



Department of  
**Education**

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Your ref: 2309 & 2310

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Dear Peter

Thank you for your letters of 2 October 2015 and 9 October 2015 in regard to the SEND Bill. For ease I have provided a single response.

- 1. Sight of the protocols that are being developed between the Department of Education and the Department of Health, Social Services and Public Safety etc. which are designed to enhance co-operation and an assessment as to the extent to which the protocols are expected to improve relevant timescales.**

As officials highlighted during the informal clause by clause sessions, the Public Health Agency is leading a review of Allied Health Professional (AHP) support for children/young people with statements of special educational needs. The review commenced in April 2013 and is due to complete next year. Phase 1 of this work involved a scoping exercise to establish the current models of AHP provision and support for children with special education in special schools. Phase 2 involved a scoping exercise to establish the current levels and models of AHP provision and support for children with statements of special educational needs in mainstream schools. Phase 3, which is currently underway, involves an analysis of identified common themes and the agreement of a proposed regional framework and an implementation plan for consideration by the Minister for Health.

The proposed framework should ensure that the AHP assessed needs of these children are met, irrespective of where they live, what school they attend and represent value of money by ensuring the most effective and efficient use of resources.

In addition to a regional framework and implementation plan, operating principles between health and education to promote collaborative working to support children who attend special schools are also being developed. The framework, plan and operating principles are still being finalised and will be subject to Ministerial agreement. I am therefore unable to share these documents with the Committee at this time. However, published documents related to this review, including terms of reference and the Phase 1 summary report can be found at:

<http://www.publichealth.hscni.net/search/node/review%20of%20ahp%20support>

In addition to this review, health and education officials have also been meeting to consider ways of addressing delays in the provision of health and social care advice within the statutory assessment process. This work is at an early stage and it will be important to identify the reasons for the delays, before developing any new procedures or protocols to address these. As an initial step, however, the EA have indicated their willingness to offer a training programme to HSCT staff, explaining the statutory assessment process from a health perspective. We would be happy to keep the Committee updated as this work progresses.

**2. Confirmation from the Department, in respect of regulation-making powers in the Bill, on those instances where the Department is content for the wording “Regulations may be made” to be replaced with “Regulations shall be made”.**

As agreed, we have considered the Committee’s desire for regulation-making powers in the draft SEND Bill to be amended to become a duty to make regulations. The assessment has been considered by the Minister who is content to support the Committee’s suggestion to move from a power to a duty within the regulation making powers under clause 2(7), 7(2), 9(2) and 9(3). In some cases, we would wish to retain the flexibility around minor or procedural matters, or matters which may change over time. **Annex A** provides the detail of the regulation-making powers and the rationale behind the assessment in each case.

**3. The Department’s views on a possible amendment to introduce a guarantee that children will always be able to speak at a SENDIST hearing.**

The Committee will be aware that the Minister is supportive of the right of the child to be heard and their views taken into account, as evidenced under clause 1 (Duty on the Education Authority to have regard for the views of the child) of the Bill. Given that SENDIST procedures are a matter for Department of Justice (DoJ), consideration of this amendment will require liaison with DoJ on the procedure of tribunals and SENDIST in particular. The Minister has written to the DoJ Minister in this regard. I am happy to provide an update in due course on this.

**4. Details of the similar pilot schemes operating, or expected to operate, in England and in Wales, in relation to Clause 11 of the SEND Bill.**

I can confirm that the pilot to allow children with special educational needs or disabilities to appeal in England has not yet been commenced. They do not have a date yet when it will begin.

In Wales, pilot projects were run in Carmarthenshire and Wrexham from 2012 to 2015 which a right for young people to appeal and claim to the Special Educational Needs Tribunal for Wales (SENTW). There were no cases of appeal and only one claim of disability discrimination to SENTW in the pilot areas during the pilot period, and the claimant opted not to take part in the study. The evaluation of the pilot found that the pilot was successful in making children and young people with SEN aware of their rights and putting support structures in place to help children and young people make decisions about their rights. Professionals were also reported to be aware of the rights of children and young people and the implications for their practice. The evaluation found that it was harder to identify and engage with children and young people with disabilities, and their awareness of their rights was unknown. The Committee may be interested in the Final Report on the pilots, available at:

