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Your ref: PMcC/KM/2232

7 August 2015

Dear Peter

SPECIAL EDUCATIONAL NEEDS AND DISABILITY (SEND) BILL – DEPARTMENTAL BRIEFING – FURTHER QUERY

I refer to your letter dated 6 July 2015 with a further query as to the legal responsibility of Boards of Governors and/or the Education Authority (EA) in respect of Clause 3 of the SEND Bill.

Clause 3 (Duties of boards of governors in relation to pupils with special educational needs)

Specifically, the Committee has sought clarity in respect of instances where, for example, a parent might choose to make a legal challenge in respect of provision of Special Educational Needs for their child by a school. The Committee has sought confirmation that where existing obligations or the proposed obligations in the SEND Bill in respect of SEN are the subject of legal dispute, if the Board of Governors or the individual governor with SEN responsibilities or the Education Authority be responsible for defending the legal action.

Oversight of schools is in part determined by the school's managing authority. Managing authorities deal with the day to day running of a school.

The Education Authority is the managing authority for controlled schools. Article 7 of the Education and Libraries (NI) Order 1986 provides that the Authority "...may provide primary, secondary and special schools within its area and shall maintain and manage any such school...". In the context of a controlled school it is highly likely that the Education Authority would "defend" a judicial review on behalf of the school, subject to

the Education Authority being satisfied that the course of action that was pursued by the school was reasonable.

Under Article 142(1)(c) of the Education Reform (NI) Order 1989, the Council for Catholic Maintained Schools (CCMS) has a duty to "promote the effective management and control of catholic maintained schools by the Boards of Governors of such schools". For a catholic maintained school, the Board of Governors is the managing authority supported by CCMS.

Therefore, in the context of a maintained school, it would be the Board of Governors corporately that would "defend" a judicial review.

The managing authority for a voluntary school (including Grammar and Catholic Maintained schools) or a grant maintained integrated school is the Board of Governors of the school. Consequently, it would be the Board of Governors of the school that would "defend" a judicial review.

In the context of any school type, we understand that no individual governor would be personally responsible if acting in good faith in the exercise of his/ her duties in relation to the present or future SEN framework. We are advised that it would be highly unlikely that a judicial review would be brought against an individual governor; but should such a situation arise we understand that the judicial system would ensure that the appropriate respondent is named in any such proceedings.

Although not provided for in the Code of Practice on the SEN framework, the Department understands that some Boards of Governors do nominate an individual governor as having responsibility for SEN matters. The position in relation to judicial review, as set out above, would not alter whether one individual governor or a committee of governors was given special responsibility for SEN; as the duties and responsibilities rest with the Board of Governors as a whole.

Comment 3.1

The Committee's letter also highlighted that *"In respect of comment 3.1, to be clear the suggestion from witnesses was to replace the "so far as it reasonably practicable" wording of Article 8(2) of the 1996 Order with "best endeavours".*

Thus:
(2) Where a child who has special educational needs is being educated in an ordinary school, those concerned with making special educational provision for the child shall secure, so far as is reasonably practicable.."

Becomes something like:
(2) Where a child who has special educational needs is being educated in an ordinary school, those concerned with making special educational provision for the child shall make best endeavours in order to secure..."
There was some misunderstanding on 1 July 2015 on this point. I would be most grateful if you could provide a written response on the suggested amendment above.

We believe, having read again the written evidence provided by CLC/CDSA/SENAC and the Hansard transcripts of oral evidence, that the suggestions to amend the term "use its best endeavours" to the term 'take reasonable steps' relate to the Board of Governor duties regarding pupils with SEN in ordinary schools under Article 8(1) and not under Article 8(2).

Firstly, in terms of Art 8(1)(a), we do not agree that the term 'use its best endeavours', as it applies to the Boards of Governors, should be changed. This is a general duty in relation to securing the necessary special educational provision for children with special educational needs in school. It is in keeping with, for example, the terminology used in Article 66 of the Children and Families Act 2015 in relation to the governing bodies of mainstream schools in England. The SEND Bill already proposes that the effect of this general duty be strengthened by amendments to Article 8(1)(b) and Article 8(1)(c). These amendments would secure a child's needs are made known to all those within the school who are concerned with the child's education and secure that the teachers, instead of merely being made aware of the child's need, take reasonable steps to identify and provide. We do not agree that this general duty should be further strengthened.

Secondly, Article 8(2) places a duty on all those responsible for children with SEN to take reasonably practicable measures to include the SEN child in the activities of the ordinary school together with children who do not have SEN. As such, Article 8(2) is much broader than Article 8(1) in that those concerned could include the school teachers or the EA. We believe that the terminology "so far as is reasonably practicable" is the appropriate terminology in this regard and do not feel that an amendment is necessary. This duty is about the individuals taking practical measures to include the child in the activities of the school. The terminology "so far as is reasonably practicable" is linked closely to the compatibility with: the child receiving the SEN provision their learning difficulty calls for; the provision of the efficient education of the children with whom the child will be educated; and the efficient use of resources. This provision is in keeping with Article 35 of the Children and Families Act 2014.

