Department of Education
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AN ROINN Oideachais
MÄNNYSTRIE O Lear

Peter McCallion
Clerk to the Committee for Education
Room 375a
Parliament Buildings
Ballymiscaw
Stormont
BELFAST
BT4 3XX

Tel No: (028) 9127 9746
Fax No: (028) 9127 9100

Email: russell.welsh@deni.gov.uk

Your ref PMcC/KM/2224

10th August 2015

Dear Peter

**Special Educational Needs and Disability (SEND) Bill – Departmental Briefing**

I refer to your letter dated 2 July 2015 seeking further detail on certain aspects of the SEND Bill following the Departmental briefing as part of the Committee Stage of the Bill.

**1. How parents can currently challenge school decisions in respect of dissatisfactory pre-statement SEN support.**

The term "pre-statement SEN support" is not a term used within the SEN framework. As you are aware not all children with SEN will require support to be made through the making and maintenance of a statement. It is therefore important not to infer that all children will proceed to a statement.

We understand that in using the "pre-statement SEN support" you are referring to situations where the parents of a child with SEN, whose needs are such that a statement is not required, are dissatisfied with the provision being made by the school at the school-based stages of the Code of Practice.

The Department of Education has produced guidance on the role of the Board of Governors. The local management of school arrangements operate with decisions on school matters being delegated to the Board of Governors according to management type.

The role of Board of Governors is to manage the school with a view to providing the best possible education and educational opportunities for all of the pupils. This involves

setting the strategic direction for the school and taking corporate decisions in relation to the statutory functions of Boards of Governors.

The responsibility for governing the school must be shared by the whole Board of Governors. Only the Board of Governors, acting together after discussion within a strong framework of rules and good practice by consensus or majority vote, has the power to question, to challenge or to change matters.

A governor will not incur personal liability in respect of any action taken in good faith in the exercise of the school Board's delegated duties and responsibilities. Good faith, broadly speaking, may be regarded as an act which is undertaken honestly, with no ulterior motive, and in the light of the information available at the time.

Although, statutory provision currently allows for parents to make a claim against the decision of the Board of Governors to the Special Educational Needs and Disability Tribunal (SENDIST) in a case of disability discrimination in relation to a SEN child with a disability, this does not extend to SEN appeals against SEN provision.

Currently in the case of complaint about SEN provision within the existing process, parents who are unhappy about the SEN provision made at school-based stages of the SEN Code of Practice can complain to the school Principal or to the Chair of the Board of Governors.

If parents remain dissatisfied with the SEN arrangements being made for their child by a school, they can discuss their child's needs with the Education Authority (EA). The EA may consider that input from some of its advisory or support services can be provided for the school and/or the child and make arrangements for this to be provided at stage 3 of the current Code of Practice. If the parent is of the view that their child's needs are not still being addressed at stage 3, then they can request that a statutory assessment of the child's needs is undertaken by the EA. If the EA determines not to conduct a statutory assessment, then the parent has a right of appeal to SENDIST. SENDIST, in considering the individual case, can order the Authority to conduct a statutory assessment of the child's needs.

However escalation of the nature set out above may not be required if a concern about school-based provision can be resolved through engagement between the parent and school. In this regard the existing statutory Dispute Avoidance and Resolution Service (DARS), as introduced by SENDO 2005, enables parents to raise issues of disagreement about any aspect of SEN provision made by the school.

For those parents who choose to use the DARS, this can often result in a successful resolution of the matter.

## 2. How the SEND Bill will enhance and improve the engagement of parents in pre-statement SEN decision-making.

The SEND Bill, under Clause 8, strengthens the independence of DARS by ensuring that it will not be staffed by persons employed by the EA. It is expected that there would be a greater uptake by parents of a more independent service. Clause 3 of the Bill also

requires the Board of Governors to inform parents and children, over compulsory school age, of the DARS arrangements. This Clause also introduces a duty on Boards of Governors to ensure that a personal learning plan (PLP) is in place for each SEN pupil.

The revised Code of Practice will set out the format of the PLP and provide guidance to schools on how parents and children should be involved in the PLP's completion, monitoring and review. The format and content of the PLP will be set out in the revised Code of Practice and reviews of the PLP will require ongoing liaison with both parents and pupils. This, in addition to strengthened duties on Boards of Governors, is aimed at ensuring that all schools are clear about what is required of them in making SEN provision and, as a result, more schools will adopt the good practice that many schools currently achieve.

The SEN Bill makes no proposals to introduce a statutory right of appeal to SENDIST against decisions made by schools about school-based SEN provision. In considering calls made, during the consultation on the policy proposals, for a formal right of appeal by parents to SENDIST about school-based provision, it was determined that this would be at odds with a key aim of the Review to reduce the bureaucratic burden on schools.

Any such change is likely to be accompanied by a significant level of additional cost and unnecessary bureaucracy. This would inevitably have the potential to divert monies available within schools for SEN provision to respond to appeals made through the SENDIST.

**3. Clarification and timeline on possible changes to SENDIST practices including guaranteeing children the opportunity to speak at Tribunals**

DE and Department of Justice officials have engaged in ongoing discussions about the proposals contained in the SEN policy and the SEND Bill as these have developed. It is hoped that the SENDIST Regulations will be developed to coincide with the consultation on the SEN Regulations and the Code of Practice. It is intended that further discussions will take place in coming weeks. The question of guaranteeing children, should they wish, the opportunity to speak at Tribunal will be explored.