<http://gov.wales/docs/caecd/research/2014/140626-pilot-young-peoples-rights-appeal-claim-sen-tribunal-en.pdf>

**5. Clarification as to the apparent contradiction between regulation-making powers at Clause 11(3)(a) which will limit the age range of children who can avail of the pilot scheme and the relevant UNCRC General Comments which oppose the application of age limits.**

In relation to clause 11(3)(a) (Appeals and claims by children: pilot scheme), I am happy to clarify that this provision does not contradict the UNCRC General Comments (2009). This provision allow the Department, through regulations, to make provision regarding the age from which children may make an appeal or a claim and will not interfere with the duty to have regard to the views of the child which is central to this Bill. Clause 11(3)(a) has been drafted to take account of Article 12 of UNCRC which articulates that ‘the views of the child being given due weight in accordance with the age and maturity of the child’.

**6. Definition of ‘parent’ that is to be used in the SEND Bill and associated regulations and Code of Practice’ (DALO 2310)**

Article 2 of the Education and Libraries (Northern Ireland) Order 1986 (Interpretation) contains the definition of parent that is applicable to all “the Education Orders”, including the Education (NI) Order 1996. It provides that a “parent”, in relation to a child or young person, includes any person-(a) who is not a parent of his but who has parental responsibility for him, or (b) who has care of him,” It also provides that

“Parental responsibility” has the same meaning as under the Children (Northern Ireland) Order 1995.

As the SEND Bill amends the 1996 Order it would be unnecessary to include any further definition in the SEND Bill.

## **7. Information on the Education and Training Inspectorates (ETI) - evaluation report on the Certificate of Educational Competency Testing. (DALO 2310)**

The Certificate of Educational Competency Testing (CCET) pilot was commissioned by DE to support the strategic objectives of Every School a Good School policy and to develop the capacity of special educational needs co-ordinators (SENCOs) in pre-school, primary and post primary schools to identify, assess and make appropriate interventions for pupils with special educational needs. The pilot was managed by the five Education and Library Boards (ELBs) over 3 ending in September 2014. Two hundred and ninety six schools participated in the pilot.

### **Key Recommendations of the pilot:**

- A need for further ongoing capacity building work in special education linking assessment more purposefully to intervention and tracking of progress.
- Schools should network on a local basis to enable SENCOs to focus on assessment and intervention, discuss practice and promote the development of best practice across all schools, including those which have not availed of the pilot.
- Training for accreditation in educational assessment should be a requirement for all SENCOs, to enhance the capacity of schools to identify and analyse appropriately the level of need and additional provision for pupils who require additional support with their learning.

DE has recently allocated funding to the Education Authority to provide an on-line accredited CCET course. This means SENCOs / teachers who did not participate in the pilot will be able to enhance their ability to identify and improve the interventions for children with special educational needs, and gain support through the creation of self-sustaining cluster groups in their locality.

Should the Committee require any further information on the CCET pilot the Education and Training Inspectorate evaluation of the pilot is available at the link below:

<http://www.etini.gov.uk/index/surveys-evaluations/surveys-evaluations-pre-school-centre-and-nursery-school/surveys-evaluations-pre-school-2015/an-evaluation-of-the-certificate-of-competence-in-educational-testing-pilot-amended.pdf>

I trust the above provides the assurances and clarity that the Committee is seeking.

Yours sincerely

*Russell*

**RUSSELL WELSH**  
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**Amendment from power to a duty:****1. Agree to amend**

Clause	Revised Wording <b>shown in red</b>	Effect
<b>Clause 2(7)</b> (EA plan of special education provision)	'Regulations <b>shall</b> make provision in relation to a plan under this Article and <b>may</b> , in particular prescribe (a) the form and content of a plan;(b) the procedure to be followed in connection with the preparation, review or revision of a plan; and (c) the persons to be consulted by the Authority under paragraph (4).'	This would place a duty on the Department to make regulations concerning the EA plan for arrangements for special educational provision but would not prescribe the content of the regulations..
<b>Clause 7(2)(10)</b> (Children under 2: appeals against the content of statement or failure to make statement)	'(2) Regulations <b>shall</b> provide that where the Authority is under a duty to service a notice under paragraph (5) and (8), the duty must be performed within the prescribed period.'	This amendment places a duty of the Department to make regulations prescribing the period of the actions outlined in 7 (2), (5) to (8).
<b>Clause 9(2)</b> (Rights of child over compulsory school age in relation to special educational provision)	'(3) Regulations <b>shall</b> make provision about assistance and support to enable a child over compulsory school age to exercise any such right'	This amendment places a duty of the Department to make regulations about assistance and support to enable a child over compulsory school age.
<b>Clause 9(3)</b> (Rights of child over compulsory school age in relation to special educational provision)	'Regulations <b>shall</b> make provision for cases where a child over compulsory school age lacks (or may lack) capacity to exercise any such right'.	This amendment places a duty of the Department to make regulations regarding provision for cases where a child over compulsory school age lacks (or may lack) capacity to exercise any such right.

