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Special Educational Needs Advice Centre

Evidence to Committee Stage:

Special Educational Needs and Disability (SEND) Bill

April 2015

Introduction

The Special Educational Needs Advice Centre (SENAC) is a charity supporting the education of children and young people with special educational needs and disability in Northern Ireland. SENAC offers an independent advice, information and advocacy service on the statutory framework of special educational needs provision in Northern Ireland. Operating as a charity since 2003 and supporting over 500 families each year to advance the education of the children in relation to their learning difficulties SENAC has gained considerable insight and experience of the SEN framework.

We welcome the opportunity to submit our views on the SEND Bill to inform scrutiny of the clauses and we welcome any opportunity to further discuss the reform of SEN and provide oral evidence to the Education Committee if invited.

Before comment on the clauses of the SEND Bill we wish to state that as the SEND Bill has been brought forward without sight of the SEN Regulations and the Revised Code of Practice it means that comment and scrutiny on the legislation can only be based on the information available yet many of the provisions within the Bill make reference to the Regulations to outline procedure and process of the implementation of the duties.

This is important to consider as the SEN Regulations and the Code of Practice are as much a part of the SEN framework in relation to rights and protections as the legislation. Furthermore it is the Code and the Regulations that set out the procedures which can demonstrate and enable compliance with the legislation and informs the practical application of the SEN framework. SENAC would stress the importance of the need for consultation and detailed scrutiny of the revised Code and the Regulations rather than an affirmation of the documents as a whole.

Duties of the Education Authority and Boards of Governors

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

Any opportunity to advance the participation of children and young people within education and provide legislative recognition of the need to promote compliance with the principles of the UNCRC in respect of Article 12 is very welcome. It is important however that every measure is taken to ensure such participation will be enabled where support is needed to aid communication and participation. Reference has been made by the Department of Education that the inclusion of this duty advances Article 12 to give the child a voice. However it is important to acknowledge that Article 12 goes further than just providing opportunity for participation. Children have the right to have *'their views given due weight on all matters affecting them' (UNCRC Art 12)* In the context of special educational needs provision and the decisions often taken on types and levels of education support based on identified need it is important for the children and young people to know and understand how their views will be applied and the impact their participation will have on their educational needs.

While this is a positive addition more detail and information is required on how this duty will be enabled in practice and the extent to which such consultations will lead to action and influence practice.

This duty could have been given a much higher profile in relation to the purpose of enabling such participation and communication. For example the Children and Families Act 2014 sets out clearly the importance of participation and gaining the views and wishes of the children and young people. In relation to a similar duty it states:

(d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

A similar inclusion in the SEND Bill would highlight the importance of this duty.

It is expected that the Regulations will set out the processes for obtaining the views of the child with particular relevance to the statutory activities required such as annual review. It is hoped that this will improve the current involvement of children within the annual review process and their feelings and views will be given equal weight for consideration of amendments as those of the other participants in the process.

The additional new rights of appeal within the SEND Bill for amendment after annual review and the right to appeal for children over compulsory school age are all welcome to assist this participation for the children and young people.

DE's 'Every School a Good School' Policy for School Improvement outlined that the characteristics of a good school was one that displayed child centred provision with opportunities for children to influence teaching and learning and will have access to customised education to enable children to reach their potential. This is particularly relevant for children with SEN as their needs involve differentiation of their learning environment and access to additional support. It is hoped that greater participation and consultation with the children and young people will realise these aspirations.

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

Without further information and detail on this plan it is difficult to comment on this duty as set out in the SEND Bill. The positives are that it provides a degree of transparency on the level of resources available which addresses in part some of the concerns expressed during the SEN Review Consultation that within many areas of SEN there is a lack of information and transparency. As this clause allows for further information in the Regulations which will prescribe the procedures for preparing and reviewing the plan, who is to be consulted on the plan as well as its format this duty does not provide adequate information in its current form.

At this stage it is not known if the plan will be informed by and reflect the level and nature of needs of the SEN population within schools in order to determine the services needed to meet those needs and if schools will be consulted. Some of the most common experiences of the parents SENAC advises are the delays or lack of access to the Board Support Services which hinder the progress and educational support of the children and may block progress through the SEN framework. In the last few years for example reductions in the number of peripatetic teachers available, the introduction of the Time Allocation Model for Educational Psychology Service Support, and the increased need for specialist behaviour support have all resulted in compromising the impact of the Board Support Services to support those children in need within the SEN framework. To ensure the effective implementation of the revised SEN framework any plan published by the Authority must be informed by an audit of the needs of the children and the schools supporting them rather than just an offer of the services available without any consideration of the demand for those services.

