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Special Educational Needs and Disability (SEND) Bill

NIAR 148-15

The SEND Bill aims to give effect to legislative changes in support of the policy for a revised SEN and inclusion framework. It aims to ensure the early identification, assessment and provision for SEN children with the child at the centre of the process. This Bill Paper outlines the background and consultation process; considers the individual clauses and highlights a range of areas that could be given further consideration.

Key Points

- The SEND Bill aims to give effect to the legislative changes necessary to support the revised SEN and inclusion framework;
- A number of proposed changes agreed by the Executive in 2012 are not included within the Bill, such as the placement of children with SEN in pre-school settings and full reviews for children with a statement at transition points;
- Clause 1 places a new duty on the Education Authority to have regard to the views of the child in relation to decisions affecting them;
- Clause 3 extends the existing duties of Boards of Governors in relation to SEN, including a requirement to maintain a personal learning plan (PLP) for each pupil with SEN and ensuring that a teacher is designated as a learning support coordinator (LSC);
- Areas for consideration in this regard could include the capacity of teachers to discharge these functions, plans for the monitoring and evaluation of PLPs and whether LSCs will have protected time to discharge their duties;
- Clause 8 makes provision for an independent mediation service, and individuals seeking to appeal to the Tribunal will be required to prove that they have first obtained advice about seeking mediation;
- Areas for consideration in this regard could include what this requirement will mean in practice for those wishing to appeal to the Tribunal and whether the mediation service will have enhanced powers or resources;
- Clause 9 gives children with SEN who are over compulsory school age rights previously exercisable by parents, including the right to appeal and to request a statutory assessment;
- Clauses 11 and 12 relate to the establishment of a pilot scheme aiming to enable children within the compulsory school age to appeal to the Tribunal;
- Most of the clauses within the Bill will come into operation when the Department chooses and it may make transitional and transitory arrangements as it feels appropriate;
- The Bill provides the Department with significant powers to make subordinate legislation. In addition, the Revised Code of Practice and proposed amendments to other regulations have not yet been made available;
- In light of these factors, consideration could be given to the extent to which the Bill supports transparency and clarity, and whether the balance of primary and subordinate legislation is appropriate.

Executive Summary

Background and consultation

A major review of SEN and Inclusion was begun by the Department of Education (the Department) in 2006 in response to a number of concerns relating to the SEN framework. The consultation in 2009 drew a large response and many of the key proposals attracted criticism. Stakeholders also called for greater information and clarity on the outworkings of the proposals.

Subsequently, the Minister for Education presented a proposed direction of travel to the Education Committee and a policy memorandum containing the proposals was agreed by the Executive in July 2012. The Review of SEN and Inclusion has recently been criticised for failing to lead to fundamental changes in relation to SEN.

Overview of the SEND Bill

The Bill aims to provide for the legislative changes necessary to support the revised SEN and inclusion framework. The Explanatory and Financial memorandum states that details about the framework will be introduced through amendments to subordinate legislation and in a revised statutory Code of Practice. However, these were not available at the time of writing.

Proposed actions not included within the Bill

A number of the key legislative actions agreed by the Executive in 2012 have not been included in the Bill. These include mechanisms for placing children with SEN in pre-school settings; setting out statements of need as a statutory CSP; and carrying out a full review for students with a CSP at transition points. Consideration could be given to:

- Why the Bill does not refer to the placement of children with SEN in pre-school settings;
- When the revised statutory Code of Practice will be brought forward;
- Whether the Department still intends to amend regulations so that statements can be set out in the form of a CSP;
- When the Department plans to amend regulations to reduce the statutory timescales for the provision of a statement from 26 to 20 weeks;
- The reasons why the Bill does not refer to reviews for students with a statement/ CSP at transition stage.

Duties of the Education Authority to have regard to the views of the child

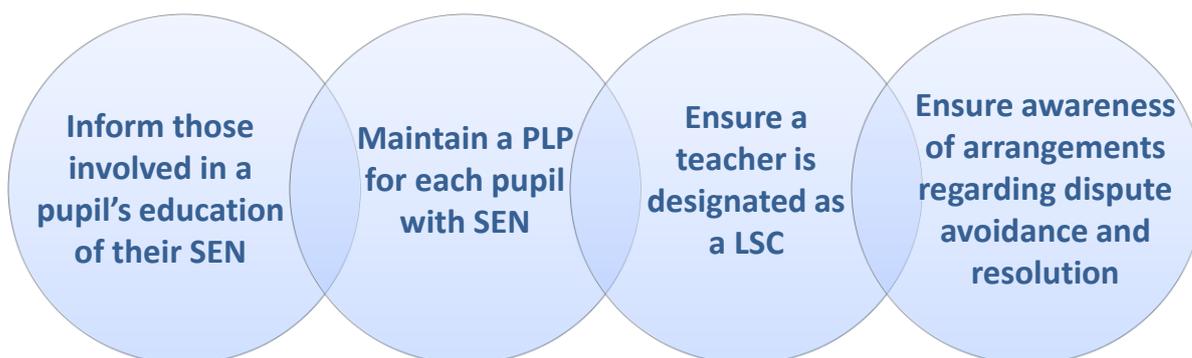
Clause 1 requires the Authority to have regard to the views of the child in decisions affecting them in relation to their SEN. While the majority of overall respondents to the

consultation were supportive of this, a large proportion of parents, carers and the general public were not, saying that it depends on the age and capability of the child.

Enhanced duties of Boards of Governors

Clause 3 extends the existing duties of Boards of Governors in relation to SEN, as outlined in Figure 1. Many respondents to the department's consultation highlighted concerns around the increased responsibility and accountability implied by proposals to enhance governors' duties.

