926) My Apprenticeship, Harmonsworth, Penguin Edition 1971

Weber M. (1949) The Methodology of the Social Sciences (ed. Shils, E.A. & Finch, H.A.) Glencoe, Illinois, Free Press.

Webster, A. & Hoyle, E. (2000) The "new professionalism" and the future of educational psychology," in Educational and Child Psychology Vol.17 (2) pp 93-104.

Wedell, K. (2000) "Moving towards inclusion: implications for professional psychological services," in Educational and Child Psychology Vol.17 (2) pp 36-45.

Westminster, (City of) Education and Leisure Department, (1998) Criteria for Statutory Assessment City of Westminster.

Williams, A. (1974) "Need as a demand concept" in Culyer, A.J.(ed) Economic Policies and Social Goals, London, Martin Robertson.

Wilson, J. (1999) "Some Conceptual difficulties about 'inclusion'," Support for Learning Vol. 14 No 3, pp110-112.

Wolfendale, S. (1992) Empowering Parents and Teachers - Working for Children, London, Cassell.

Wolfendale, S. (Ed.) (1997a) Working with Parents of SEN Children after the Code of Practice, London, David Fulton.

Wolfendale, S. (Ed.) (1997b) Meeting Special Needs in the Early Years, London, David Fulton.

Wolfendale, S. & Cook, G. (1997) Evaluation of Special Educational Needs Parent Partnership Schemes, DfEE.

Wolfendale, S. & Bastiani, J. (Eds)(2000) The Contribution of Parents to School Effectiveness, London David Fulton.

Wright, J. (1989) "The dishonest statements that protect LEAs - not children" Childright No 49, pp 12-14.

Wright, J. and Poynter, R.(1996) Taking Action! Your Child's Right to Special Education. IPSEA, Question Publishing Company.

Zola, I. (1993) "Self, identity and the naming question: Reflections on the language of disability," Social Science and Medicine, 36 (2) pp 167-73.

Appendix 1 List of Cases.

Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582;101 S.J. 357; [1957] 2 AER. 118.

Jarvis v Hampshire County Council, [2000] ELR 1-108 Number 1 p 36; Times Law Report November 23 1999, p14.

Phelps (A.P.) V. Mayor Etc. of The London Borough of Hillingdon; Anderton, (A.P.) By Her Mother and Next Friend v. Clwyd County Council; In Re G (A.P.) (A Minor) (By His Next Friend); Jarvis (A.P.) v. Hampshire County Council, House of Lords 1999- 2000, Publications on the Internet, Judgements, phelp- 7/27/00

HoL Barry (1996-7) R v Gloucestershire County Council and the Secretary of State for Health ex parte Barry House of Lords 20 March 1997 www.publications.parliament.uk./pa/ld199697/jd970320/barry02.htm.

X (Minors)(Appellants) v Bedfordshire County Council (Respondents) and others [1995] W.L.R. 152.

R v. Secretary of State for Education ex parte S [1994] The Times 20 July

R v. Dorset County Council ex p G. The Times 30 Dec 1994

R v Surrey County Council ex parte H [1985] per Waller LJ at 221.

R. v Secretary of State for Education and Science ex parte Davis [1989]

R. v. Isle of Wight County Council ex p S [1992] The Times 2 November

R. v. Secretary of State for Education and Science ex p E[1992] FLR 377

R v. Newham Borough Council ex parte R [1994] COD 472

R v. Hampshire County Council ex parte W [1994]

R v. Secretary of State for Education ex parte C[1995]

R v. Surrey County Council ex parte G. and H.[1995] COD 50

E.(a minor) v Dorset County Council, Christmas v Hampshire County Council &Keating v London Borough of Bromley [1995] 3 WLR 152

R v. Hampshire County Council ex parte F[1995] COD 110

R v. Cumbria County Council ex p NAB[1995] COD 180

R. v Secretary of State for Education ex parte Skilt.[1995] COD 270.

R v Camden & Islington Health Authority, Ex p K. [2001] Times Law Report, 15 March 2001.

Appendix 2

Questions for SENCOS

1. How many children are on your Special Needs Register at Stage One ☐ Stage Two ☐ Stage Three ☐ Stage Four ☐ Stage Five ☐

2. How many successful interventions did your school manage last year within the Stages One to Three of the Code of Practice?

   Children moving from Stage Two to Stage One, ☐

   Three to Two, ☐ or off the Register altogether? ☐

3. What area were you most successful in? (Please give numbers if possible)

   Specific learning difficulties ☐ General learning difficulties ☐

   Emotional difficulties ☐ Behavioural difficulties ☐

   Other (Please specify) ☐

4. How many of the children on the Register have free school dinners?
   have a home language other than English?

4. How did you involve parents in meeting their children's special needs? Letters ☐

   Informal contact by classteacher ☐ Meeting SENCO ☐ Special homework ☐

   Other ☐ (Please specify:)

5. How were the school's resources used? Individual Support Teachers ☐ Support Assistants ☐

   Extra EP time ☐ Small Groups ☐ Books ☐ Other (Please specify)

6. What help did you/the children receive from the LEA? (EP, Support Services, etc)

7. What help did you/the children receive from other services? (eg Speech and Language Therapy, OT, Schools Medical Service, Parent Advocacy/Partnership Service, Parent Pressure Groups etc)

8. How could the Code of Practice be made more effective?

Please return in enclosed envelope.

Many thanks!

Appendix 3
Questions for Interviews with Parents

1. When were you first worried about your child?
2. Were the teachers worried?
3. Did you go to school to talk about your worries?
4. Did the school invite you?
5. How was it explained to you?
6. Do you know what your rights are in law?
7. Did you get a letter from the school or the LEA?
8. Did you understand it?
9. Did you give permission for your child to be assessed?
10. Did you sign a form?
11. Did you speak to the class teacher, SENCO, support teacher, EP, speech therapist or other?
12. Were you offered independent advice or a named person?
13. Did you understand the Draft Statement?
14. Did you know what special provision means?
15. How long did the process take?
16. How did you feel about the process?

(Based loosely on Rehal, 1989)

Questions for LEA Officers/EPS/Parent Advocates

1. What interventions and support does the LEA provide to schools and pupils at Stages 1-3 of the Code of Practice?
2. How aware are parents of the CoP?
3. Does the LEA produce any information for them or is it up to the schools?
4. Has the LEA produced its own criteria or descriptors to asistthe SEN panel in its decisions?
5. What proportion of children are assessed under the Act?
6. What proportion receive statements?
7. How many appeals are there?
8. Has the LEA had to recruit extra staff to deal with the SEN arrangements since 1994?
9. Is there a Parents' Support Service?
10. Is there a conciliation or mediation service?
11. What is the social class and ethnic background of children with statements and those appealing to the SENT, in proportion to the rest of the school population?

Appendix 4
Case Study Details

Case study one; Child "K"

I interviewed Child K's mother at her flat one evening. The interview took an hour and a half, and I hardly prompted her at all, just listened to her story as it unfolded. She had all the relevant documents and referred to them as she talked, showing them to me to back up what she was saying and to get the sequence right. She photocopied the most important ones and gave them to me. I checked the records both verbally with the special needs officer and by reading the LEA files.

Child K's mother is from an EC country and her father is Asian. K's mother left school at 16 to work for her living. Her parents could not afford further education for her. K was born in 1981 in her mother's home country in a private hospital where K's mother had hoped to have good obstetric care. It was a complicated labour. K's mother described the problems of the epidural anaesthesia making it difficult for her to push. Fetal distress led to the use of forceps. K. was a small baby (less than 6lbs) and during the first week of her life had several fits. She also had a dislocated hip which was treated immediately. The family came to England in 1982. K had treatment for epilepsy until she was seven years old, when she no longer needed medication.

Her learning difficulties began to be identified when she was eighteen months old. The medication made her drowsy and her development was slow. Often when she fitted it was necessary for her to go to hospital by ambulance and her mother commented on how the service had deteriorated due to inner city traffic. It is now quicker to call a taxi to go to the hospital than to wait for an ambulance. She had "glue ear" and grommets were inserted when she was three years old. This improved her conductive hearing loss but her speech

development was not age-appropriate. She began to speak and to walk when her brother was born and she was about four years old. By 1997 (age 16) an EP report stated that she was functioning at about a five to six year old level.

When K was a baby they were visited regularly by a health visitor but the parents could understand very little of the conversations and advice because at that stage they were both at an early stage of learning English.

K's mother described how she used a dictionary to try to make sense of everything. Indeed, one of the most remarkable aspects of this case is how she educated herself, learning not just English, but also the complicated medical and educational concepts and the routines and techniques of pressurising public bodies in order to achieve a purpose. When she discovered the advantages of sending multiple copies of documents to various protagonists she bought a photocopier to assist her, which was why she was able to give me copies of documents on the spot.

At four years old K went to a creche and then to the local primary school where she was given two hours of primary helper time every day. When K was seven the class teacher told her mother that she would have to go to a special school. The local education authority provided an escort and a mini-cab to take K to the special school (for children with moderate learning difficulties), which was in a neighbouring borough. At this time K's mother did not know about the Code of Practice or the statementing process, but she was reassured by the teachers and was satisfied with the education K received at the special school. K stayed at this school until she was sixteen.

At the last review meeting held for K at the school concern was expressed over an appropriate post-sixteen placement for her. She had been attending a link course at a local

further education college and there was an incident there that led to social services and child protection involvement. K's mother did not wish to elaborate on this but merely said it was sexual abuse. I did not wish to probe further as it seemed a sensitive issue. It was suggested that a residential school would provide a safe and nurturing environment, with a 24 hour curriculum that would develop K's self care skills and independence. In the Autumn Term of her final year, the Key Stage 4 Co-ordinator suggested a possible residential school to K's mother and they visited it together. K's parents were impressed with the school and agreed that she should go there. Unfortunately the LEA did not agree with the placement because the residential provision should be paid for by Social Services rather than the education budget and Social Services felt that there was no need for residential care because K's mother cared for her extremely well. There was no question that she should be taken into care. The placement at the residential school was supported by the social worker, the GP, the clinical psychologist to whom K had been referred, and her teachers at the special school. Although her mother cared for her well she found it difficult to encourage her independent living skills. K's mother was seen as a naturally "over-protective" parent. Up to this time K's mother had a good relationship with the LEA parent liaison officer, whom she trusted.