**2. Retain the flexibility a power (rather than a duty) provides.**

Clause	Text to be retained	Rationale
<p><b>Clause 3(3)</b> (Duties of Boards of Governors in relation to children with SEN – ordinary schools)</p>	<p>Retain - ‘In Article 8 after (2) insert – (2A) Regulations <b>may</b> – (a) require the Board of Governors of an ordinary school to notify the Authority, in the prescribed manner, of any changes of a prescribed kind affecting a child attending the school for whom the Authority is making special educational provision; (b) require the Board of Governors of such a school to ensure that a learning support co-ordinator has prescribed qualifications or prescribed experience (or both); and (c) confer on the Board of Governors on such a school other functions relating to learning support co-ordinators.’</p>	<p>While the Department intends to exercise this power (illustrative content of proposed new regulations confirms this) based on the legal advice outline above that to change this power to a duty would prescribe the contents of the regulations and it is considered better to keep a degree of flexibility. In general, we are advised that as a basic rule is it is wrong to impose an obligation for regulations to deal with X if there is the slightest possibility that X may not actually be needed or that some other alternative to X might work.</p>
<p><b>Clause 3(4)</b> (Duties of Boards of Governors in relation to children with SEN – special schools)</p>	<p>Retain - ‘(2) Regulations <b>may</b> – (a) require the Board of Governors of a special school to ensure the learning support coordinator has prescribed qualifications or prescribed experience (or both) and (b) confer on the Board of Governors on such a school other functions relating to learning support co-ordinators.’</p>	<p>Same as Clause 3(3) rationale</p>
<p><b>Clause 8(7)</b> (Mediation in connection with appeals)</p>	<p>Retain - ‘(7) Regulations <b>may</b> make provision in relation to mediation with the Authority and in particular – (a) about giving notice; (b) imposing time limits; (c) who may attend mediation; (d) where a child’s parent is a party to mediation,</p>	<p>While the Department intends to exercise this power (illustrative content of proposed new regulations confirms this) based on the legal advice outline above that to change this power to a duty would prescribe the contents of the regulations and it is considered better to keep a degree of flexibility. This is particularly relevant given the relatively</p>

	<p>requiring the mediator to take reasonable steps to ascertain the views of the child;</p> <p>(e) about provision of advocacy and other support services for a person pursuing mediation with the Authority;</p> <p>(f) enabling the Authority to take prescribed steps following the conclusion of mediation;</p> <p>(g) about the training, qualifications and experience of mediation advisers and mediators.’</p>	<p>untested nature of mediation within the SEN arena in most jurisdictions. Flexibility to respond to emerging good practice will be essential.</p>
<p><b>Clause 9(4)</b> (Rights of child over compulsory school age in relation to special educational provision)</p>	<p>Retain ‘Regulations made by virtue of subsection (3) <b>may</b> in particular make provision –</p> <p>(a) for, and in connection with, determining whether a child lacks capacity in relation to the exercise of any such right (including the criteria to be applied in making that determination);</p> <p>(b) 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 the right;</p> <p>(c) for Part 2 of the 1996 Order to have effect in such a case with such modifications as may be prescribed by regulations.’</p>	<p>Changing the power to a duty would prescribe the detailed contents of the regulations and it is considered better to keep a degree of flexibility.</p>
<p><b>Clause 10(2)</b> (Rights of children over compulsory school age in relation to disability discrimination claims)</p>	<p>Retain ‘2A In a case falling within Article 22(1)(i) where a claim is made by A the regulations <b>may</b> in particular make provision –</p> <p>(a) about assistance and support to enable A to pursue the claim;</p> <p>(b) for cases where, in the opinion of the Tribunal, A lacks (or may lack) capacity to pursue the claim, including provision – (i) for, and in connection with, determining whether A lacks capacity to pursue a claim (including the criteria to be applied in making that determination); (ii) for A’s parent to</p>	<p>Changing the power to a duty would prescribe the contents of the regulations and it is considered better to keep a degree of flexibility.</p>