Figure 1: New duties for Boards of Governors



This clause requires Boards of Governors to prepare and keep under review a personal learning plan (PLP) for each pupil with SEN. A number of concerns have been raised regarding this proposal in relation to the protection of children's rights, the monitoring of plans and the timescales for their completion. Consideration could be given to:

- How, if at all, PLPs will differ from Individual Education Plans in practice;
- The capacity of teachers to develop and review robust and effective PLPs;
- What plans exist for the review, monitoring and evaluation of PLPs;
- The rationale for not including timescales for the completion of PLPs in the Bill;
- What, if any, role children and parents will have in the development of the PLP.

Clause 3 also places a duty on Boards of Governors to designate a teacher as a learning support coordinator (LSC), a role currently filled by Special Educational Needs Coordinators (SENCoS). The literature suggests that a majority of teachers in schools in Northern Ireland feel that they do not have adequate time or resources to meet the needs of children with SEN. Consideration could be given to:

- The implications for teachers designated as a LSC, for example whether there will be protected time to discharge their duties;
- Whether the LSC would have a role on the school's senior management team;
- What, if any, training will be provided to teachers designated as a LSC;
- What qualifications and experience are likely to be required by LSCs;

- The other functions that may be conferred to the Board of Governors in relation to learning support co-ordinators.

Requesting help from health and social care bodies

Clause 4 requires the Authority to request help where it believes the health and social care bodies could help in the discharge of its duties. In 2010 a survey found that just 14% of teachers thought that there is a coherent approach across health, social care and education in supporting children with SEN. Consideration could be given to:

- Whether there will be a corresponding duty on the Health and Social Care Board or a health and social care trust to provide help where required;
- Plans for facilitating this multi-disciplinary working - for example, planning, funding and accountability measures.

Time limits for assessment of educational needs

Clause 5 reduces the period in which parents can make representations and submit evidence to the Authority (when it is considering whether to make a statutory assessment) from 29 to 22 days. It also enables children over compulsory school age to provide such evidence. Consideration could be given to:

- Whether there are likely to be implications for obtaining and submitting specialist advice and evidence within this timescale.

Appeals and mediation

Clause 6 provides a new right of appeal to the Tribunal where the Authority decides not to make changes to a statement following the annual review. Clause 7 gives parents of children with SEN under the age of two a new right of appeal against the contents of a statement or the failure to make a statement.

Clause 8 makes provisions for an independent mediation service for those appealing to the Tribunal. It requires individuals wishing to appeal to first seek and obtain advice about pursuing mediation – they must obtain a certificate to prove that they have received such information prior to lodging the appeal.

Clauses 11 and 12 allow the Department to make regulations governing a pilot scheme enabling children within the compulsory school age to make an appeal to the Tribunal, and subsequently to bring forward legislation in this regard. Consideration could be given to:

- What the requirement to have engaged the mediation service prior to lodging an appeal will mean in practice;
- Whether the mediation service will have increased resources or powers;

- The other implications of this requirement, for example, on timescales, levels of bureaucracy and the ability of parents to pursue an appeal;
- The persons to be appointed to the mediation service, how they will remain independent of the Authority and what qualifications/ expertise they will have;
- The rationale for stating on the certificate whether or not an individual wished to pursue mediation and the potential implications of this;
- The areas left to subordinate legislation, including whether the power to take prescribed steps following mediation will include an enforcement function.

Rights of children over compulsory school age

Clause 9 gives children with SEN who are over compulsory school age rights previously held by parents, including the right to request a statutory assessment and to appeal to the Tribunal. It includes a series of powers to make regulations where a child may lack the capacity to exercise these rights. Consideration could be given to:

- The nature of the assistance and support to be provided to children;
- The level of subordinate legislation provided for within this clause.

Commencement and transitional provisions

The majority of the clauses within the Bill will come into effect when the Department chooses, and clause 14 allows the Department to make transitional, transitory or consequential provisions in this regard. Consideration could be given to:

- When it is proposed that clauses 1-12 will come into effect and the rationale for not including sunrise clauses;
- The nature of the transitional arrangements envisioned by the Department.

Conclusion

The SEND Bill aims to give effect to the necessary legislative changes to support the revised SEN framework. However, a number of the key proposals agreed by the Executive in 2012 have not been included, and the Revised Code of Practice and proposed amendments to the relevant regulations have not yet been made available. The Bill also gives the Department significant powers to make subordinate legislation. Consideration could also be given to:

- The extent to which the Bill supports transparency and clarity in relation to SEN;
- Whether the balance between primary and subordinate legislation is appropriate;
- The extent to which the legislation supports the objectives of the SEN framework.

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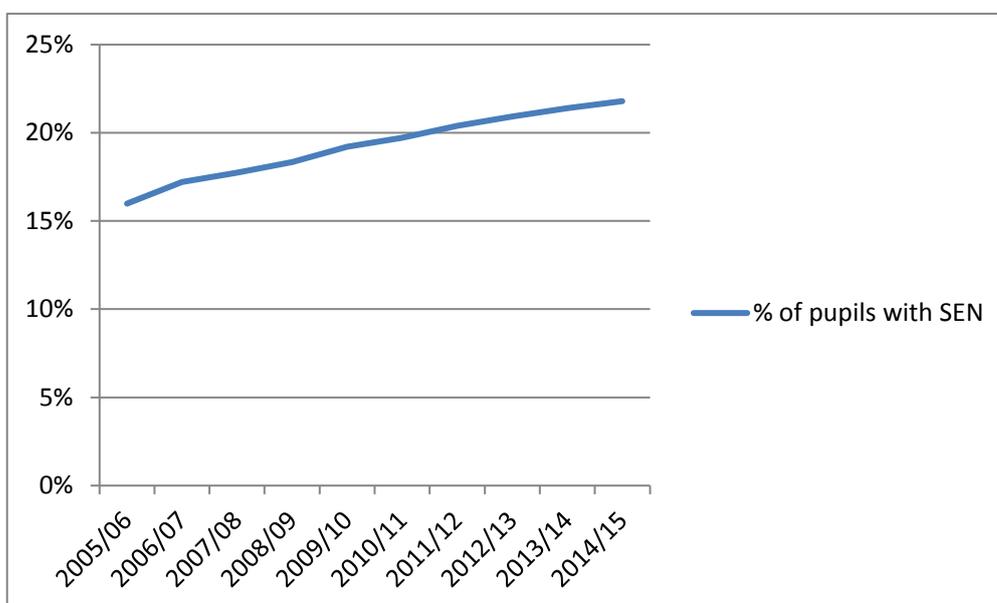
1 Introduction