It came as something of a shock to K's mother when the LEA refused funding to send her there and recommended instead that she should go their own day school for children with severe learning difficulties. The decision process took from January to July and there was no time to arrange an alternative before the beginning of the new school year. K's mother accepted the placement "as an interim arrangement" (letter from social worker.) K did not understand the other children, who had more severe difficulties than herself, and began to

behave strangely at home, copying the children with cerebral palsy, and talking about the locked doors at school. K's mother began to be depressed about the school. The headteacher told her that her attitude was not helping K to settle in, but K's mother was sure that the school was inappropriate for her child's needs. Shortly after this the head teacher resigned after an OFSTED report made severe criticisms of the senior management team at the school.

After ten days K's mother decided to keep her at home and because she had a full-time job she paid a girl to stay with K at home. She worried that her daughter was missing out on her education. It was a very stressful time for them and it prompted her son, who had just started at secondary school, to write to the Prime Minister on his sister's behalf. He received replies from the PM's secretary and the Department for Education and Employment, enclosing the booklet "How to appeal to the Special Educational Needs Tribunal." At about this time K's mother found out about the parents' advocacy charity and enlisted their help. She read the SENT booklet with a dictionary and a highlighter pen, and the independent advocate (from the charity) encouraged and helped her. She sent copies of all the papers to everyone she could think of. In January a letter came from the residential school saying that there was no place available for K.

This was a setback but K's mother went to the library to look for a list of other possible schools. Eventually she found a book in a University book shop, which listed schools for children with all kinds of difficulties. She found what seemed to be a suitable school, (St X's) showed it to the independent parent advocate, and immediately went to visit. The LEA still insisted that the day school was an appropriate placement and so K's mother appealed to the Tribunal, asking that the LEA should name St X's School on the up-dated

statement. The head teacher of that school confirmed that a place would be available from the summer term.

The appeal was lodged in February and heard in June. The Tribunal expressed extreme disappointment that the LEA had "failed to comply with its Statutory responsibility..... which had contributed in large measure to leaving her for the majority of the year without educational provision." The Tribunal accepted the contention of the independent parent advocate that although there would be "considerable additional cost" to the LEA (£25,850 plus transport as against £12,000 plus transport) this was not an issue because the SLD school was "unable to meet her needs." So Mrs K had won. K has made sound progress in her residential school and her mother was very happy.

K's mother read the above transcript and made two minor corrections but was otherwise satisfied with the account. Subsequently however, after she had replied as above, when I checked the transcript with the LEA officer who had dealt with the case, it was sad to discover that, after all, the residential school had not lived up to its safe and nurturing reputation, or at least, it had failed to prevent an incident of sexual abuse (a second incident), which means that K is now moving to another school. Nevertheless, K's mother, having expressed fears to her social worker about renewing contact with the LEA officer (who had been "on the other side") later said how much she appreciated his support over the incident. I was told this by the parent partnership officer. K's mother gave me copies of all the most important documents and I checked them in the LEA's files. The only documents they did not have appeared to be Mrs K's and her son's correspondence with the Prime Minister's office and the DfEE (of which Mrs K. gave me copies.)

A general point that arises from this case is about the difficulties that parents have when

their dependent disabled child reaches puberty. Both Mrs K and Mrs E (Case Study Seven) expressed their fears of sexual problems or exploitation when their "beautiful" daughters became sexually aware or active. . I felt unable to explore this aspect more deeply in the interview situation, with one visit only, but it obviously is a matter of concern and could be a topic for further research. Another interviewee (Case Study Eight) had experienced a similar problem with her daughter, and indeed her current experiences show that exploitation of a adult with learning difficulties is a real worry for a parent.

Mrs K appeared to be a very strong and active parent, having gone through several stages of despair and desperation almost unsupported, abandoned by her husband, who, she said, now has another wife. I met her son only briefly, but it emerged from her conversation that he, too, is a determined person, taking on the role of supporting his mother in a positive way at the age of twelve if not earlier. There is an interesting area for research here, the way young children take on the role of the parent in families with difficulties, supporting their parents and/or siblings. The specific point that arises concerns the remarkable tenacity of this parent in arguing for her child, her ability to understand the administrative and legal processes, despite her having English as a second language, her understanding of the importance of the documentary evidence and her particular determination to engage with it in the interests of her child. She had an idea of the *duty of care* in the sense that she was sure that the LEA should provide for her child. Her single-mindedness led her to be fearless in challenging authority, but she did not mention whether she was aware of the problems of other parents in similar circumstances, or whether she was able to generalise her experiences, with a sense of *comparative* need. Her tenacity in her commitment to her children and the effort she devoted to this, as well as the demands of a full time job with

unsocial hours, probably meant she had little energy for other problems. As I left, however, she began to tell me of her efforts on behalf of the tenants' association, which efforts sounded quite substantial, so it is probable that, if the situation should arise, she would be an indefatigable member of any pressure group she chose to join.

Case study two; Child "Y"

I met Child Y's father on the steps of a university building which was his choice of venue, and we talked in the students' union bar. This made the use of the tape recorder impossible. Mr Y, like most of my interviewees, appeared to enjoy telling his story and punctuated his narrative with expressive hand gestures and superlatives. He told me that his wife came from Africa with Child Y and siblings to be with him. He had been a student and had moved around quite a lot, and was teaching, mainly open learning for adults, such as refugees. The family settled in a northern city where Child Y first went to school, and then they moved to the capital. Mr Y is an educated man who now runs a service company covering a large area. He says he was naive; as his child's English seemed good, he assumed that because he (the father) had no problems with language the child would not either. Soon after starting school, other children began to pick on him, and there were complaints about behaviour and lack of concentration.

Mr Y trusted the teachers because "in Africa they were like God" and the English ones were "so sweet" and "brilliant" (sic) Then child Y was accused of cutting one child's hair, and hitting another child. Mrs Y developed stress because the teachers were complaining about Y so frequently. They gave permission for the Educational psychologist to be involved. The first EP report was unacceptable to Mr Y so he asked for changes. It was brought back again with changes but in Mr Y's view it was merely playing with language.

Mr Y rejected the report entirely and a new EP, described as "brilliant" wrote a "better" report and Y was given a Statement which gave him individual tuition three or four times a week. The Individual Support teacher was African and this worked well initially, but then problems developed in class and the teachers kept throwing Y out of class. He was eventually excluded after an incident where he was accused of throwing a pencil and hitting a girl in the eye. It emerged that he had been wrongfully accused. He had actually been at home on the day in question, and another child had thrown the pencil. Y had been victimized and this was admitted by the school. Mrs Y especially found this very upsetting.

By Year Six Y had had a Statement for two years, and a Primary SEN Assistant with whom he had a good relationship. Mr Y sought advice about secondary transfer and was referred to the LEA's Parent Advisor. He was advised that the local large comprehensive school had an excellent special needs department, although his preference was for a MLD school maintained by the same LEA. Y went to the comprehensive school and Mr Y found the SENCo to be most helpful ("beautiful" in his words) although he wanted the Primary Helper to move schools with Y and this was not allowed.

At primary school transport had been provided for Y under his Statement but at the first review at secondary level it was proposed that this should be discontinued. Mr Y did not agree and wrote to the Parent Advisor to ask for support. He also discussed the matter with a friend who happened to be a teacher, and about this time, by accident, found out about a charitable organisation which helps and advises parents. At the same time the helper hours were cut from 21 to 11, apparently due to an error on the part of the school. Mr Y described the advisor from the charity as a "peacemaker" who advised him not to

"point the finger" at the Special Needs Department and all would have been well if there had not been a serious incident at school where eight boys came to school and beat Y in front of a teacher. All the boys, including Y, were suspended. Mr and Mrs Y appealed to the Governors, but the suspension was upheld. At this stage the parents asked for Y to go to the MLD school they had originally chosen and this was refused by the LEA. Mr Y decided to take legal action against the LEA and claim for educational and psychological damage. The advisor from the charity advised Mr Y against this course of action, saying that he could not possibly win. He did, however, draw his attention to the Special Educational Needs Tribunal.

Mr Y asked for his son to go to the MLD school, and the request was refused. He then asked to discuss the matter and one of the officers replied that the school was not a "detention centre." He decided to appeal to the SENT although his friend the teacher said he couldn't possibly win. He laid out his case carefully and presented it all with evidence of everything from primary school onwards. He was able to show that the Educational Psychologist had only seen Y once. He had kept every letter and report and labelled and dated them all in bundles. His report referred to the numbered bundles.

He took the report and the bundles by hand to the venue of the SENT. It emerged during the hearing that the school was receiving money for the support teacher and assistant, but for various reasons they were not being employed. Another point which favoured Mr Y's case was a fax sent from the MLD school to the LEA saying that there was no place there for Y, which was seen a an action "behind Mr Y's back." As a result of the SENT decision a place was found for Y at the MLD school and since then there has never been a fight, Y does his homework and is happy. His siblings all go to other mainstream schools and Mr

Y is satisfied with their schooling.

He concludes that "Psychology is not an exact science" and his parting words were

> I come from a culture where everything is by word of mouth, my parents could not read or write, but valued learning. They gave me to the teacher and I was taught the value of reading and writing. I learnt to keep every piece of paper.

The astonishing thing was Mr Y's complete lack of acrimony and his delight in the satisfactory outcome of the proceedings. He admitted that he found the process daunting and suggested that anyone without a certain level of education would be unable to challenge the system. It took a great deal of energy. He was glad he had been so diligent about keeping every document as evidence. He understood that transport and extra support for his child were extra costs for the LEA and that the place at a MLD school was more expensive for the LEA than mainstream, and he was grateful for the fact that his child was able to benefit from this extra expenditure. He recognised that it was the duty of the LEA to use their resources wisely, and said of the officers, "they were doing their job, whereas I was fighting for my child." This last comment was made as he opened my car door for me, after the interview was over, and I had to stop the car round the corner to make sure I wrote it down immediately.