	pursue the claim in a case where it is determined that A lacks capacity to do so; (iii) for provisions of the regulations to apply with modifications in relation to such a claim.’	
<b>Clause 11(1)</b> (Appeals and claims by children: pilot scheme)	Retain ‘(1) The Department <b>may</b> by regulations make a scheme (referred to in this section as a “pilot scheme”) for the purpose of enabling a child who has not attained the upper limit of compulsory school age to— (a) appeal to the Tribunal under any provision of the 1996 Order mentioned in subsection (2); (b) make a claim to the Tribunal under Article 22 of the Special Educational Needs and Disability (Northern Ireland) Order 2005 (unlawful discrimination against disabled pupils).’	While the Department intends to exercise this power, as cooperation with Department of Justice (DoJ) will be required, flexibility in making the regulations should be retained.
<b>Clause 11(3)</b> (Appeals and claims by children: pilot scheme)	Retain ‘(3) The pilot scheme <b>may</b> make provision— (a) about the age from which children may appeal or make a claim; (b) in respect of appeals under subsection (1)(a), about mediation and the application of Article 21C; (c) about the bringing of appeals or making of claims by a child and by his or her parent concurrently; (d) about determining whether a child is capable of bringing an appeal or making a claim, and the assistance and support a child may require to enable the child to do so;	Changing the power to a duty would prescribe the contents of the regulations and it is considered better to keep a degree of flexibility, We will need to draw on practice from elsewhere, but such schemes are relatively untested, hence the need to retain flexibility.



	<p>(e) enabling a person to exercise a child's rights under the scheme on behalf of the child;</p> <p>(f) enabling children to have access to advice and information which is available to a parent in respect of an appeal or claim of a kind mentioned in subsection (1);</p> <p>(g) about the provision of advocacy and other support services to children;</p> <p>(h) requiring notices to be given to a child (as well as to his or her parent);</p> <p>(i) applying any statutory provision (with or without modifications); and</p> <p>(j) making consequential or transitional provision with respect to the cessation of the scheme.</p>	
<p><b>Clause 12(1)</b> (Appeals for children follow-up provision)</p>	<p>Retain '(1) The Department <b>may</b> by regulations provide that a child who has not attained the upper limit of compulsory school age may—</p> <p>(a) appeal to the Tribunal under any provision of the 1996 Order mentioned in subsection (2);</p> <p>(b) make a claim to the Tribunal under Article 22 of the Special Educational Needs and Disability (Northern Ireland) Order 2005 (unlawful discrimination against disabled pupils).'</p>	<p>While the Department intends to exercise this power, the use of this power will depend on the results of the pilot at 11. As such flexibility in making these regulations should be retained.</p>
<p><b>Clause 12(4)</b> (Appeals for children follow-up provision)</p>	<p>Retain '(4) Regulations under subsection (1) <b>may</b>, in particular, make provision—</p> <p>(a) about the age from which children may appeal or make a claim;</p>	<p>Changing the power to a duty would prescribe the contents of the regulations and it is considered better to keep a degree of flexibility.</p>

	<p>(b) in respect of appeals under subsection (1)(a), about mediation and the application of Article 21C;</p> <p>(c) about the bringing of appeals or making of claims by a child and by his or her parent concurrently;</p> <p>(d) about determining whether a child is capable of bringing an appeal or making a claim, and the assistance and support a child may require to enable the child to do so;</p> <p>(e) enabling a person to exercise a child's rights under the scheme on behalf of the child;</p> <p>(f) enabling children to have access to advice and information which is available to a parent in respect of an appeal or claim of a kind mentioned in subsection (1);</p> <p>(g) about the provision of advocacy and other support services to children;</p> <p>(h) requiring notices to be given to a child (as well as to his or her parent);</p> <p>(i) amending, repealing or revoking a statutory provision (including a provision of this Act).'</p>	
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