A number of factors, including high levels of bureaucracy associated with the special educational needs (SEN) framework and inconsistencies and delays in assessment and provision, led to a major review of SEN and inclusion in 2006.¹ This Bill Paper outlines the background and consultation process to the Bill; considers the individual clauses and highlights a range of areas that could be given further consideration.

2 Background and consultation

Northern Ireland has experienced a steady increase in the number of children and young people with SEN over the past ten years. In 2014/15, a total of 73,435 pupils had SEN (22% of all pupils), of which 15,977 had a statement (5% of all pupils).

Figure 2: Percentage of pupils in Northern Ireland with SEN²



The main existing legislation governing provision for children with SEN is contained within the Education (NI) Order 1996 (the 1996 Order), as amended by the Special Educational Needs and Disability (NI) Order 2005a (the 2005 Order). The legislation is supported by guidance documents including a Code of Practice for the identification and assessment of SEN that schools must have regard to.³

¹ Department of Education (2009) *Every School a Good School – The Way Forward for Special Educational Needs and Inclusion* Bangor: DE

² Data provided by the Department of Education, March 2015

³ Department of Education (1998) *Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

In April 2006 the Department of Education (the Department) began a review of SEN, and high level policy proposals were developed in consultation with a range of stakeholders, including parents, organisations and education and health groups.⁴

Consultation process

In August 2009 the then Minister for Education, Caitríona Ruane MLA, launched a consultation on *Every School a Good School: The Way Forward for Special Educational Needs and Inclusion*. The document proposed extensive changes to provision for SEN, including:⁵

- Introducing a **new model** based on Additional Educational Needs;
- Placing **greater responsibility on schools** for early identification;
- Extending the role of Special Educational Needs Co-ordinators (SENCOs) and renaming them **Learning Support Co-ordinator (LSCs)**;
- Replacing statements with statutory **coordinated support plans (CSPs)**.

The consultation concluded in January 2010, resulting in almost 3,000 responses. Many of the core proposals attracted criticism from stakeholders and a number of public petitions were brought forward. A common theme from the consultation responses was “*a desire for more detail, clarity and information on the outworking of the proposals.*”⁶

Indeed, the Committee for Education response in 2010 referred to “*a groundswell of concern and anxiety about the proposed changes*”. The main concerns included the dilution of protections and resources for children with SEN; the replacement of statements given relatively high levels of satisfaction among parents; the role of multi-disciplinary groups; and the enhanced role of the school.⁷

Proposed direction of travel

The Minister for Education, John O’Dowd MLA, published a summary of the consultation responses and presented the proposed direction of travel to the Education Committee in 2012. The proposals included developing a revised Code of Practice, enhancing the duties of Boards of Governors and replacing Individual Education Plans (IEPs) with Personal Learning Plans (PLPs) on a statutory basis.⁸

⁴ Department of Education (2012) *Summary Report of Responses to the Consultation on Every School a Good School – The Way Forward for Special Educational Needs and Inclusion and the associated Equality Impact Assessment* Bangor: DE

⁵ Department of Education (2009) *Every School a Good School – The Way Forward for Special Educational Needs and Inclusion* Bangor: DE

⁶ Department of Education (2012) *Summary Report of Responses to the Consultation on Every School a Good School – The Way Forward for Special Educational Needs and Inclusion and the associated Equality Impact Assessment* Bangor: DE

⁷ As above

⁸ Northern Ireland Assembly (2012) *Committee for Education Official Report: Special Educational Needs and Inclusion 18th January 2012* [online] Available at: <http://www.niassembly.gov.uk/globalassets/documents/official-reports/education/2011-2012/special-educational-needs-and-inclusion.pdf>

Subsequently, officials consulted with stakeholders and the Minister presented amended proposals to the Committee during May and June 2012.⁹ In July 2012 the Executive agreed to the preparation of the required implementing legislation.

A recent article criticised the Review of SEN and Inclusion, stating that contradictory messages and policy discussions had “eroded” the initial proposals as they were “*interpreted and misinterpreted by competing interests,*” leading to little in the way of fundamental change.¹⁰

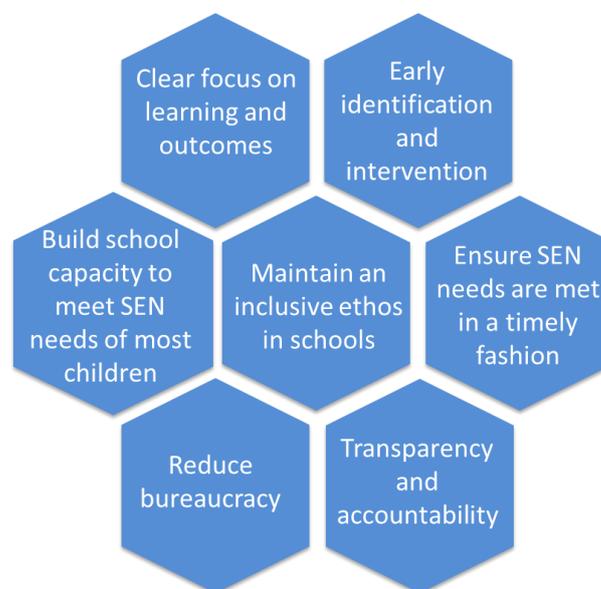
Approach of the current Special Educational Needs and Disability (SEND) Bill