When I followed up Child Y's notes at the Local Education Authority, it emerged that Mr Y had played down the exact nature of his child's medical problems. Indeed he gave little indication of any such problems, although medical advice was sought by the LEA as part of the Statutory Assessment procedure and it was used at the appeal to the SENT. Child Y had Renaud's Disease (a circulatory disorder) and arthritis, which were very disabling at times, affecting all his motor skills. This was the reason for provision of transport to the mainstream school in the Statement, which Mr Y only mentioned in relation to the Special

school. He had also had quite serious ear, nose and throat (ENT) problems, including bilateral glue ear, which had led to speech and hearing problems. Mr Y's teacher friend was his child's Sunday school teacher, who gave the child extra coaching as well as specialised advice, as an officer of a national organisation for Special Educational Needs. It is interesting that this teacher advised him not to appeal, although she gave written evidence to the Tribunal on his behalf.

The LEA's case was that the special school that Mr Y wanted for his child was

- unsuitable to the child's ability, aptitude and special educational needs,
- incompatible with the efficient education of the children with whom he would be educated
- incompatible with the efficient use of resources and
- that the child was making satisfactory progress at the mainstream comprehensive.

The SENT found for the parent because

- both schools were suitable and therefore the parent's preference should be honoured
- the child's difficulties in the mainstream school might be alleviated by being in a smaller group, and
- the overall costs were not significantly different as the transport costs for going to the special school were considerably less than to the mainstream school.

This case is relevant to the inclusive debate. The child's needs were being met in the mainstream school and he was making academic progress, but his medical needs were such that he found it hard to relate to the larger groups in the mainstream. The schools dealt with the bullying problem as best they could, but Mr Y felt that the smaller teaching groups in the MLD school would be better for his son. His mobility problem was easier to deal with in a smaller building.

Mr Y coped well with the administrative process and kept all documents in orderly "bundles." He took advice and was keen to use the legal process. He comes across as an "active " parent, who has a good grasp of all the issues, including the *duty of care* and

normative and *comparative* need. He, more than any of the other parents I met, was aware of the LEA's difficulties and the requirement that they should use resources wisely. He was also aware of his child's needs but made no excuses for him. It was plain that the LEA officers had great respect for him, bordering on affection, although he had challenged them at the Special Needs Tribunal.

Case study three; Child "C"

I met Child C's parents in their home one morning. Father did most of the talking, with mother interjecting fairly frequently. C, who is an only child, was at school. He had a difficult birth and soon was diagnosed by the Child Development Team as having hemiplegia and autistic "traits." He went to a Montessori nursery and the staff there suggested he should be assessed by a educational psychologist. He also had speech therapy and occupational therapy at the nursery. It was agreed that he should attend mainstream school, and he was given a place in the reception class at the local primary school, pending the writing of his statement. He was only there one day and the school said it would be unable to cope.

He was out of school for nearly a year, while the LEA tried to find a suitable place for him. In the meantime his mother was trying to do a four year course and the stress forced her to give it up. The Local Authority Social Services Department provided care workers, who came to the house and looked after C. His parents had nothing but praise for their specialist caring skills and for the stimulating activities and outings they planned for their son whilst he was out of school.

In his sixth year C started in a mainstream school with a unit for children with behaviour difficulties and was there for half a term.

His parents asked for the care worker who had won their confidence to accompany him to the school but for various reasons, which seemed to the parents to be unnecessarily bureaucratic, this was not permitted. I could find no reference to this request in the LEA files, so it must have been at school level. At this school he had some physiotherapy which was essential for his physical problems. He found it hard to cope in school and his behaviour deteriorated. After an incident he was excluded for 5 days and later for ten days and at this stage his parents decided that the school was not the right one for him. They asked the LEA for the names of possible schools, and went to visit several. At this stage C had a draft statement, needing only the name of a suitable school.

They chose a school in a neighbouring borough and after being refused a couple of times they placed his name on the waiting list. In his seventh year a place was found for him and the LEA agreed to fund his placement and pay for transport, after appeal to the SENT.

The parents said they found the appeal procedure easy to understand and helpful but that the situation was extremely stressful because of the feelings of guilt associated with having a child with special needs and wanting to continue with life as normally as possible. C's mother badly wants to resume the course she had abandoned, so that she can gain a qualification, but it is difficult for her to commit herself to such an undertaking. C's parents commented by telephone that this was a fair account of their experience.

Mr and Mrs C did not tell me about the difficulties they had in ensuring that their son would have access to speech and language therapy and occupational therapy. In my examination of the LEA files I discovered that this issue was raised at the Tribunal and, as with Case T (Case Five) the LEA were reluctant to specify the amount of "non-educational provision" because it was felt that, since it was provided by a health authority, and

education authority could not guarantee its delivery. The SENT ruled that current practice should be specified in the statement to ensure that it continued, and that the LEA must determine the amount of provision even though they were not responsible for its delivery. Another interesting point to emerge from this appeal was that the Health Authority (HA) responsible for these therapies should be, in the case of an out of borough placement, the HA in which the school was situated, not the child's home HA.

Examination of the LEA's records revealed that the parent advocate had raised the issue and quoted several cases in support of his client's case that occupational therapy, and speech and language therapy could be regarded as educational provision and therefore ought to be specified in the statement.

These were mainly "passive" parents, concerned about their child and his *felt* needs, but also trying to get on with their work and study. They had no concept of a *duty of care*, or that their child's needs could be anyone's responsibility other than theirs. It seems they did not fully understand the process in which they were involved, but relied on the parent advocate for support and advice. They were ignorant of the availability of resources, and deferential to educational and administrative authority.

Case study four; Child "O"

I met the O family at their flat and interviewed Mr O. Child O was at school and is the eldest of four children. The two youngest children were at home and played at our feet while we talked. The flat appeared to have only two rooms and although mother said very little, she did not leave the room and only once joined in the conversation. The television was on to entertain the children all through the interview. When I asked for it to be turned off the volume was reduced slightly. I could not use the tape-recorder. As a guest in their

home I found it hard to be assertive. The following paragraphs were approved by Mr O. His family are from North East Africa and the children were all born here. O. attended the local independent nursery school where his difficulties began to be apparent. At a routine check with the Child Development Team the parents were told that he "had Autism." They had never heard of it and said that in their country they had never come across it. They saw a specialist at the local teaching hospital who explained that they would need to have their child assessed by the educational psychologist. O was observed and assessed in the nursery where he was settled and happy. The local nursery kept him for an extra year and this was funded by charities, but then he was out of school because no place could be found for him for more than a year.

The LEA offered them a place in a MLD school although the parents preferred a mainstream school and wanted to try and see whether O would be able to attend mainstream. The LEA insisted that they should try the MLD school, and Mr and Mrs O went to look at several other schools that they thought might be suitable. As O also has chronic asthma they did not want him to go to a school which was too far away, as they feared the traffic fumes on the journey might bring on an attack.

They chose a school which was in another borough but only a short journey away. They believe that the LEA put pressure on this school to refuse their son a place, and eventually they asked the authority to find a place in a mainstream school. The LEA offered them 6 hours of primary assistant time per week for this but no place could be found. O attended the MLD school for six months but his parents were unhappy with it because he copied the grimaces and actions of the children with cerebral palsy. It will be remembered that the mother of Child K (Case study 1) made a similar complaint Although they felt that the

"director" and the teachers were "good," Mr and Mrs O were sure that their child is clever and felt that the teachers' expectations for him were not high enough. The LEA put them in touch with the Parent Advocacy Charity, and with the advice of this organisation they decided to appeal to the SENT.

Mr O found the appeal procedure somewhat daunting but was greatly helped by the parent advocate. His main complaint is that because his English is not "perfect" people assume he does not understand and he finds this patronising. O now attends a special school in another borough, but his parents still wish that he could attend a unit in a mainstream school. They are pleased with the progress their daughter is making in an ordinary school. Mr O congratulated me by telephone on the way I wrote this account.

I could find no evidence in the LEA's file to support Mr O's supposition that the LEA put pressure on the special school to say there was no place available, but the special school was in "Special Measures" after an adverse OFSTED Report and the SENT accepted the Head teacher's evidence that the quality of education in the school depended very much on the small size of the teaching groups, and that one more would be too many. The SENT decided not to specify a school on the Statement and ordered the parties to meet and agree a placement. This they managed to do.

This parent appeared to have a good understanding of administrative and legal issues, including a view that the LEA had an obligation towards his child. His comment about "autism" is interesting, because he virtually disregarded it as a diagnosis for his child's difficulties, preferring to concentrate on his asthma and high intelligence. This could be seen as a disregard for medical/psychological opinion. Nevertheless he seemed to be less active in pursuit of his child's interests than many parents, relying on the parent advocate,

and unaware of the importance of keeping the documents. Although he had some of them, they were not kept in a particular order. He appeared to be ignorant of the availability of resources, and had no intention of joining any support group.

Although this is the second case where the parent was dissatisfied with an MLD school placement, and blamed the school being "in special measures" I think it is only fair to say that this particular school is now back on track and has many satisfied parents.

Case study five; Child "T"

I met Child T's mother at their home in the evening after both children were in bed and the nanny had gone home, but father did not come home from work until our interview was nearly finished. He is a hospital consultant. Mrs T told me that T suffers from a rare immune deficiency disorder which was discovered when he was 11 weeks old. He was given a bone marrow transplant with his two year old sister as a donor. Two months later he had a stroke which left him with right side hemiplegia. At eighteen months old he learned to sit up. He had physiotherapy and speech therapy and at two years old he went to an LEA nursery attached to the local special school which was recommended by the speech therapist. His attendance was part-time and flexible to fit in with hospital and speech therapy appointments. His mother attended a parents' support group which she found very helpful and at this stage she found out about the Code of Practice.

When he was eighteen months old the paediatrician referred them to the LEA, to request a Statutory Assessment. They heard nothing for seven months and received an apology from the authority, who agreed to carry out the full assessment. After 12 months of meeting with the parent liaison officer, and several drafts, the statement was finalised. It still did not reflect what he was actually getting in terms of speech therapy, and the parents

were keen that the availability of speech and occupational therapy and physiotherapy should be guaranteed by having these specified in the statement. At this stage T's parents were in touch with a disabled parents' group and a parents' liaison charity and their child was assessed by an educational psychologist on behalf of SCOPE. They were advised to appeal, and did so.

The case was due to be heard on a Tuesday, and the Friday before this they heard that the LEA had agreed in principle to include these therapies in the statement under the section for Educational Needs.