**4. Clarification and timeline on the publication of hearing decisions**

DE is aware that SENDIST has been considering the publication of Tribunal decisions on the NI Courts and Tribunals Service website. DE welcomes this and has indicated that it has no objection to the publication of decisions provided that appropriate safeguards are in place to ensure data protection issues are addressed. We understand that matters are progressing within DoJ and that there will shortly be engagement with DE on the publishing of such decisions.

**5. Clarify DE plans to provide advocacy support for the new mediation service.**

Under Clause 8 of the Bill, it is proposed that the EA will have a duty to make arrangements for the provision of mediation services to those considering making an

appeal to SENDIST. It is envisaged that the EA will be funded by DE to put in place an independent mediation service, so no parent or child, over compulsory school age, will have to pay any fees for using this service. This is similar to the position in England under the Children and Families Act 2014, whereby local authorities contract with independent mediation suppliers to provide mediation services in relation to possible appeals to tribunal.

Regulations would make provision for the parent or child, over compulsory school age, who is engaged in mediation to be able to bring along an advocate that they would wish to attend mediation meetings. It is, however, not the intention that the advocate would act in any kind of legal capacity since it is important that mediation remains a joint problem-solving process between the EA and the parent or child facilitated by a trained mediator, rather than an adversarial forum. Nor is it the intention that the EA would be legally represented during mediation. The purpose of mediation is to find a workable solution with which everyone can agree.

While the EA will have a duty to facilitate arrangements for advocates to support a parent or child during mediation, there would not be a duty on the EA to fund the advocates present at mediation meetings. The EA would be required to inform the parent or child of their right to have an advocate involved and through the information and advice service, would provide details of any local advocacy services.

## 6. Further information as to how DE envisages how the capacity of children to understand and exercise their rights iro SEN will be assessed

Regulations under Clause 9 of the SEND Bill allow for provision to be made for cases where a child over compulsory school age lacks, or may lack, capacity to exercise any right conferred on him/her within the SEN framework. Regulations will in particular make provision in connection with determining whether a child lacks, or may lack, capacity in relation to the exercise of any such right and for the exercise of any such right by the parent of the child in a case where it is determined that the child lacks capacity to exercise that right.

In drafting the Regulations, DE plans to consider arrangements already made in other jurisdictions for determining criteria as to whether a child may lack capacity within the context of special or additional needs frameworks.
For example, the Education (Additional Support for Learning) Scotland Act 2004, as amended, makes provision for the local authority to determine the capacity of a young person in the context of the information made available by the authority about the additional support for learning framework.

DE will also consider the principles of UNCRC General Comment 12 (2009), about the right of the child to be heard, in determining the criteria to be used.

It is possible that the EA would be responsible for determining whether a child over compulsory school age lacks or may lack the necessary capacity. Key elements in making a determination would be the capacity of the child, at a particular point in time when a decision is to be made, to understand the information provided by the EA, the options available to him/her and the impact of any decisions reached. The EA in

reaching a decision would have discussed the case with the child, where possible, with the parents and with relevant professionals.

DE will, however, consult with parents, children, the EA and others before making specific proposals on how the child's capacity will be assessed.

I trust this addresses your questions.

Yours sincerely

*Russell*

**RUSSELL WELSH**
**Departmental Assembly Liaison Officer**

Northern Ireland
Assembly

**Committee for Education**

Russell Welsh
Departmental Assembly Liaison Officer
Department of Education
Rathgael House
Balloo Road
Bangor
BT19 7PR

2 July 2015

**Our Ref:** PMcC/KM/**2224**

Dear Russell

**Special Educational Needs and Disability (SEND) Bill - Departmental Briefing**

At its meeting on Wednesday 1 July 2015, the Committee for Education received a Departmental briefing as part of the Committee Stage of the Special Educational Needs and Disability (SEND) Bill.

The Committee agreed to write to the Department of Education seeking further information as to: how parents can currently challenge school decisions in respect of dissatisfactory pre-statement SEN support and how the SEND Bill will enhance and improve the engagement of parents in pre-statement SEN decision-making.

Officials referenced anticipated possible changes to SENDIST practices including guaranteeing children the opportunity to speak at Tribunals relating to their SEN support and the publication of SENDIST decisions. The

***Committee for Education***

***Room 375, Parliament Buildings, Ballymiscaw, Stormont, Belfast, BT4 3XX***

***Tel: (028) 9052 1201 Fax: (028) 9052 21974***

***E-mail: peter.mccallion@niassembly.gov.uk***

Committee agreed to write to the Department seeking clarification and a timeline in respect of the above.

The Committee also agreed to seek clarity in respect of the Department's plans to provide advocacy support for the new mediation service. Additionally the Committee agreed to seek further information as to how the Department envisages that the capacity of children to understand and exercise their rights in respect of SEN will be assessed.

A response by 17 July 2015 would be greatly appreciated.

Yours sincerely

*Signed Peter McCallion*

**Peter McCallion**
**Clerk**
**Committee for Education**

***Committee for Education***

***Room 375, Parliament Buildings, Ballymiscaw, Stormont, Belfast, BT4 3XX***

***Tel: (028) 9052 1201 Fax: (028) 9052 21974***

***E-mail: peter.mccallion@niassembly.gov.uk***