The Bill purports to take the approach of “*embracing the key principles of the review and the responses from stakeholders*”, while achieving a “*middle ground*” in addressing the issues associated with the current framework. The Department states that the Bill allows issues in the current framework to be addressed through a mixture of primary and subordinate legislation and statutory guidance.¹¹

3 Overview of the Bill

The SEND Bill aims to give effect to the legislative changes necessary to support the policy for a revised SEN and inclusion framework. Its policy intention is to ensure the early identification, assessment and provision for SEN children with the child at the centre of the process.¹²

Figure 3: Objectives of the revised SEN framework¹³



⁹ Northern Ireland Assembly (2012) *Committee for Education Official Report: Special Educational Needs Review: Ministerial Briefing 13th June 2012* [online] Available at: <http://www.niassembly.gov.uk/globalassets/documents/official-reports/education/2011-2012/special-educational-needs-review-ministerial-briefing.pdf>

¹⁰ Smith, R. (2014) “Changing policy and legislation in special and inclusive education: a perspective from Northern Ireland” *British Journal of Special Education* Vol. 41, No. 4. pp.382-402

¹¹ As above

¹² As above

¹³ Adapted from Special Educational Needs and Disability Bill (2015) Explanatory and Financial Memorandum

The Explanatory and Financial Memorandum states that details about the framework will be introduced through amendments to secondary legislation and in a revised statutory Code of Practice.¹⁴

4 Proposed actions not included within the Bill

The Bill does not appear to include a number of the key legislative actions published in the form of a Policy Memorandum Paper agreed by the Executive in July 2012.¹⁵

Table 1: Legislative actions agreed by the Executive not included in the Bill

Proposed action	Legislative changes proposed
Consider the mechanisms for placing children with SEN in pre-school settings	<ul style="list-style-type: none"> • Further consideration to be given to the mechanisms for the Authority to place SEN children in Pre-School Education Advisory Group (PEAG) settings • Amending Article 17 of the Education (Northern Ireland) Order 1998 to require the Authority to ensure that appropriate SEN provision is available and that providers can identify and meet SEN
Reducing the five stages of the SEN framework to three levels of support	<ul style="list-style-type: none"> • The framework is expected to be detailed in a revised statutory code of practice (not yet introduced)
Setting out statements of need as a statutory CSP	<ul style="list-style-type: none"> • Use existing power to amend regulations so that statements can be set out as a CSP • Reduce the statutory timescales within the Regulations from 26 to 20 weeks (not yet introduced)
Carrying out a full review for students with a CSP at transition points	<ul style="list-style-type: none"> • Full reviews would be required for students with a CSP at the transition stage

In this regard, consideration could be given to:

- The reasons why the Bill does not refer to the placement of children with SEN in pre-school settings;
- When the revised statutory Code of Practice will be brought forward and what it is likely to contain;

¹⁴ Adapted from Special Educational Needs and Disability Bill (2015) Explanatory and Financial Memorandum

¹⁵ Department of Education *Review of Special Educational Needs and Inclusion: Summary of key policy proposals* [online] Available at: http://www.deni.gov.uk/review_of_special_educational_needs_and_inclusion.htm

- Whether the Department still intends to amend regulations so that statements can be set out in the form of a CSP;
- When the Department plans to amend regulations to reduce the statutory timescales for the provision of a statement/ CSP from 26 to 20 weeks;
- The reasons why the Bill does not refer to reviews for students with a statement/ CSP at transition stage. For example, will such provision be included in the Code of Practice or the wider SEN framework?

5 Duties on the Education Authority

Clause 1: Duty of Authority to have regard to the views of the child

This clause requires the Education Authority to seek and have regard to the views of the child in decisions affecting them in relation to their SEN. It must also have regard to the importance of participation and provide support for the child's participation.

This is in line with Article 12 of the UN Convention on the Rights of the Child, adopted in 1989, which states that in all matters affecting a child, their views must be given due weight in accordance with their age and maturity. It notes that they should be involved in any judicial and administrative proceedings affecting them.¹⁶

There was support from the majority of respondents to the consultation in relation to having regard to the views of the child (72% overall agreed or strongly agreed). However, only 18% of parents, carers and the general public were in favour of this, with some suggesting that it depends on the age, capability and maturity of the child.¹⁷

Clause 2: Duty of Authority to publish plans relating to its arrangements for special educational provision

This clause places a duty on the Education Authority to develop and publish a plan detailing the arrangements to be made for SEN provision, including:

- The resources, advisory and support services the Authority will make available in fulfilling its SEN duties; and
- The arrangements for providing training to school staff to enable them to discharge their duties in relation to SEN.

The plan must be reviewed annually and the Authority must consult "*such bodies or persons as it considers appropriate*" when preparing, reviewing or revising the plan. The clause allows for the development of subordinate legislation prescribing the procedures for preparing, reviewing or revising the plan, its form and content and the persons to be consulted.