The parents felt that the LEA had been unduly cautious about including a specified amount of therapy, speech physiotherapy and occupational therapy in the statement. They saw these therapies as an *educational* rather than a *non-educational* need, and pointed out that they were only asking for the statement to say what their child was already getting. There was to be a difficulty as to whether these therapies should be paid for by the LEA or the Health Authority, and the LEA could not guarantee that provision would continue despite issuing an agreed final statement to that effect.

T's mother read this account and approved it after making several corrections. Examination of the LEA's files confirmed the details and showed that Mr and Mrs T had written to the Director of Education and had an interview with him. Their letter asked for a discussion of the failure of the statement to specify the exact quantity of therapy, and asked that these therapies should continue over school holidays. They complained that there was no liaison between the LEA and the community health authority and were dissatisfied with the method of delivery especially for speech and language therapy which was delivered in half-termly blocks by the speech and language therapist with the help of

the classroom assistant and then continued in the second half term by the classroom assistant alone. This appears to be standard practice in most health authorities and the letter from the senior speech and language therapist to the LEA was very specific thus:

> 1. Joint planning with parents to develop communication programmes which are carried out on a daily basis by nursery staff.
> 2. The speech therapist would contribute to the child's individual education plan (IEP.)
> 3. There would be blocks of direct therapy sessions, both individual and group, run jointly by the nursery and therapy staff. The group would be weekly, and the individual sessions would be in a block for alternate half terms, implemented by the classroom assistant in the second half of term.
> 4.There would be on-going monitoring of communication and language skills.
> 5. There would be regular liaison between staff, parents and the child development team. (Letter in LEA file)

In their letter to the director the parents said

> we cannot accept that budgetary restrictions might in any context be relevant in formulating the statement.

Thus, without knowing, they were stating the position of Barry in the case of R v Gloucester County Council ex p Barry, to which I referred earlier. (Chapter Two, p47) The decision in this case, it will be remembered, was that a local authority was entitled to take into account its resources when deciding on the appropriate level of care. The director commented that a member of the medical profession "must be aware of budgetary constraints on public services." This is an important point because the wise use of resources must take into account budgetary restraints and special needs provision for one child should be compatible with adequate provision for other children. In this case the parties agreed at the appeal to accept the inclusion of advice and monitoring from the speech therapy, physiotherapy and occupational therapy services, with the programmes implemented by the support assistant. The parents also accepted that it could only be provided in term time.

These were "active," articulate, literate parents, with professional knowledge about administration, rights and the legal obligations of a local authority. Like K's brother, writing to the Prime Minister, (Case Study One) T's parents attempted to bypass the stages of administration by writing to the Director of Education and asking for an interview, indicating that they had some idea of a *duty of care*. In spite of this they still relied on the advice of a self-help parents' group and the parents' advocacy charity, showing the importance of these groups not just for educationally disadvantaged parents but for all parents with children with SEN.

Case study six; Child "X"

I interviewed the mother of X at school. I was mainly concerned with her son X because he had a Statement, but she told me about her second son, Z, as the interview progressed. She came to England with her husband from an middle-eastern country before the boys were born. She left her husband after the birth of X but was persuaded to try to make a success of the marriage, with the result that the second boy was born two years later. Shortly after this the marriage broke down again and this time the mother refused to try again. When the elder son, X, was four years old, and Z a small baby, the mother contracted a serious illness and was hospitalised for some time. This coincided with X's entry into the Reception class, and his behaviour was difficult to contain. He would run out of the classroom and had to be physically restrained on several occasions. On one of these he bit a teacher hard on the arm causing bruising. While their mother was in hospital the boys were cared for by her mother who spoke no English, helped by an aunt who was later married to a teacher. This aunt and her husband were very supportive, accompanying the mother to meetings and translating difficult letters.

In Year One X was referred to the Learning Support Service and the EP for literacy difficulties but due to a long waiting list for individual support, he received in-class support for behaviour problems in school and was in a small group of second language learners for most of his literacy work. These details were recorded on an IEP. He and his brother, who was also displaying behaviour problems at school and at home, were referred to the Department of Child Psychiatry at a London Teaching Hospital. X's mother was provided with a behaviour modification programme which she followed with difficulty but with a measure of success. She showed me the notes for this programme which her sister had translated into Turkish.

X's teachers told his mother that they felt that he was more able than his literacy skills indicated, and that he had specific literacy difficulties, well as problems with coordination and motor skills, of a dyspraxic nature. His behaviour was difficult to manage, because he was extremely impulsive and fidgety, rushing from his seat at the slightest whim, often with the best intention of helping the teacher or another pupil, however inappropriate. He made little or no progress in literacy, despite some individual help using the "Beat Dyslexia" Programme in Year Four and the continuing small group work with the Section 11(English as an additional language) teacher. His mother borrowed a tape recorder and the "Beat Dyslexia" tapes from school to use at home.

At about this time X's aunt or uncle got in touch with the British Dyslexia Association and he was referred to a Specialist Dyslexia Centre where he started to have an hour's tuition a week, paid for by a charity. At the same time his name came to the top of the LEA's Primary Support Service waiting list and he began to have an hour's tuition with a specialist Reading Recovery Teacher each week. The Section 11(EAL) help in a small

group also continued and he began to make some progress in reading and writing, gaining in self esteem. At this stage the mother and the school, with the advice of the BDA, decided to ask the LEA for a Statutory Assessment, with a view to making a statement of his special educational needs. It was hoped that a statement would enable his individual support to continue when the charity ceased to fund it and when the limited period of the PLSS help came to an end. Fortunately this happened and the Authority agreed that the two hours IST time (or equivalent) provided in the Statement could be used to fund the time at the Dyslexia Centre and provide the balance (¾ hour) in IST time paid for by the Authority. X is now making slow but steady progress. His mother described how happy she was that his "problem was found out."

X's mother was very appreciative of the school, although she was sometimes critical, and she tried hard to co-operate with them. She felt the teachers were sometimes patronising because her English is not "perfect." Sometimes she felt her children were "picked on" because they had been "bad" in the past. She suggested that their behaviour was mainly due to their problems with literacy, but was happy with the idea that blaming was not a sensible way to proceed. She did not like going to the Department of Child Psychotherapy and felt there was a stigma attached; this was intensified when she met another family from the same school there. She refused to return for further consultations although she agreed the programme had helped her to be stronger in managing the children's behaviour at home. She was helped by the British Dyslexia Association, and by her sister and brother-in-law who were able to explain the Code of Practice to her in her own language, and spend time helping her to understand. She said that it is so complicated that it takes time to understand it, a valid point. Her story was confirmed by reference to the files.

This was a "passive" parent who was enabled to be active with help from her sister and the BDA. She found it hard to understand educational or legal issues. Her concern about stigma coloured her view of the service offered, and her refusal of further psychotherapy could have had a serious effect on her child. She appears to have found an educational explanation of her son's difficulties (dyslexia) easier to accept than a psychiatric one, which she perceived as inappropriate. Her illness probably contributed to her difficulties and feelings of anxiety and helplessness. On the whole she was deferential to educational and administrative authority, but was motivated by the help given by her sister and the British Dyslexia Association.

Case study seven; Child "E"

I interviewed Mrs E. mother of E. in her semi-detached house in a tree-lined traffic-less road in a north London suburb. I was put in touch with her through a solicitor who asked her if she would mind being interviewed. E's younger brother was at home during the interview and came into the kitchen twice while we were talking. Mrs E was very candid and clear in her own mind that the "system" had failed her family. She felt she had been sent "to hell and back" by the bureaucracy. The need to blame someone or some organisation seems to be a common response of parents of children with special educational needs. Yet even Mrs E had come "back" from hell and was able to describe her experiences with humour and sympathy for others. The tape of her interview is astonishing for the number of times she laughs aloud at her misfortunes. Mrs E showed me some of the papers but said that there were many more in bundles in the loft.

Mrs E. first suspected that something was wrong with her daughter when other children of her age were beginning to speak and she wasn't. Everyone reassured Mrs E. that she

was the ideal baby, "a pretty little thing" who "didn't grab the spoons in the high chair." At about two years old she was making noises, and using isolated words. Mrs B. kept asking the health visitor for speech therapy but was told that she couldn't have therapy if there was no speech to work on at that stage. They lived in Oxford and "did the rounds."

They saw a psychiatrist who suggested "the Holding Therapy." Mrs E. had very little confidence in this therapy which is designed for autistic children, because although E. showed some autistic tendencies "like many special needs children," she was not autistic. By this time E. was 2½ and her mother was expecting her second child. Although they had further appointments with this doctor they decided not to "go down that route" because they were going to send her to a private prep school in Oxford.

They were also referred to a paediatric neurologist who had nothing to suggest, and a hearing specialist, who could find nothing wrong with E's hearing at that point. Mrs E. says she is still "a bit angry, still bitter" that she wasn't offered the normal sort of help, no support, no explanation. Later on, when she was five, E. had glue ear and grommets were inserted for the first time.

Mrs E's second child, a son, was born when E. was 3 years and 3 months. At this stage she was still only using single words and the first time she put words together was when she saw her new brother in the hospital. She said, "My baby boy." She attended a private nursery school where they were very nice to her and all the children wanted to mother her. From there she went to a private prep school, and although Mrs E. "said from day one she needed extra help" they wouldn't listen. E. was quiet and not at all disruptive in school but Mrs E. felt she was being branded as a neurotic mum when she pointed out to them that E. was not doing what other children were doing. It didn't become apparent to the school

that she had special needs until she was six or seven. Even then the school did not suggest any kind of assessment. She had her first educational psychology (EP) assessment when she was about eight, paid for by her parents. They also paid for "remedial" teaching. Her IQ was assessed at about 67 and in all the reports that followed it was consistently between 65 and 70. The second EP report used the word "retarded." Mrs E. expressed slightly amused annoyance with the term "slow learner" saying it implies they're going to get better slowly. She preferred the term "learning difficulties."

When it was time for E. to leave the prep school the head teacher said "You were right, Mrs E. from the beginning, we're so sorry. You were right"

The educational psychologist suggested various schools and wondered if Mrs E. would consider a boarding school. She advised the parents of their right to contact the local educational authority but when it got contentious with the local authority she said she didn't wish to be involved and they had to find other people.