Comment 9.4 (Rights of child over compulsory school age in relation to special educational provision)

A response was also sought in respect of comment 9.4, wherein INTO suggested that the Bill should provide rights to children over 16 to access mainstream non-SEN provision where they may be unable to gain such access owing to academic entrance criteria being applied post-16.

The Department believes that INTO may have misunderstood this clause 9 provision. Clause 9 transfers to the SEN child over compulsory school age, the rights within the SEN framework, which are presently exercisable by the parent. In considering the INTO response, the Department believes that INTO understands the clause to be about making additional SEN provision for SEN children, over compulsory school age, to enable them to remain in school beyond statutory school age.

Provision for such arrangements is already an integral part of the existing SEN framework and clause 9 does not amend these. Article 3(7) of the 1996 Order defines

a child as ‘any person who has not attained the age of nineteen years and is a registered pupil at a school'. Article 3(8) provides that a person who attains the age of nineteen years at any time during a school term shall be deemed not to have attained that age until the day after the end of the school term. In this context, clause 13 of the Bill amends ‘term’ to ‘year’.

The EA may not cease to maintain a statement except as outlined under paragraphs 12 and 13 of Schedule 2 of the 1996 Order. There is a right of SEN appeal to SENDIST if a parent or a child, over compulsory school age, disagrees that the statement should be ceased. The EA may not cease to maintain the statement if an appeal has been made to SENDIST. It is through this existing provision that the EA has to consider whether they need to meet the needs of pupils beyond statutory school age. It is legitimate that the EA may consider that the child’s needs do not require a statement post 16 and that an opportunity within further education, training or employment can be pursued; alternatively the Authority may determine that it is necessary to maintain a statement post-16 and the child will attend the school named on the statement.

Comment 11.6 (Appeals and claims by children: pilot scheme)

You have requested a written response to NICCY’s suggestion that all children at age 11 or over be assumed to have capacity to make a SEN appeal under the 1996 Order, or to make a claim to SENDIST under Article 22 of the Special Educational Needs and Disability (Northern Ireland) Order 2005 and to be capable of exercising their rights, and that younger children should be subject to assessment in this regard.

The Department has not proposed any age restriction on this pilot within the Bill and does not consider that the suggested amendment for assessment of children under 11 is required. Indeed, clause 11(3) recognises that the pilot scheme may make provision about the age from which children may appeal. In developing the regulation regarding the criteria for determining capacity the Department will consider UNCRC General Comment 12 (2009) (The right of a child to be heard) and will be consulting with NICCY and children.

With regard to the right of the child to be heard in relation to UNCRC General Comment 12, 2009, and in particular the child being ‘capable’ of forming his/her own views, the Committee emphasises that Article 12 imposes no age limit on the right of the child to express his/her views and discourages State parties from introducing age limits either in law or in practice, which would restrict the child’s right to be heard in all matters affecting him/her.

Yours sincerely

Russell

RUSSELL WELSH
Departmental Assembly Liaison Officer

Northern Ireland
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6 July 2015

Our Ref: PMcC/KM/**2232**

Dear Russell

Special Educational Needs and Disability (SEND) Bill - Departmental Briefing – further query

Further to my correspondence of 2 July 2015, please be aware that the Committee also agreed to write to the Department as to the legal responsibility of Boards of Governors and/or the Education Authority in respect of Clause 3 of the SEND Bill.

Specifically, the Committee agreed to seek clarity in respect of instances where e.g. a parent might choose to make a legal challenge in respect of the provision of Special Educational Needs for their child by a school. Members sought confirmation that where existing obligations or the proposed obligations (in the SEND Bill) in respect of SEN are the subject of legal dispute, will the Board of Governors or the individual governor with SEN responsibilities or the Education Authority be responsible for defending the legal action.

Committee for Education

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In respect of comment 3.1, to be clear the suggestion from witnesses was to replace the "so far as is reasonably practicable" wording of Article 8(2) of the 1996 Order with "best endeavours".

Thus:

> "(2) Where a child who has special educational needs is being educated in an ordinary school, those concerned with making special educational provision for the child shall secure, so far as is reasonably practicable…"

becomes something like:

> "(2) Where a child who has special educational needs is being educated in an ordinary school, those concerned with making special educational provision for the child shall make best endeavours in order to secure…"

There was some misunderstanding on 1 July 2015 on this point. I would be most grateful if you would provide a written response on the suggested amendment above.

A response is also sought in respect of comment 9.4, wherein INTO suggested that the Bill should provide rights to children over 16 to access mainstream non-SEN provision where they may currently be unable to gain such access owing to academic entrance criteria being applied post-16.

Furthermore at comment 11.6, there was some misunderstanding. NICCY had suggested that all children at age 11 be assumed to be capable of exercising their rights and that younger children should be subject to assessment in this regard. A written response in respect of this suggestion is requested.

A response by 24 July 2015 would be greatly appreciated.

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Yours sincerely

Signed Peter McCallion

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