¹⁶ United Nations Human Rights Convention on the Rights of the Child [online] Available at: <http://nia1.me/2i7>

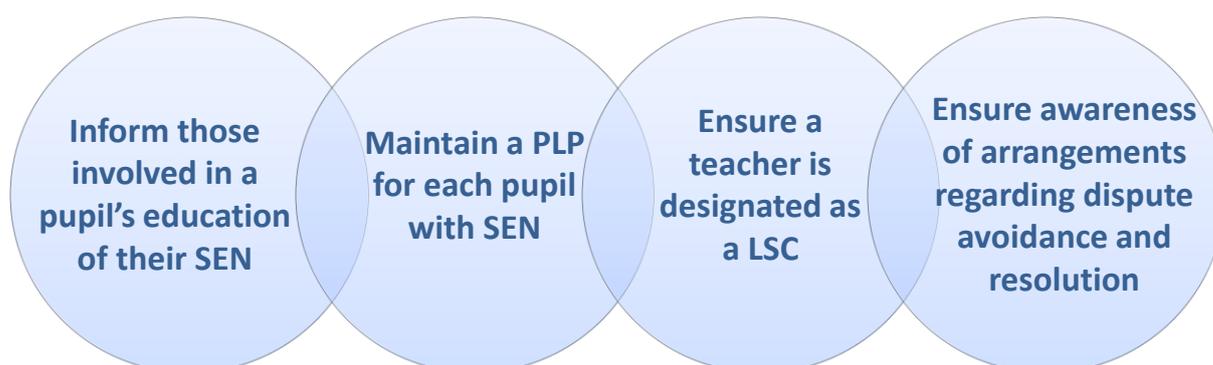
¹⁷ Department of Education *Review of Special Educational Needs and Inclusion: Summary of key policy proposals* [online] Available at: http://www.deni.gov.uk/review_of_special_educational_needs_and_inclusion.htm

6 Enhanced duties of Boards of Governors

Clause 3: Duties of Boards of Governors in relation to pupils with special educational needs

This clause extends the existing duties of Boards of Governors of mainstream schools and special schools in relation to SEN. Clause 3 (2) (a) extends the existing duty to make a child's teacher aware of their SEN to include "all who are likely to be concerned with the pupil's education."

Figure 4: New duties for Boards of Governors of ordinary schools¹⁸



Almost a quarter (23%) of respondents to the Department's 2009 consultation were concerned about the increased responsibility and accountability for schools implied by the proposals, particularly for Boards of Governors and for nursery, small and rural schools.¹⁹

Personal Learning Plans

Current provision

When a child reaches stage 2 of the Code of Practice, the SENCo leads in assessing the child's needs and planning, monitoring and reviewing their provision. The child's teachers, working with the SENCo, develop an IEP. IEPs were designed to build access to the curriculum for children facing barriers to learning.

The evidence suggests that IEPs have been developed too narrowly and questions have been raised in relation to the ability of teachers to set appropriate targets, especially at post-primary.²⁰ The key policy proposals agreed by the Executive in 2012 stated that PLPs should replace the non-statutory IEPs for children with SEN and put greater emphasis on targets and outcomes.

¹⁸ The duties to maintain a PLP for each pupil with SEN and to ensure that a teacher in the school is designated as a LSC also apply to Boards of Governors of special schools

¹⁹ Department of Education (2012) *Summary Report of Responses to the Consultation on Every School a Good School – The Way Forward for Special Educational Needs and Inclusion and the associated Equality Impact Assessment* Bangor: DE

²⁰ Department of Education (2011) *Resource file for Special Educational Needs* Bangor: DE

In 2014/15 a total of 43,134 pupils were at stages 1 and 2 of the SEN assessment framework, representing 13% of the overall school population and 59% of those within the five stages of the framework.²¹

Proposed approach

Clause 3 (2) (c) requires Boards of Governors of ordinary schools and clause 3 (4) requires their counterparts in special schools to prepare and keep under review a personal learning plan (PLP) for each registered pupil with SEN.

The Northern Ireland Commissioner for Children and Young People (NICCY) has expressed concerns regarding the proposals around PLPs; including suggesting that they would not adequately protect children's rights and stating that legislation should cover the monitoring of plans.²²

NICCY also called for statutory timescales for the completion of PLPs to ensure that children can 'move on' from this stage of the framework and that appropriate support can be put into place in cases where it is beyond the remit or capacity of the school.²³

In this regard, consideration could be given to:

- How, if at all, PLPs will differ from IEPs in practice;
- The capacity of teachers to develop and review robust and effective PLPs;
- What plans exist for the review, monitoring and evaluation of PLPs to ensure that they are consistent, effective and have measurable outcomes;
- The rationale for not including timescales for the completion of PLPs in the Bill;
- What, if any, role children and parents will have in the development of the PLP.

Learning support co-ordinators (LSC)

Currently, the Code of Practice states that schools should have a designated teacher responsible for coordinating SEN provision, known as Special Educational Needs Coordinator (SENCo). Their other responsibilities include responding to requests for advice from other teachers; maintaining a SEN register; liaising with teachers in developing IEPs; and liaising with parents and external agencies.²⁴

Clause 3 (2) (c) places a duty on Boards of Governors of ordinary schools to designate a teacher as a LSC; clause 3 (4) places a corresponding duty on the Boards of Governors of special schools.

²¹ Information provided by the Department of Education, March 2015

²² Northern Ireland Commissioner for Children and Young People (2012) *Submission to the NI Assembly Committee for Education: 25 May 2012*

²³ As above

²⁴ Department of Education (2011) *Resource file for Special Educational Needs* Bangor: DE

3 (2) (c) “*designate a teacher on the staff of the school (the “learning support co-ordinator”) as having responsibility for co-ordinating the provision of education for those pupils attending the school who have special educational needs.*”

Clause 3 (3) gives the Department power to make regulations regarding the LSC, in particular to prescribe the qualifications and/ or experience a LSC must have, and to confer on the Board of Governors “*other functions*” relating to learning support co-ordinators.