Mr E. is a legal executive, though not a qualified lawyer, so he wrote to the director of education quoting the relevant sections of the Education Acts, saying "Please could you statement my child" Mrs E. read Halsbury's Statutes and they set out to find everything out for themselves. She found out more than she ever wanted to know.

The LEA carried out an assessment of E and issued a statement naming their own boarding school for children with moderate learning difficulties. During the time it took to do the assessment and issue the statement Mr and Mrs E. had found a little school in Sussex and arranged for her to go there. At this stage, with the expense of private school for both children, and the assessments and extra tuition for E. Mr and Mrs E. were starting to get into debt. Mr and Mrs E. did not like the named school. It seemed to them to be large and

institutionalised, so they appealed to the local Appeals Committee. They found in favour of the LEA, and an appeal to the Secretary of State was turned down.

In the summer of 1992 the E. family moved to London, and they asked the new LEA to *take over the statement or issue a new one naming the school in Sussex. They asked the LEA to pay for one term so that they could give notice, and made E available for an* assessment at half term. They had three extensive reports from eminent child consultants in Oxford all of whom recommended a residential placement. Without seeing E the LEA changed the statement naming their own MLD day school, and she started there the following January (1993). Her behaviour at home began to worsen and this affected her little brother so they sent him to boarding school in Oxford. The situation became very difficult and Mrs E. refused to accept three or four draft statements naming the LEA's day school. Mr and Mrs E. decided that E. should stay at home rather than attend the day school and appealed against the new statement.

Eventually a date was set for the appeal hearing, but by this time things were so bad at home that Mr E, who had had a nervous breakdown twenty years before, began to show signs of another one. He went to the hearing but could not take anything in and he finally broke down in his office.

He had to be hospitalised so that Mrs E. had to cope on her own with her daughter at home with no school for her to go to, and summonses for bills coming in. Mrs E. had heard of a solicitor who specialised in education law and in desperation she phoned him. He phoned the special needs department and explained that they were a "family in crisis" and the hearing was postponed for a month. The LEA continued to offer day provision backed up by family therapy at the Tavistock Clinic. Mrs E. found the Social Services

Department very unhelpful. She says that the NSPCC were at that time taking on only desperate cases and were doing no preventative work, although her GP had written a letter saying hers was a "family in crisis." Not much had changed when the hearing took place, and Mrs E attended on her own and lost.

Mr E. phoned the Secretary of State and they started another appeal. This took a year, during which E. had a private tutor from an agency for a few weeks and attended a weekly social group run by a charity. They sold their car, cashed their insurance policies and moved house to pay the bills. They sent E back to the school in Sussex. For the whole of 1994 E was at school in Sussex, and her parents met the full boarding fees, making financial sacrifices to do so. Then in December 94 they received the result of their appeal to the Secretary of State. They won and E moved to a new school in Cheshire in January 1995. The Statement was amended to name that school. The decision meant they could bring her brother back to day school in London. Notice could not be given to his school in Oxford until after the Secretary of State's decision.

E is now at college of further education in Manchester, which offers a sheltered and nurturing environment for young people with learning difficulties and teaches them independent living skills. They also have opportunities for supervised voluntary work and later on, supported housing.

Mrs E does not regret taking responsibility for her children's education, and the financial risks involved. She is sad that the "bureaucracy sent her to hell and back" and says that the money was a nightmare, although she had an "understanding bank manager." She says that the "new" parent liaison officer at the LEA is "excellent" and helped her very much and is "still apologising." (There was no such post when they originally appealed) The

warmth of this relationship was reciprocated although Mrs E had occasionally perhaps overstepped the mark in trying the patience of busy administrators with not just one but many cases to deal with. In 1995 Mrs E was granted legal aid to sue for educational negligence in E's name, and the outcome of the Phelps case will probably mean that the case will go ahead.

When I asked to see the LEA files it emerged that although they were now on microfiche, I could not have access to them because the paper files had been transferred to the education authority of the outer London borough to which the E family had recently moved. I had, however, seen the most important documents at Mrs E's house, and the parent liaison officer confirmed the details of the case. This officer expressed considerable admiration for Mrs E's persistence and strength in spite of Mrs E's often critical attitude towards her and her LEA colleagues.

In conclusion, this is an extremely "active" parent, ready to leave no stone unturned in her pursuit of justice. Like Mrs K, (Case Study One) but with the advantage of an English education, she took care to understand all the educational, administrative and legal problems, but only after she and her husband had used the private sector to the best of their ability. She was probably more accurate in her assessment of her child's problems than the school. Like Mrs K and Mrs W she experienced the anxiety of having a daughter reaching puberty and needing a nurturing and safe environment, but in this case there seems to have been a successful outcome for the young adult. It remains to be seen whether the case will go to court. The parent has a very strong and well-informed view of the legal issues involved. She did not mention membership of any self-help or pressure group.

Case study eight; Child "M"

I was introduced to Mrs W. by a school SENCo because she is the carer of a child at Stage Two/Three of the Code of Practice. This child (L) is doing well at school and the teachers are full of praise for him. This was one of the two cases that I investigated where a statement of special educational needs was not involved. I went to interview Mrs W. who is his grandmother, so she began by explaining the circumstances in which she has a residence order for M to live with her.

Her story has at least three strands which are significant for this research, because not only her daughter, M's mother, has learning difficulties, but also M has a younger brother who is at a residential school because he has severe dyspraxia. This younger brother has a statement of SEN but although I recorded what his grandmother said about him, he was not my primary concern.

We began by talking about him, the younger brother, whom I shall call N. He is 8 years old and can read beautifully and spell, but is clumsy, frequently falls over, and cannot write or even draw a circle. He still wears nappies because he's incontinent of the bowel, although he has bladder control. He is also hyperactive. He was at the local primary school who contained him with difficulty until he was seven, and then "they wanted him out." Social Services wanted to place him in a foster home, but his grandparents said no. They felt that no foster parents would be able to cope with him on a one-to-one basis and he would go from foster home to foster home, from special school to special school. So they thought very hard and in the end the Social Services Department and the LEA agreed to fund a place at a residential special school, half each. N was due home for half term shortly and Social Services wanted Mrs W to have him. But she was firm and said that she has the older boy, M, and only a small house. It would be too disruptive for M and so

she had to say no.

This led to a discussion about M's mother, who has been divorced from M's and N's father, and is living with somebody else, by whom she has had another baby. Mrs W explained that a Trust had been set up to provide for her daughter's future, because she had been at a special school. She reads with difficulty and can't understand numbers very well. She has a very low IQ but her whole life has been dedicated to being normal and to her "that means having babies." The father of the latest child has found out about the Trust and is "trying to break it so that he can have the money." So every time Mr and Mrs W refuse to give him extra money or anything he pours paint over their car, breaks the windscreen or throws pots through the windows. Mrs W confessed that she was "frightened to death" every time she hears a noise. They have told the police and they had decided to arrest him on a charge of criminal damage. This would mean he would go to court and they would try to get an injunction to say that he must not go near the house or their persons or property. Mr W had taken the car with him that day, to keep it safe, and whilst I was interviewing Mrs W the police rang to say they'd been round to arrest him but he had not been at home. This is perhaps an extreme example, but it does show the pressure that parents of adults with learning difficulties can experience.

We went on to talk about M. who went to the local primary school, and was late in learning to read. His grandmother tried to teach him because he was doing nothing at five, six or seven. At school they all said he was fine, but she knew that he wasn't writing anything, wasn't drawing anything, although everything was very sociable and he was having a lovely time. The Year Three teacher said he was very articulate and had a good vocabulary although he couldn't spell or do sums. There was a total lack of concentration

unless he was watching television and one day Mr and Mrs W decided that this was no good. By this time they had got a residence order for him to live with them. Mrs W remembered how she went into school "to help with a cookery thing they were doing, a special meal for a treat," and when they'd done all the preparation and put it in the oven the teacher said that the mothers should go for a walk up the high street and come back later because the children were going to write the recipes. They came back three-quarters of an hour later and everyone was handing in pieces of paper. M was just sitting there and he had copied just one word from the blackboard in that time. The teacher said that it was because he didn't concentrate and that she had to sit with him to get him to do any work. His grandparents thought it was odd, because he seemed such a bright boy in every other way, so by the time he was in Year Four they began to look at alternatives.

They approached a local independent school and took M along for an interview. The school said they would love to have him, that he was obviously intelligent and sociable, but there was some kind of learning difficulty. So they recommended an educational psychologist who worked for a well-known hospital. Mrs W described her relief when M was diagnosed as "dyslexic." He remained at the state primary school, because he was so well integrated and they felt it would be a shame to move him. His grandmother began taking him out of school for five hours a week for special tuition, and it helped to build his self confidence. The tutor persuaded him that he was not stupid, that indeed he was very clever but that he would have to work much harder than other children to get over his difficulty with writing. This would help him to do very well, because he'd get used to working very hard. Thus M's self-esteem was improved by the diagnosis and the indication that it was not "his fault" that he could not read.

Mrs W said that the primary school Head was very reluctant to accept the label dyslexia and called it specific learning difficulties, but provided some help "extra spelling and reading and writing with a nice lady." Mrs W thought it was ridiculous not to use the word dyslexia if it suited a person. She was not otherwise critical of the school although it seemed that they had not explained the Code of Practice to her clearly. She said that another parent with a child with cerebral palsy explained the procedures to her. By that time she was taking M out of school for extra work and felt that anything extra at school was just "a bit of frosting on the icing of the cake." The school did not suggest any referrals to other agencies. Mrs W felt they were less helpful than they might have been, and that their attitude was that M's difficulties were emotional and caused by his early background. She agreed that before he came to live with her he had lived in a family that never stopped shouting at each other and had a father who drank, so he did have some emotional problems. Even before the residence order he found sanctuary with his grandparents, spending most of his time with them. Mrs W said that she knew that there is a theory that emotional traumatic shock can cause dyslexia, but even when the emotional problems were more or less sorted out he continued to have reading difficulties, and still has, but is learning to overcome them.

