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Dear Peter

SPECIAL EDUCATIONAL NEEDS AND DISABILITY BILL

I refer to your letter of 21 May 2015 regarding the Committee's request for sight, at the earliest opportunity, of the draft regulations associated with the SEND Bill and of the draft SEN Code of Practice, along with a request for further information on a number of areas contained within the SEND Bill.

I can confirm that the Department plans to have the regulations and the Code of Practice available in draft form for the Committee within the extended Committee Stage of the Bill. Officials would also intend to keep the Committee updated on drafting progress over the course of the summer.

In addition, the Committee requested further information in respect of a number of aspects of the Bill; these have been addressed in turn.

1. **The support services to be provided for children (under compulsory school age) who wish to make appeals to SENDIST under the pilot scheme**

This has been answered in the context of the proposed pilot scheme, which relates to children **under the upper limit** of compulsory school age. The precise nature of the pilot arrangements for such children, including the supports to put in place to assist the child in making an appeal, will be developed when agreement has been reached to include the relevant provision in the SEND Bill. In developing support services, consideration will be given to similar arrangements for schemes in other

jurisdictions as they are developed. Proposals will be discussed with pupils, parents, the Education Authority (the Authority) and other statutory and voluntary sector stakeholders.

2. The residual rights for parents etc in respect of appeals made by their children

-In relation to the **SEN child, who is under the upper limit of compulsory school age**, the SEND Bill does not contain any proposals to change the rights of the parent to make a SEN appeal or a disability discrimination claim in respect of their child. The rights will still remain with the parent.

It is anticipated that, in the delivery of the proposed pilot scheme for such children to make an SEN appeal or a disability discrimination claim to SENDIST in their own right, the parent would retain the right during the pilot phase to also make an appeal or claim in relation to the child. Clause 11 (3) (c) of the Bill identifies that the pilot scheme may make provision about the bringing of an appeal or a claim by a child concurrently with the parent.

- For the **parents of a SEN child, who is over the upper limit of compulsory school age,** for example a child with severe learning difficulty within a special school or a SEN child taking A levels, all existing rights of SEN appeal or disability discrimination claim transfer to the child. The parent would not retain any rights. The provision of rights to the child was called for by the Human Rights Commission and Children's Law Centre, amongst others, to give effect to the requirements of the UNCRC.

Where, a child above compulsory school leaving age lacks the capacity to make decisions within the SEN framework, the parent would be able to exercise rights on behalf of the child. This is provided for at Clause 9 of the SEND Bill.

3. The nature of advocacy arrangements that are planned to support appeals made by Looked After Children

The Code of Practice would set out the shape of arrangements for advocacy. During consultation on the Code, consideration will be given to the views of the looked after child who is over the upper limit of compulsory school age. We recognise that the child in these circumstances may or may not wish not to avail of an advocate. Consideration will also be given to any special arrangements required to ensure effective communication between the child, the advocate and others. The role of the Health and Social Care Trust (HSCT) as the corporate parent in these cases would also require consideration. Voluntary bodies such as the Children's Law Centre (CLC) the Special Educational Needs Advice Centre (SENAC) and Barnardo's already provide independent advice and advocacy services on behalf of children and young people with SEN which would include for looked after children.

4. The impact and the level of satisfaction for mediation arrangements in other jurisdictions

Only limited information is currently available from Department for Education in England relating to the new mediation arrangements under the Children and Families Act 2014. We understand that a survey will be conducted in due course to establish the number of mediations that the local authorities have taken part in and how many have been helpful in resolving disagreements. There is no timescale for this survey. We are, however aware of reported positive impact of mediation from a number of independent providers of mediation /disagreement resolution. For example one reported that "75% of cases that went through our mediation /disagreement resolution process last year resulted in agreement"[i].

5. The proposed mediation arrangements for Northern Ireland including the nature of the mediation provider

The inclusion of provision for mediation in the Bill is in keeping with a wider move towards greater use of alternative dispute resolution and with approaches in other jurisdictions. The Authority will have responsibility for the appointment of independent persons (a person is not independent if he or she is employed by the Authority) to act as mediators. It is expected that the Authority will arrange for an independent mediation service through competitive tender. This has been the approach adopted within local authorities in England under the Children and Families Act 2014.

It is proposed that when a parent or a SEN child, who is over the upper limit of compulsory school age, is considering making an appeal to SENDIST, the person will first be required to make contact with a mediation adviser. They would be required to participate in discussion about whether mediation might be a way of resolving the dispute that has led to their consideration of making an appeal.

The discussion would take place at any time before an appeal is lodged. This first contact is most likely, although not exclusively, to be by 'phone. The mediation adviser will provide information on arrangements for mediation such as: when and where it is likely to take place; who would be involved; the fact that the Authority would be under a duty to participate if the complainant wished to pursue mediation; that entering into mediation would not prevent an appeal being lodged with SENDIST; and that the mediator would be completely independent of the Authority.

The mediation adviser would also advise that entering into mediation is not compulsory for the parent or child and that, after having received advice about mediation, the person could decide not to engage in mediation. Should the parent or child **not wish to engage in mediation**, the mediation adviser would issue a certificate to enable an appeal to be lodged with SENDIST, without delay.

Should the parent or child **wish to engage in mediation**, then arrangements would be put in train for this to happen and an independent person would be appointed to the case, by the mediation service. The parent or child would also be able to lodge an appeal to SENDIST pending the outcome of the mediation, thereby avoiding any delay in the SENDIST appeal, should mediation not prove successful.