Some respondents to the departmental consultation were concerned about the time, resources and training that would be required for a LSC to fulfil their duties. It should be noted that the original proposals included wider duties such as carrying out low level diagnostic testing.²⁵

Wider research has highlighted existing concerns around the capacity of teachers to address special educational needs.²⁶ A 2010 survey of teachers by the General Teaching Council Northern Ireland (GTCNI) found that a majority of teachers did not believe that they had adequate time and resources to enable them to meet the needs of children with SEN.²⁷

Three quarters (75%) of those responding to the survey said that teachers do not currently have the expertise to take on additional responsibilities relating to SEN, while 81% stated that schools do not have the resources.²⁸

In this regard consideration could be given to:

- The implications for teachers designated as a LSC, for example whether there will be protected time to discharge their duties in relation to SEN;
- What role, if any, it is envisaged that the LSC would have on the school’s senior management team;
- What, if any, training will be provided to teachers designated as a LSC;
- What qualifications and experience are likely to be required by LSCs;
- The other functions that may be conferred to the Board of Governors in relation to learning support co-ordinators, and the inclusion of this in subordinate legislation.

²⁵ Department of Education (2012) *Summary Report of Responses to the Consultation on Every School a Good School – The Way Forward for Special Educational Needs and Inclusion and the associated Equality Impact Assessment* Bangor: DE

²⁶ Education and Training Inspectorate (2014) *Chief Inspector’s Report 2012-14* Bangor: ETI

²⁷ Gardner, J., Galanouli, D., Devlin, G. (2011) *Teachers’ Voice 2010* Belfast: GTCNI

²⁸ As above

Ensuring awareness of dispute avoidance and resolution arrangements

This new duty requires Boards of Governors to ensure awareness of the arrangements in place under Article 21B of The Education (Northern Ireland) Order 1996. This goes further than the 1996 Order to make sure that children over compulsory school age as well as parents are aware of the arrangements.

3 (2) (c) “*secure that-*

- (i) *parents of registered pupils at the school who are of compulsory school age and have or may have special educational needs,*
 - (ii) *Children over compulsory school age who are registered pupils at the school and have or may have special educational needs,*
- are informed of the arrangements made under Article 21B which relate to disagreements between the Board of Governors and those persons.”*

Article 21B of the 1996 Order (as amended) requires ELBs to make arrangements for avoiding or resolving disagreements between parents or children over compulsory school age and the Board of Governors regarding fulfilment of their duties in relation to SEN and the individual child’s SEN provision. This is considered further in Section 9 of this Bill Paper.

Clause 3 (3) also gives the Department power to make regulations setting out the circumstances and manner in which a Board of Governors would be required to notify the Education Authority of changes regarding a child with SEN.

7 Requesting help from health and social care bodies

Clause 4: Duty of Authority to request help from health and social care bodies

Article 14 of the 1996 Order stated that an ELB (now the Authority) “*may request*” the help of the Regional Health and Social Care Board or a health and social care trust to support the exercise of its duties in relation to SEN. Clause 4 changes this to “*shall request*”, thereby placing a duty on the Authority to request help where it believes the health and social care bodies could help in the exercise of its functions.

Consultation respondents were generally supportive of multi-disciplinary working between the health and education sectors. However, a number of concerns were highlighted in this regard, including concerns around:

- The ability of the health and education sectors to work together;
- The lack of a statutory duty on the health sector to make provision in schools;
- The capacity of health professionals to deliver adequate support.

Indeed, the 2010 GTCNI survey of teachers found that just 14% believed that there is a coherent approach between health, social care and education in identifying and supporting children with SEN, while 45% did not agree and 41% were 'not sure'.

In this regard, consideration could be given to:

- Whether there will be a corresponding duty on the Health and Social Care Board or a health and social care trust to provide help where it is required;
- Plans for facilitating this multi-disciplinary working - for example, in regard to who will have lead responsibility for planning and development; the development of agreed procedures/ service-level agreements; funding and accountability measures.

8 Time limits for the assessment of educational needs

Clause 5: Assessment of needs: reduction of time limits

Currently, when an ELB is considering whether to make a statutory assessment of a child's education needs, it is required to notify their parents who have a right to make representations and submit written evidence within 29 days. The time limit is the same where the Board of Governors of a grant-aided school (or the proprietor of an independent school) requests that the ELB make an assessment.

Clause 5 reduces this time period to 22 days. It also makes provision for children over compulsory school age to provide such evidence and to be notified where the Authority decides to make an assessment (and its reasons for making it).

The clause also allows the Authority to carry out the assessment before the end of the 22 day period if it has received the written consent of the child's parent, or the child if they are over compulsory school age.

In this regard, consideration could be given to:

- The implications of the reduced timescale for parents and for children over compulsory school age. For example, whether there are likely to be implications for obtaining and submitting specialist advice and evidence within this timescale, and whether it could discourage parents or children over compulsory school age from providing evidence.

9 Appeals and mediation

Currently, if parents are unhappy with aspects of SEN assessment and provision they may approach the Dispute Avoidance and Resolution Service (DARS). DARS is independent, confidential and voluntary and operates on a cross-ELB basis. It aims to

provide an informal forum for resolving disputes between Boards of Governors or ELBs and parents in relation to SEN.²⁹

Where parents cannot reach agreement with the ELBs (the Authority) the independent Special Educational Needs and Disability Tribunal (SENDIST) considers parents' appeals against decisions. It also deals with claims of disability discrimination in relation to children at school.³⁰

In 2013/14, SENDIST heard 42 appeals, of which 27 were against the contents of a statement and 15 were against the decision not to make a statement.³¹

Clause 6: Appeal following decision not to amend statement following review

This clause provides a new right of appeal to the Tribunal where the Authority decides not to make any changes to a statement following the annual review. The appeal may be lodged by parents of children of compulsory school age and the child himself if over compulsory school age.