Although two of Mrs W's own children went to independent schools she prefers the state system and so when she began to think about secondary schools for M she looked at the local comprehensive schools very carefully. She chose a voluntary aided boys school because she felt it would be best for him. Although they were technically outside the catchment area M got a place on special social and medical grounds. Mrs W said she was "deeply grateful" that he seems so happy and confident there and that it's a very caring

school. She helps him with his homework and he's very proud to be doing *well*. *She is a* little concerned that the teachers don't seem to take his dyslexia into consideration. Someone at the Parents' Association told her that she should go round and tell each teacher because M told her that he told the geography teacher who said "Oh why didn't you tell me!"

M is very untidy but he is getting good marks and is proud of himself. Mrs W asked him if he would like to be withdrawn from class for extra help at school but he said, "No, no" because he'd miss things in class and he would hate to do that. One day he came home from school and said, "So and so's dyslexic" so Mrs W said, "Oh is he?" and M said, "Yes, he just told me." Mrs W said that it was nothing to be ashamed of and asked him if he told him that he was too. M said that he did "in the end."

Mrs W went on to tell me about her daughter, M's mother, whom I shall call O. I record the details here because they are relevant not just to M's problems, but as a case study in its own right, illustrating many of the points that came up in other cases. As a baby and a small child she was hyperactive and Mrs W decided there was something wrong with her. She saw several doctors who reassured her saying it was only because she had a medical background (physiotherapy) that she was worried that something might be wrong. The baby didn't suck properly at first and never stopped crying. All her milestones were way behind. Mrs W's brother's wife to be, who had just qualified as a doctor, saw the baby lying on the sofa and said that she felt there was something not quite right. She was referred to a specialist and had a scan about a year old. The diagnosis was minimal brain damage due to unknown causes and that she would probably never read or write.

They said nothing could be done so Mrs W went to another specialist because she was

getting near to school age and she didn't know what to do. Nobody could understand a word O said except for her mother. They tried several nursery schools but she would not allow her mother to leave and Mrs W sat with her for terms which "was terrible" but eventually a small independent school solved the problem. Then they went to see an independent school for O's brother and the Head said they could take both children. Mrs W thought the school would be marvellous for O but then the Head said it wouldn't be fair to the brother to have his sister in the same school. Mr and Mrs W felt that O's needs were greater so they sent her there and chose another school for her brother. They had to pay for a carer to sit with her to help her along because there was no extra help available in the school. When she was ten she was assessed by an educational psychologist who recommended a special school where she went until she was old enough to leave. Since then she had jobs intermittently but found it hard to cope with them even when they were "sheltered." As already noted, her parents have supported her as much as was possible to enable her to lead a normal life, at great personal and financial cast to themselves, and giving them considerable anxiety.

I checked the details of M's case with the school SENCO without revealing any of the details about his mother and brother, although he was aware of some of the background. All the teachers are now aware of M's literacy problems; he has opportunities to use a computer and is given extra time to complete work when necessary. As he has no statement, the LEA had no records of this case.

This grandparent was "active" in the sense that she worked hard to get the best for her grand children as well as for her children. She had no engagement with educational administration or the law. She had the intellectual and financial resources to pick and mix

from the private and maintained sectors, obtaining entry to the mainstream school of choice by the process of appeal. She had a firm belief in inclusive education, but was prepared to make exceptions where she felt it was the best solution. She was in touch with the BDA but the impression she gave was that she felt she should support them to get a better deal for other children rather than for her own support. She is an active member of the Parents' Association at her grandson's school.

Case study nine; Child "J"

I was introduced to Mr and Mrs J by the SENCo and arranged to interview them while J was at his evening swimming club. Both parents work in the hotel and catering business; mother is a manager and father a chef. They welcomed me to their flat, which is a conversion of two floors of a Victorian house in an inner-city area near a big park. J is now 13 and doing well at secondary school. He has an older brother who is about to do GCSE. During the interview this brother was doing his homework in another room and occasionally appeared to get a drink or something to eat.

J was late in learning to speak and his parents were worried early on. He was probably only about two. He didn't say sentences until he was about four. At the developmental checks it was decided that he had a stammer problem. When he started in the Reception Class he was finding it hard to get the words out and his sentences were often incomplete. He started speech therapy when he was about four, at the local family health clinic. This continued until he was about six and then he was referred to the Michael Palin Centre for Stammering Children. They attended a number of courses but the main one was a two week intensive family course which involved the parents. J "would have the words in his brain but be unable to get them out and it was very frustrating for him." It was very

tempting to finish his sentences for him. The Palin Centre encouraged the parents to wait and be patient. They showed J how to slow his speech down and gave him all sorts of strategies so that now his problem is no longer obvious. He also learnt strategies for defusing difficult situations relating to his stammering, such as the possibility of being teased or bullied. Nevertheless the problem does slow down his reading and writing and this affects every school subject where there is a need for reading and writing.

J had special help while he was at primary school, both individual and small group help at various times. He also had an individual support teacher from the LEA's primary learning support service for eighteen months. This really helped his self esteem. His mother was aware of the Code of Practice as she had been a school governor for nine years. She always made sure that the class teacher knew of his difficulties. His parents were kept informed of how he was getting on. They had meetings to discuss his IEP and targets every quarter with the SENCo. In the Key Stage Two SATs he had extra reading help for the questions which meant that he did as well as was expected. He is good at science and quite good at maths.

Transfer to secondary school was a big jump but he developed a lot. Since he went there he has been quite definite that he doesn't need speech therapy although they have kept in contact with the Michael Palin Centre and he has the chance to go back if he feels the need. He had quite a bit of homework in the last year of primary school and a great deal at secondary school. His parents help him and make sure he does it as it is set, because he takes longer than other children.

J is good at music and plays two wind instruments as well as keyboard. He learns his music off by heart very quickly. He goes to Saturday Music School (run by the LEA.)

He also swims very well and belongs to a swimming club which meets four times a week. Although when he is tired he stammers, after swimming for two hours his speech improves. He is in the competition squad and it has given him great confidence, but he is still reluctant to speak up for himself. His parents told of an incident at swimming where he almost failed to get into the squad because he had answered the register so quietly that the instructor thought he was absent.

As J is at Stage Three of the Code of Practice the LEA does not have a file on him. His mother left a message on my answer phone, correcting a small detail but otherwise agreeing with the transcript. The SENCO confirmed the details as far as the school was concerned, and said that the school were delighted with the progress he was making.

These were *active* parents; the mother was familiar with the procedures, having been a school governor. Both parents were involved in the education of their child, and the whole family took part in the therapy which helped him. The parents considered that the other extra-curricular activities were helpful, and made considerable efforts to ensure that the opportunities were there, despite their own work commitments. Apart from the Michael Palin Centre, which they support, they did not mention any self-help or pressure groups. Since their son was making satisfactory progress, they did not feel the need to press for further help in school, so it might be said that they did not need to be aware of more than Stages One to Three of the Code of Practice.

Case study ten; Child "L"

I was introduced to Mrs L by the School SENCO and met her in her flat one morning when her children were at school. The flat was part of a 1970s council rehabilitation scheme in what had been a run-down area of mid-Victorian terraces. Mrs L has two children, whom

I shall call N and L. Mrs L's husband was alcoholic and they split up when the two boys were quite small. He has had little or no contact with them ever since. Mrs L did not want to talk about him. She had grown up in the neighbourhood having come from Ireland as a child.

Mrs L was very nervous and shy about talking at first and refused to use the tape-recorder. I therefore read my notes back to her after the interview, to make sure they were a correct record. After a while she began to be more relaxed; we have the same colour hair and my grandfather came from Ireland. Our shared experience led to a more positive discussion. When Mrs L was not "on benefit" she worked as a cook or a cleaner, but it has been very hard for her because looking after her son when he has not been at school has made it difficult, if not impossible, for her to work.

N is the older boy and attends a Catholic voluntary-aided Grammar School in another borough. He enjoys school and has no problems, getting good reports from his teachers and passing his exams. Mrs L showed me the boys' school photos from primary school, three or four of them in a row, each one showing the boys together. In each one the older boy was smiling happily at the camera whilst his brother scowled and looked utterly miserable. Mrs L said that the photos showed everything. L hates going to school. He is on the roll of the local boys' comprehensive school, also voluntary-aided. He has also attended the local hospital school and is at present gradually making the transition from the hospital school to mainstream school. This is made possible by an individual support teacher who accompanies L to school.

L went to the local council nursery when he was about three years old and transferred to the primary school nearby. His older brother had already settled happily there. L found

it hard to settle in the Reception Class. When L was five years old he started to complain of his stomach, rolling in pain on the floor. The GP could find nothing wrong and referred him to the local hospital. He was never very happy at school, but there were no apparent problems until Year Four when he was referred to the Child and Adolescent Psychiatry Department of another hospital for school phobia and clinical depression. At this stage, aged nine, he had a complete breakdown and refused to attend school or the out-patients. So he had to be admitted as an in-patient and attended the hospital school and was treated with Prozac. He was re-integrated into primary school but was sad during the holidays and during his last term absolutely refused to get dressed and go to school. Thus his last term at primary school was spent mainly in the hospital school and a shared timetable was planned for his first term at secondary school, between the hospital and mainstream schools.

Despite her worries, Mrs L is very appreciative of the liaison and planning between the schools. The teacher from the hospital supported L by coming to his home every morning and going with him to school. After two weeks his medication was reviewed and he returned to the hospital for a further two weeks. It was arranged that he would spend three mornings a week in class in the mainstream school with his individual support teacher from the hospital and he would go three times a week to child guidance. L now has a Statement of Special Educational Needs and his mother said that at every stage she was helped by the teachers. She also had advice from a friend who is a teacher to help her write the parental advice for the Statutory Assessment. She had high praise for all the teachers but said that at times she got very depressed herself. She felt she had to be strong for her children and indeed seemed to be managing pretty well. She derives considerable comfort

and satisfaction from the success of her elder child, another case where a child is supportive of his parent.

Mrs K sent the above draft back to me without comment. Checking the records at the LEA confirmed the details of the case. The teacher who helped her with the statutory assessment was the teacher from the hospital school who has supported her in getting the child to go to school each morning. The records revealed that Mrs K herself finds it hard to read and write, which explains her embarrassment when I asked if I might see the papers and the fact that she did not comment on the draft I sent her.