We would expect a short timescale for completion of mediation; the time limits would be set out in the regulations. The mediation adviser would arrange to hear the facts

of the case from each party and would convene mediation meetings; the aim would be to try to reach a resolution in the case. The mediator would remain impartial and endeavour to address any imbalance of power between the Authority and the parent or child by ensuring that the parent or the child has the equal opportunity to put forward their views. If the mediation resulted in a resolution of the reason(s) for the appeal then the SENDIST application would be withdrawn. Should agreement not be reached, the parent or child may consider if they wish to pursue a case with SENDIST. Having heard an appeal, SENDIST has the power to order the Authority to take action as the tribunal considers necessary.

The mediation services, as described, would apply to all types of SEN appeal within the framework except those in respect of appeals about:

- the school or other institution named in a statement;
- the type of school or other institution named in a statement; or
- the fact that a statement does not name a school or other institution.

Appeals in these areas would continue to be addressed by the SENDIST without recourse to mediation.

The provision of simultaneous engagement in mediation and lodging of an appeal to SENDIST differs from that under the Children and Families Act 2014 in England where, in a case where a parent or young person decides to engage in mediation, this is required to be concluded and a certificate issued before an appeal can be lodged with the tribunal.

6. The nature and format of Co-ordinated Support Plans (CSPs) including how the new stages will differ from the current statementing process

In the Summary of Key Proposals presented to the Committee in June 2012, the Minister moved away from the proposal for a CSP to replace a statement as contained in the 2009/10 formal consultation document.

To clarify, the Minister's proposal is to retain the statutory provision under Article 16 of the 1996 Order for the Education Authority to make and maintain a statement of special educational needs, if required following statutory assessment. The key outcomes expected for the child, in line with the additional support to be arranged by the Authority, would be set out and there would be an opportunity for the parent, in partnership, to support the child's learning. This, for example, could include an agreement on the parent's behalf to read with the child to support reading difficulties or to practice certain words or sounds in the case of a speech difficulty or delay. The parental contribution section would be optional. Any other changes would be limited to improvements to the layout of the document. The sections that set out the special educational needs, the non-educational needs and associated special educational provision, other than placement, special educational needs placement and non-educational provision would remain.

The 5 stages of the SEN framework in the current Code of Practice will be replaced by a new model, consisting of three levels of support:

- Level 1 – School-led (broadly equivalent to stages 1 and 2 of the current arrangements) - this would comprise of the support that most SEN children in a mainstream classroom can normally expect to receive from their school. This would, as now, apply to the majority of SEN pupils
- Level 2 – School-led, but with additional external support or guidance (broadly equivalent to stage 3 of the current arrangements) - this would comprise of the support that some SEN children in a mainstream class will require to receive from their school, with additional short-or-medium term external, specialist support or guidance from the Education Authority or others.
- Level 3 – Authority-led – this would comprise support that some children in mainstream classrooms, all children in learning support centres attached to mainstream schools, and all children in special schools would receive through a statement of special educational needs. This would broadly consist of supports that the Authority or the HSCT would not routinely make available to schools.

7. The legal status of Co-ordinated Support Plans as compared with SEN statements

The legal status of statements will remain on the same statutory footing as at present, apart from the additional appeal rights introduced by the SEND Bill. See paragraph 6 above. The document will continue to be known as a statement.

8. Whether the introduction of a Co-ordinated Support Plans is designed to alter the thresholds for access to SEN support and thus reduce both the number of children who can avail of SEN provision and the level of challenge from parents/children who are dissatisfied with that provision

As outlined in paragraph 6 and 7 above the statutory basis for statement will remain. Coordinated support plans are no longer proposed. At present neither the primary nor secondary legislation sets the threshold for provision made by the Authority; the SEND Bill does not change this position. It will continue to be for the Authority to consider the supports that it will make available, as it does at present. The Department would expect the Authority to review the former Boards' Provisional Criteria for Statutory Assessment document and, following consultation, issue revised criteria for statutory assessment which reflect the Authority's provision.

The review of SEN is not about saving money or reducing budgets, but has a strong focus on delivering an efficient and effective system within the resources available. The proposals are not about reducing the number of children with statements as such, but they do recognise the need for interventions at an earlier stage in order to prevent greater and therefore more costly interventions at a later stage; such as supports currently provided through a statement. Apart from the cost of the provision made through a statement, a significant element of the overall cost is in the associated administrative bureaucracy to develop and review the statement (a process which nonetheless is necessary in the context of children with the most significant, long-term needs).

If children are effectively supported at levels 1 or 2 of the new process, the bureaucracy attached to statutory assessment and statementing would be greatly

reduced. The review is about improving the system through early identification and getting children the supports they need earlier in order to meet their special educational needs.

The new framework seeks to improve the capacity of schools to support most SEN pupils, with Education Authority supports being more widely available at level 2. The new statutory duty on the Education Authority to prepare and publish a plan of its arrangements for special educational provision and the new statutory requirement on Boards of Governors in respect of personal learning plans would also assist this and, as a consequence, there should be significantly less need for the same numbers of children as now to go through statutory assessment. The aim is for the children to be appropriately supported by schools or be able to access Level 2 supports from the Authority without the lengthy delays as at present.

However, it is important to note that a child over compulsory school age would have a new right, and the parent of a younger child will continue have a right, to request a statutory assessment and to appeal against the Authority's decision not to make a statement under Article 17 of the 1996 Order. Therefore, should a parent or a child over the upper limit of compulsory school age feel that provision at, say, level 2 is not meeting the needs, there would remain a right to request a statutory assessment and a right of appeal to SENDIST should the Authority decline the request.

Yours sincerely

Russell

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Departmental Assembly Liaison Officer

[i] Kids Mediation and Disagreement Service