Where the Authority decides not to make changes to a statement it will be required to provide the details in writing and the reasons for its decision to the parent or child, as well as setting out the right to appeal. The parent or child will have the right to request and receive a copy of any advice given to the Authority on which the decision was based.

Clause 7: Child under 2: appeals against contents of statement or failure to make a statement

Clause 7 provides a new right of appeal to the Tribunal for parents of children with SEN under the age of two, and gives them the right to receive a copy of the information on which the decision was based. The appeal may be against:

- The Authority's decision not to make a statement; or
- The description in the statement of the Authority's assessment of the child's SEN and provision detailed in the statement.

²⁹ Lundy, L., McKeever, G., Treacy, V. (2015) "Education Rights" *Human Rights in Northern Ireland: The CAJ Handbook* pp. 483-516 Oxford: Hart Publishing

³⁰ Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

³¹ Information provided by the Department of Education, March 2015

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(2) On an appeal under paragraph (1)(a) the Tribunal may-

- (a) dismiss the appeal;*
- (b) order the Authority to make and maintain a statement under Article 21; or*
- (c) remit the case to the Authority for it to reconsider whether, having regard to any observations made by the Tribunal, it is necessary for the Authority to determine the special educational provision which any learning difficulty the child has may call for.*

As outlined above, where the Authority decides not to make a statement, 21ZA (2) gives the Tribunal a series of options. It has the right to dismiss the appeal; order the Authority to make and maintain a statement; or send the case back to the Authority to reconsider whether it should determine the special educational provision required (taking account of the Tribunal's observations).

Where the appeal is against the description of the child's special education needs or the special educational provision specified in the statement, article 21ZA (3) allows the Tribunal to either:

- Dismiss the appeal; or
- Order the Authority to amend the statement in relation to the assessment of the child's SEN or the detailing of the special educational provision; and to make "*such other consequential amendments as the Tribunal thinks fit.*"

Clause 8: Mediation in connection with appeals

Article 21B of the 1996 Order (as amended by the 2005 Order) provides for the appointment of "independent persons" by the ELBs to facilitate the avoidance or resolution of disagreements between parents and ELBs or Boards of Governors. 21 (b) (7) states that the arrangements do not affect a parent's entitlement to appeal to the Tribunal.

This clause goes further and requires the Authority to make arrangements for the provision of an independent mediation service for a person appealing to the Tribunal. The person appointed to this function and for the function of facilitating and avoiding disputes cannot be an employee of the Authority. If mediation is requested, the Authority must participate in it.

Clause 8 (Article 21C (3) and (4)) places a new duty on persons seeking an appeal to first seek and obtain independent advice and information about pursuing mediation.

21C (3) The person may appeal only if a mediation adviser has issued to that person a certificate under paragraph (4); and any provision of this Part enabling a person to appeal has effect subject to this paragraph.

(4) A mediation adviser must issue a certificate under this paragraph to a person if the mediation adviser has provided that person with information and advice about pursuing mediation with the Authority

(5) If the person has informed the mediation adviser that he or she wishes (or, as the case may be, does not wish) to pursue mediation, the certificate under paragraph (4) must state that fact.

As outlined above, a person wishing to appeal must first obtain a certificate from the mediation adviser to prove that they have received the necessary information and advice prior to lodging an appeal with the Tribunal.

Within this clause Article 21C (7) gives the Department a range of powers to bring forward subordinate legislation in relation to the mediation service, including regarding:

- Imposing time limits;
- The people who may attend mediation;
- Where a child's parent is party to mediation, requiring the mediator to take reasonable steps to ascertain the views of the child;
- The provision of advocacy and other support services for a person pursuing mediation with the Authority;
- Enabling the Authority to take prescribed steps following the conclusion of mediation;
- The training, qualifications and experience of mediation advisers and mediators.

Wider research suggests that mediation tends to be well regarded by users. However, it is relatively untested in the public law sphere and there is limited evidence in this regard. Concerns in relation to its use in education include adequately protecting the child's interests and whether it is likely to increase or decrease the inequalities between those involved in disputes.³²

The literature also suggests that mediation may be daunting for parents who may perceive that the service is not wholly independent. Other issues highlighted include a perceived lack of expertise and legal knowledge among mediators.³³

³² Harris, N., Smith, E. (2009) "Resolving disputes about special educational needs and provision in England" *Education Law Journal* Vol.10 No.2 pp.113-132

³³ As above

Research in 2010 in Scotland and England found that parents were more likely to make a formal tribunal appeal than to use mediation services, perceiving that it offered a better chance of achieving their desired outcome.³⁴ The Children and Families Act 2014 introduced a duty for parents in England to consider mediation before appealing to the Tribunal regarding SEN issues.³⁵

In this regard, consideration could be given to:

- What the requirement to have engaged the mediation service prior to lodging an appeal with the Tribunal will mean in practice. For example, will individuals be required to go through the informal mediation process in order to receive the required certificate and appeal to the Tribunal?
- Whether the mediation service will have increased resources or enhanced powers;
- The other implications of this requirement, for example, the impact on timescales, levels of bureaucracy and the ability of parents to pursue an appeal;
- The persons to be appointed to the mediation service and for the resolution of disputes, for example, how they will remain independent of the Authority and what qualifications/ expertise they will they be required to have;
- The rationale for stating on the certificate whether or not an individual wished to pursue mediation and the potential implications of this;
- The areas left to subordinate legislation, including what the Department proposes for each of the areas. For example, whether the power allowing the Authority to take prescribed steps following mediation will include an enforcement function; what timescales are proposed and who would be permitted to accompany parents during the mediation.