Mrs K is on the whole a *passive* parent, although she cares passionately about her child. She appreciated the help she and her children have received from the schools, the teachers and the hospital. She had no understanding of the processes of education, or administrative or legal issues.

Appendix 5

Phelps v the London Borough of Hillingdon (and Associated Cases)

> After its customs the thing which a people changes the least is its civil law. Only lawyers, that is to say, those who have a direct interest in keeping them as they are, good or bad, simply because they know then, are familiar with civil laws. The nation at large hardly knows about them; people see them in action only in particular cases, have difficulty in appreciating their implications and submit to them unthinkingly. (De Tocqueville, 1969, p49)

What follows is based on the law reports and judgements in the various courts. The details for the Phelps case are taken from the Judgement of Garland J in the High Court, 23 September 1997 and that of LJ Stuart-Smith and LJ Otton in the Court of Appeal, 4 November 1998, as well as the House of Lords judgement. Lord Slynn of Hadley, in delivering his judgement in the House of Lords, referred to the individuals in the cases before him by their first names so I shall follow his lead and do the same. The details are important for my argument because they show how the Phelps family's view of Pamela's needs differed from that of the professionals, and how these differences were interpreted in a legal context.

Narrative: The High Court.

On 23 September 1997 Pamela was awarded more than £45,000 by way of damages and interest against Hillingdon Local Education Authority. Pamela's case was that

1. She should have been diagnosed as dyslexic in 1985.
2. Her continued under-performance required further investigation which never happened because the Defendants relied on their original mistaken belief that the difficulties were entirely emotional.
3. They did not teach her appropriately because they had not determined what her needs were.
4. If she had been taught appropriately her standard of literacy would have been enhanced and her frustrations and anxieties avoided.

Garland J. held that the educational psychologist was under a duty of care to Pamela and was in breach of it in failing to discover her dyslexia and that the London Borough of

Hillingdon, the LEA, were vicariously liable for her negligence. He held that had they known that Pamela was dyslexic the teachers would have adopted a different approach with the result that her literacy skills would have improved, and that their failure to mitigate the adverse consequences of her dyslexia constituted an injury. This was a high profile case, not least because Miss Cherie Booth QC acted for Pamela, and the media highlighted the case with photographs of Miss Booth and Pamela hugging each other and smiling happily. The headline in the Times was dramatic;

> £45,000 for dyslexic who was failed by experts .... One missed test led to bullying and dead-end jobs .... (24 September 1997)

Despite the fact that Pamela was not given the label "dyslexic" she did in fact receive a considerable amount of individual tuition from as many as seven special needs teachers through out her school career.

Given the state of knowledge and available resources at the time Pamela was being assessed by her teachers and the educational psychologist, it is perhaps not surprising that she received insufficient help to enable her to overcome her literacy difficulties, whatever their cause. Her "lack of educational progress" was giving concern to her teachers when she was seven years old, in 1980. She was referred to an educational psychologist, Miss Meyerhof, who assessed her IQ at 93, confirmed that she was under-functioning and concluded that "time, patience, interest and praise are currently greater needs than measurable attainments." There appears to have been no suggestion that Miss Meyerhof should have looked at the possibility of dyslexia at that stage despite the BDA's view that early diagnosis is possible. This may be because it would have been difficult to find supporting evidence for such a suggestion.

This EP met Mr and Mrs Phelps and thought that there might be problems at home.

Whether there was any evidence for this is not clear, and it is tempting to speculate that this might be a prejudice against step-families. Mr and Mrs Phelps had both been married before. Mr Phelps' first wife had died leaving him with two children. Mrs Phelps had adopted a child, John, with her former husband, from whom she was divorced. Pamela and her younger brother were the children of Mr and Mrs Phelps. John, her older stepbrother, gave evidence on her behalf during the case and it seems that he was instrumental in bringing the case to court.

In February 1981 Pamela was referred to the Child Guidance Clinic,(CGC) where she was seen by a psychiatric social worker and Dr Urquhart, who noted that when she wrote bus she reversed the letter "b" "as she had told me she does with letters, or the mother had." He assumed that "the pattern of her failures in learning are those that go with unhappiness or emotional difficulty" and recorded that he found himself

> with a very tricky proposition trying to put this one over to the parents because father is prepared to take a fairly mechanistic explanation.....mother is eager, anxiously and unhappily to put in the reasons why and to feel that there is some reflection upon herself (Garland p 4)

I quote this in detail because it seems to me to be a fairly common reaction for parents either to seek a "mechanistic explanation," to be "anxious and unhappy" about their child's difficulties, or to feel that "there is some reflection" upon themselves. Mrs Phelps told The Times, "I knew there was something wrong, but no one would listen. They kept trying to say it was problems at home. When dyslexia was diagnosed, it was such a relief." This is a common reaction to a diagnosis of this kind, as I discovered with two of my case studies, perhaps because to some extent it counteracts the feeling of guilt and bewilderment that parents and children feel over literacy failings.

Ten days later Dr Urquhart wrote to the Phelps' GP and explained that they had accepted

psychotherapy at the CGC. This was arranged and began in May 1981. By November the therapist had missed ten sessions (for legitimate reasons) and Mr and Mrs Phelps "became impatient" and decided to discontinue the psychotherapy. Despite the legitimacy of the reasons, it seems likely that at least half the possible sessions were missed (if one assumes that there were four possible appointments in each month from May to October excluding August) enough to make any reasonable person impatient, especially as Pamela missed half a day of school each time.

Meanwhile Pamela had transferred to the Junior School and her class teacher discussed her with the senior Educational Psychologist in November 1981, referring to her poor reading skills. The CGC continued to liaise with the GP and Dr Urquhart, as well as the psychiatric social worker and the psychotherapist, effectively blamed her parents for her difficulties, especially Mrs Phelps' "desire to keep secret the family relationships.... and her apparent lack of understanding of what the GCG was trying to achieve." If Mrs Phelps did not understand the objectives of the CGC, perhaps they should have tried to explain them in a way that she would understand. Certainly the CGC seemed to have failed to win the confidence of Mr and Mrs Phelps and the school did not seem to come up with any answers.

In February 1982 the headteacher of the Junior School contacted the senior EP because of Mr and Mrs Phelps' concern about their daughter's lack of progress. A report of May 1982 reads, under "Educational Progress"

> Very slow. Pamela needs ideally a one-to-one working/learning situation. She needs a lot of reinforcement with any new work covered and lots of repetition of work already covered. Lately she seems to be more independent. (Garland, p 6)

Presumably the teacher who wrote that report was trying to give Pamela "reinforcement" and "repetition" as best s/he could in the whole class situation. Garland J commented

that this report shows a "shadow" of the approach of Hornsby's "Alpha to Omega," one of the first textbooks designed to help people with dyslexia. Pamela's teachers in the secondary school were familiar with the techniques expounded in this book. They all agreed that the correct approach was "a structured multi-sensory approach with overlearning." (Garland p 9)

Mrs Phelps was reluctant to return to the CGC but made a further visit there in September 1982. This resulted in a complete breakdown of communication, with Dr Urquhart reporting that the parents tended to "react in suspicious and critical ways" and were hostile and uncooperative. For their part, Mr Phelps said in evidence that Dr Urquhart was non-committal and unhelpful.

Unfortunately most of Pamela's school records were destroyed when she was 21 and there seem to be no records of her last two years at primary school. LJ Stuart Smith in the Court of Appeal notes that Mr and Mrs Phelps did not seek a second opinion or help elsewhere. All the four professionals from the CGC knew that Pamela was under-performing in her literacy skills but none of them considered the possibility that she might "be dyslexic" or have specific learning difficulties, and assumed that her problems were entirely due to emotional and behaviour difficulties which arose from her family circumstances. It seems extraordinary that these professionals did not look at the possibility of SpLD, but none of them were from an educational background, and, as the British Dyslexia Association has maintained for nearly twenty years, dyslexia is an educational not a medical issue. Certainly their diagnosis may have influenced subsequent assessments of Pamela's difficulties. But as LJ Stuart-Smith points out, none of these professionals was made the subject of any allegation of negligence.

At age 10 years 3 months, in May 1984, the Advisory Remedial Teacher at the Junior

School tested Pamela's spelling and reading using the Daniels and Diack tests. She scored a reading age of 6 years 7 months and 6:6 for spelling. The teacher advised that she should

> be given materials and tasks commensurate with her functional level in order to encourage her to be independent and successful. (Garland p 7)

It was also suggested that the parents should be informed and that they should be asked to give permission for the Educational Psychologist to be involved. This was just before she started her last year at primary school and no evidence was given as to whether this advice was carried out or whether she received any "remedial" help in that year. Certainly she made little or no progress in that final year and scored a reading age of 6 years 9 months when she was tested in her first year at secondary school, at age 11:9. Only two of that year's intake of 180 pupils scored less than Pamela.

In the school year 1985-6 Pamela had 6 hours a week of Special Needs teaching, being withdrawn from English and Maths classes for the purpose. Garland LJ does not comment on this specifically at this point, but the Special Needs teachers in the secondary school were also aware of the need for multi-sensory teaching with over-learning, as advocated by Dr Hornsby's "Alpha to Omega." .

During Pamela's first term at secondary school, Mrs Phelps spoke to both the Head of Year and the Head teacher about her daughter's problems, and at the end of October the class teacher referred Pamela to the educational psychologist (EP). The EP did a Salford Sentence Reading Test and WISC(R) assessment. The results were not available to the Courts because her school file would have been destroyed when she was 21. Her reading age, according to the EP report, was 7.3, her verbal skills were below average and her practical ability was good average. Her auditory memory was average. The report stated

> Testing revealed no specific weakness. Pamela was cautious and hesitant in her responses and her speech was sometimes unclear and mumbled. The assessment

> was discussed with Mrs Phelps who expressed considerable concern and seemed anxious to find a cause..... Mrs Phelps recognised that Pamela lacks confidence but was not prepared to consider any emotional basis to her difficulties. .....In order to make progress she needs help to develop confidence and feel that she can read. This has been discussed with the school and with Mrs Phelps. It is recommended that Pamela's progress should be discussed again at the end of the first year. (Garland, p 11)

The EP gave evidence in court that although she had read the CGC file with its views on emotional difficulties, it did not influence her judgement.