Clause 11: Appeals and claims by children: pilot scheme

This clause allows the Department of Education to make regulations to conduct a pilot scheme to enable children within the compulsory school age to make an appeal to the Tribunal regarding their SEN or a disability discrimination claim, specifically appeals:

- Against the decision not to make a statement;
- Against the contents of a statement;
- Against a refusal to arrange assessment of educational needs;
- Against a refusal to changes the school names in a statement;

³⁴ Riddell, R., Stead, J., Weedon, E., Wright, K. (2010) *Dispute Resolution and A voidance in Special and Additional Support Needs in England and Scotland* Edinburgh: Centre for Research in Education Inclusion and Diversity

³⁵ Legislation.gov.uk *The Children and Families Act 2014* [online] Available at: <http://www.legislation.gov.uk/ukpga/2014/6/notes/division/4/3/5>

- Against the Authority ceasing to maintain a statement.

The pilot scheme would begin within ten years of the Bill receiving Royal Assent and last for at least two years and the regulations in this regard must be approved by a resolution of the Assembly.

Clause 12: Appeals and claims by children: follow-up provision

After the pilot scheme detailed in Clause 11 has been conducted for two years, the Department may make regulations enabling children within the compulsory school age to bring a SEN appeal or disability discrimination claim to the Tribunal. The regulations in this regard must be approved by a resolution of the Assembly.

10 Rights of children over compulsory school age

Clause 9: Rights of child over compulsory school age in relation to special educational provision

This clause gives children with SEN who are over compulsory school age rights within the SEN framework which were previously exercisable by the parent, including the right to request a statutory assessment and to appeal to the Tribunal against certain decisions of the Authority.

Clause 9 includes a power to make provision about assistance and support to enable a child over compulsory school age to exercise any such right. It also contains a series of powers to make regulations where a child over compulsory school age lacks, or may lack, capacity to exercise these rights, including making provision for:

- Determining whether a child lacks capacity in relation to the exercise of any such right (including the criteria to be applied in making the determination);
- The parent of the child to exercise the rights where it is determined that the child lacks the capacity to do so;
- Part 2 of the 1996 Order (the main legislation governing SEN) to have effect in such a case with any modifications prescribed by the regulations.

The regulations made under this section will be subject to negative resolution.

The literature suggests that the involvement of children and young people in SEN dispute resolution can promote ownership of decisions and support outcomes. However, there can be challenges relating to the child's ability, particularly where a child's SEN affect their communication. It has been suggested that an independent person should obtain the views of the child due to the influence of parents.³⁶

In this regard, consideration could be given to:

³⁶ Harris, N., Smith, E. (2009) "Resolving disputes about special educational needs and provision in England" *Education Law Journal* 10 (2) pp.113-132

- The nature of the assistance and support to be provided to children to enable effective participation;
- The level of subordinate legislation provided for within this clause, and the additional modifications to Part 2 of the 1996 Order envisaged;
- The decision to subject the regulations under this section to negative resolution.

Clause 10: Rights of child over compulsory school age in relation to disability discrimination claims

This clause extends the right of a parent to make a claim to the Tribunal that a school or the Authority has unlawfully discriminated against him on the grounds of disability – to include a disabled pupil over compulsory school age (Article 22 of the 2005 Order).

It also provides a power to make regulations regarding the proceedings of the Tribunal, in particular regarding:

- Assistance and support for children over compulsory school age to pursue a claim;
- Where, in the Tribunal's opinion, the child may lack capacity to pursue the claim, the criteria for determining that that is the case and enabling their parent to pursue it.

11 Definition of a “child”

Clause 13: Definition of “child” for the purposes of special education

The Bill alters the definition of a child for the purposes of special education to enable a child reaching age 19 during a school year to remain in school until the end of that year subject to the authority maintaining their statement. Currently (as defined by the 1996 Order) children are deemed to reach that age the day after the end of the same school term in which they celebrate their 19th Birthday.

12 Commencement and transitional provisions

Clause 15: Commencement, transitional provisions etc

This clause sets out details for the commencement of the legislation. Clauses 13 (Definition of “child” for purposes of special education); 14 (Interpretation of this Act); 15 (Commencement, transitional provisions, etc); and 16 (Short title) come into effect the day after the Act receives Royal Assent.

The remainder of the clauses come into effect on days of the Department's choosing. Clause 15 allows the Department to make such savings and transitional, transitory or

consequential provisions that it feels are appropriate in regard to these clauses (i.e. they are left to be settled by subordinate legislation).

In this regard, consideration could be given to:

- When it is proposed that clauses 1-12 will come into effect and the reasons why sunrise clauses have not been included;
- The nature of the transitional arrangements envisioned by the Department within this clause, particularly if they are likely to be important in relation to the acceptability of the Bill. The usefulness of ensuring that commencement orders including transitional provision are subject to a draft affirmative procedure (so that the Assembly will be able to review them) could also be considered.

13 Conclusion

The SEND Bill currently before the Assembly aims to give effect to the necessary legislative changes to support the policy for a revised SEN and inclusion framework. The objectives of the framework include increased transparency, reduced bureaucracy, and a focus on early intervention.

However, a number of the key proposals agreed by the Executive in 2012 have not been included. While some of these are intended to be introduced through a revised Code of Practice and amendments to regulations, they were not available at the time of writing.

In addition, the Bill appears to include a significant number of provisions to make subordinate legislation. These factors may be problematic given that a key source of concern regarding the initial consultation was a lack of clarity and detail around the proposals. In this regard, further consideration could be given to:

- The extent to which the Bill supports transparency and clarity in relation to the proposals for SEN;
- Whether the balance between primary and subordinate legislation is appropriate;
- The extent to which the legislation supports the objectives of the SEN framework.