In November 1985 the advisory remedial teacher wrote a report, emphasising the child's lack of confidence and reluctance to try, performing

> particularly badly in a testing or formal situation.. We are concentrating on building a better sight vocabulary, word attack skills and spelling rules, although she has difficulty in remembering the difference between "b" and "d."

In spite of that reversal, which, as already noted, is commonly if erroneously perceived as an indicator of dyslexia, the view persisted that the parents were in some way responsible for Pamela's difficulties;

> I personally feel that if Mrs Phelps would relax and not transmit her certainty that Pamela is somehow defective to her daughter, that we would help Pamela to improve to the level that she could cope with most of her lessons. (Garland p 12.)

Mrs Phelps was not reassured and in December communicated her concerns that her daughter cope not cope with Science. The remedial teacher wrote to her in the following February (1986) claiming that she was making

> good progress with reading and writing and (was) able to attempt most tasks in her other subjects reasonably well.

Mr Justice Garland was sceptical about this report, in the light of subsequent events. The report continued

> although Pamela is still weak in some areas of her school work, she has made substantial improvements, I think, directly related to her increasing confidence. I am sure you are doing all you can at home to encourage her to believe in herself. (p 13)

In March a year later (1987) all her teachers filled in a Special Needs Form 2 which was the first step towards a statement of special educational needs under the 1981 Education Act. After these forms were filled no further steps were taken. At the end of the year her reports for most subjects were "equivocal" and for mathematics poor. Judge Garland commented that it was

> difficult to believe that her teachers in Geography, German, Science and Social Education were properly aware of her problems (p 14)

One might add that even so they must have noticed her poor reading and writing skills.

In July 1987 Pamela had an operation on her knee and missed a great deal of school in the Autumn term. A home tutor who taught during this time was surprised that she had had so little help from the special needs teachers at school. Her parents had several meetings with the EP and the form teacher and discussed the possibility of sending her to a special school. In a report dated March 1988 her class teacher commented on her unhappiness and lack of self confidence. He described the strategies she used to cover up her "shortcomings."

In the next two years Pamela attended a Foundation Course at school, designed to develop practical and business skills. It seems that her behaviour was "less than commendable and her absences frequent" (p 15) In her fifth year (1989) she started work experience with a company, a position that had been found for her by her sister-in-law. She left school in April 1990 and continued in the same job where, according to the evidence of her sister-in-law, the office manager, she had difficulties taking phone messages and writing down numbers correctly, which were part of the job. She acted as receptionist, making coffee, doing photocopying and similar tasks. (p 29) Her sister-in-law was able to cover up her mistakes until she left in January 1991. The new manager was sympathetic to Pamela, but

the company got into financial difficulties and Pamela was dismissed in July 1991.

At this stage her family all were very supportive, so perhaps it seems strange that the professionals had blamed family circumstances for her problems. Her brother saw a TV programme about famous people with dyslexia and realised that their difficulties were the same as his sister's. Mr and Mrs Phelps got in touch with the Dyslexia Institute and Pamela was assessed by an EP recommended by the Institute.

The following table shows the results of the various tests, using the data from the High Court Judgement.

Test results for Pamela Phelps

Test date Type	May 1984 Age 10.3	October'85 *Age 11.9	February 1990 16.1	September '94 20.8	October 1996 22.9	February97 23.1
Reading	Daniels & Diack 6.7	Daniels & Diack 6..9	Single word recog. (BAS) 7.11 Vernon-Warden 9.0	BAS 7.11	BAS 8.5-8.6 Schonell 9.11 (Particularly slow)	Schonell 10.6
Reading	Spelling 6.6	Salford sentence 7.3	Speed of reading & writing well below average	Vernon-Warden (comprehension 9.0	Watts-Vernon (comprehension) 9.8 Vernon (Spelling) 8.2	spelling 9.9½
WISC **		Below average 70 to 84	Full Scale IQ 96	Full Scale IQ 88 Verbal Scale IQ 79 Performance IQ 109	Full Scale IQ 90 Verbal Scale IQ 83 Performance IQ 104	
ACID profile ***		No significant weaknesses			"The scoring pattern of typical dyslexics"	
Practical ability		good average just over 100				
Auditory memory		average 95-104				

Key: * This is an estimate, as explained in the text:
** Weschler Intelligence Test for Children
*** Arithmetic, Coding, Information, Digit Span.

The table shows the difficulty of using such data to draw any firm conclusions. The tests used are different, and the results are inconsistent.

Mr and Mrs Phelps asked the London Borough of Hillingdon for help with further education. This they refused, because Pamela had left school and was in full-time employment. In May 1990 she started tuition with the President of the Hillingdon Dyslexia Association and her reading began to improve slowly. She obtained an NVQ in computing and completed a child care course. In December 1996 she started a course for dyslexics at a further education college. .

Anderton, Jarvis and "G"

The appeal was heard together with three other cases, two of which were also concerned with children who were dyslexic, and the third was a child suffering from Duchenne Muscular Dystrophy. Phelps was the only case in which there had been a trial, in the others the House of Lords effectively had to decide whether a trial could proceed (technically the discovery of documents.) Thus the Phelps case was dealt with in more detail than the others because the facts had been established at trial and in general the same principles applied in all four cases.

Anderton; Statement of Claim to go ahead

Rhiannon Anderton suffered speech and language difficulties as a child and claimed that her problems were not recognised and, because she was not referred to the local education psychology service, she did not receive appropriate education. When she was eleven a private assessment diagnosed severe dyslexia. She went to the local mainstream comprehensive school, where she claims she was bullied and developed psychological problems because no suitable educational provision was made for her. In the initial

application for pre-action discovery (of documents) her counsel, *Mr Bowen*,

> said he contemplated suing all the teachers who had taught the plaintiff between 1983 and 1990, and for good measure any educational psychologist who might have been concerned with the plaintiff's education. (Court of Appeal p 27)

Just as with Phelps the House of Lords had to decide

> (i) whether the effect of failing to diagnose and deal with dyslexia is "personal injury";
> (ii) whether the effects of such failure sound in damages where there is no recognisable psychiatric condition;
> (iii)whether the teaching staff owes a common law duty of care to take reasonable steps to investigate the reasons for, and to provide for, a child's under-performance, including reference to a psychological service, and whether the psychologist owes a duty of reasonable care in carrying out an assessment and giving advice; and
> (iv) whether an LEA is under a direct common law duty of care in performing its functions under the Education Act 1996, and in particular whether the House should depart from its decision in X (Minors) v Bedfordshire. (House of Lords 3.p 4)

Lord Slynn said that the answers to these must be the same as in Phelps, and found for Rhiannon.

Jarvis

The case of Jarvis is similar. Marcus moved from Alderney to a Hampshire Junior School when he was ten years old. Almost at once his needs were assessed under the 1981 Education Act. The EP who did the assessment reported that he would benefit from going to the local main-stream secondary school with extra support but did not specify what that support should be and did not mention dyslexia. He started at this school in Sept 1990 and his Statement was finalised in October of that year. By November there was concern about his behaviour with the suggestion that his problems were due to his learning difficulties. The following May the Deputy Head of the school asked for a review of his suitability for a main-stream school and the EP replied immediately saying how difficult it was to place children with Marcus' strengths and weaknesses and that they must look at ways of

supporting him in the school. In June his parents were informed that he was to be reassessed because the school was not meeting his very specialised needs. In July the EP recommended that Marcus, despite her view that he had "specific learning difficulties," should attend a school for pupils with "moderate learning difficulties"

> although it is important that it is recognised that his functioning does not entirely fit into this category and that teachers are aware of his high levels of functioning in certain areas that he may be stretched accordingly. (Quoted in House of Lords, 3, p 2)

The EP expressed her misgivings about the appropriateness of this placement in a memo to an education officer and obviously the parents, despite having agreed to it, shared her feelings. The Head of the MLD school also felt it was inappropriate,

> not on the grounds of his specific learning difficulties... but because of the incidences of his inappropriate and unacceptable behaviour and language.

He went on to say

> I am aware that there are Out-County provisions for young people with Marcus's needs. I am informed that such a place exists..... and I am not prepared to be the cheap inappropriate option for an authority which is trying to save money. (Headteacher, quoted by Morritt LJ, in Jarvis v Hampshire, [2000] ELR 1-108 No. 1 p 44F)

Despite this, the authority, acting on the advice of the EP, decided to place Marcus in another MLD school and he attended there from September to late November 1992, when he was excluded. He returned briefly during December, but from then until October 1995, when his Statement came to an end, he had home tuition and attended a pupil referral unit part-time. His home tutor recorded that Marcus' mother thought that he should be in a unit specialising in dyslexia and this was the essence of his claim, that he should have been placed in such a unit and

> that to put him in a school for children with moderate learning difficulties was wrong; such a decision led to a deterioration of his behaviour which resulted in his being in prison for robbery. (House of Lords, 3 p 2)

From January 1995 onwards Marcus committed a number of serious criminal offences including robbery, for which he was sentenced to five years imprisonment. (Court of *Appeal as above, p 45G) Hampshire* applied to strikeout the claim on the basis that it was "frivolous, scandalous, vexatious and an abuse of the process of the court." (*CA above* p 45H) For the reasons given in Phelps Lord Slynn refused to strike out the claim and the other Lords agreed.

The case of "G"; another refusal to strike out

David "G" who suffers from Duchenne Muscular Dystrophy which involves progressive muscular wasting, had a Statement of Special Educational Needs. This emphasised the need for him to have access to a computer to preserve his means of communication. He claimed that the LEA failed to

> provide a proper education, and in particular, computer technology and training to enable him to communicate and cope educationally and socially. As a result he suffered damage in the form a lack of educational progress, social deprivation and psychiatric injury consisting of clinical depression. (House of Lords, 2000, 2 p 8)

He issued a Writ for a Statement of Claim which Bromley applied to have struck out.

The House of Lords decision in David's favour means that the case can go to trial, as with Rhiannon and Marcus. For them the legal process has only just begun and it will be interesting to see how their cases proceed.

For Pamela, though, the process is finished and she has won her damages and been vindicated. She can get on with her life as a mother of a small child, with the help of £45,650, which she originally intended to spend on her further education. Nothing can really compensate her for the difficulties she and her parents have been through. On the individual level this may seem to be a fair and just decision. Hillingdon's insurers will pay up.