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

Any additional duty or enhancement of existing duties which will improve the legal safeguard for children to ensure their special educational needs are met is welcome. This duty relates to all children with SEN however it is especially important for those children with SEN who do not have statements of special educational needs. In comparison to their classmates who hold statements of SEN this duty is the only protection in law for children without statements to ensure their learning difficulties and needs are assessed, identified and provided for. Currently in our schools over 73,000 children have special educational needs but no statement of SEN compared to over 15,000 with statements. (DE 14/15) The vast majority of children who face challenges in learning will not need statements but they do require appropriate measures to be applied quickly and effectively to address their needs yet SEN law makes a clear distinction in duty between those children with statements and those without and the means to redress should a parent feel their child's are not being appropriately met within the school based stages.

It is therefore important to consider if the SEND Bill has adequately set out duties which will ensure the children's needs will be met and consider the importance of this duty for the thousands of children with SEN dependent on the school's ability and capacity to identify and meet their needs. During the public consultation of SEN and Inclusion concern was expressed that the current legal duty on Board of Governors *'to use their best endeavours in exercising its functions in relation to the school, to secure that if any registered pupil has special educational needs the special educational provision which his learning difficulty calls for is made'* (Art 8(1) (a) Education (NI) Order 96) was not a strong duty and compromised by the interpretation of 'best endeavours'. Minister O'Dowd in his presentation to the Assembly Committee for Education in May 2012 gave recognition to the fact that *'many SEN pupils do not achieve positive outcomes within the current framework.'* He further stated that *'There is a need therefore to promote increased awareness of disability and a culture of*

raised expectations for children with SEN across schools, which includes increased accountability for the in-school education of these children.' To achieve this he concluded was the need to strengthen the duties on Board of Governors to identify, assess and make provision for children with SEN and/or disability in schools. The current duty to 'use their best endeavours' has not been amended and the amendments in SEND in relation to the duty on BOGs must be considered in this context and whether or not a stronger duty has been achieved. This duty is however proactive and places an obligation and a high level of responsibility on the Board of Governors to actively ensure the school are meeting the special educational needs of the pupils. SENAC have concern from our case work that Board of Governors may not be fully aware of the importance of this duty and the measures needed to demonstrate compliance with this duty within their governance role of the school. To ensure understanding of this duty and the enhanced duties within the SEND Bill it is crucial that Board of Governor receive training specific to all their duties on SEN.

Clause 3 (a) substitution of 'teach him' with 'be concerned with the pupil's education' in relation to ensuring a pupil's needs are made known: The inclusion of this phrase is positive in that it broadens the context in which a child's needs will be known within the school community. However SENAC is of the view that the phrase 'teach him' should be retained rather than substituted. The primary function of SEN provision is to teach a child inclusively and with differentiation which places the teacher at the centre of the delivery of SEN provision and should remain within this duty.

We there suggest this amendment:

'...those needs be made known to all who are likely to teach him and be concerned with his education'.

Clause 3(b) the substitution of 'are aware..' to 'take reasonable steps to identify and provide' : This is a positive change as it makes this a stronger proactive duty and further strengthens the duty to 'use best endeavours' as discussed earlier. However the phrase 'take reasonable steps' is open to interpretation in relation to what are reasonable steps and may not mean all steps that may be available are taken giving rise to ambiguity and judgement. If further guidance is to be provided within the out working of the framework within the Code of Practice and/or the Regulations then consideration should be given to include a reference to take the steps as set out within the statutory guidelines limiting the introduction of further criteria and guidelines beyond the content of the statutory Code.

Clause 3(c)(d) Prepare and keep under review a programme of special educational provision (a personal learning plan) in respect of each registered pupil at the school who has special educational needs.'

SENAC welcomes the inclusion of the duty relating to Personal Learning Plans. Many of the enquiries received on SENAC's Advice Line are concerns from parents on the content and effectiveness of the individual education plans (IEPs) for their child. These concerns are in relation to strategies and resources, achievable targets and recording of outcomes and the extent to which they are set out and reviewed within IEPs. SENAC has observed considerable range in practice by schools in IEPs despite the guidance within the Code of Practice on the format and content of IEPs. It is therefore positive that the need to enable greater consistency in the practice of developing and maintaining educational plans has been included as a legislative duty and will be supported by a pro forma PLP within the provisions of the statutory guidelines.

However to safeguard against any future inconsistency in education plans concern must be expressed that there was recognition during the consultation period for the review of SEN that there

is a need for an enhanced role for the Education and Training Inspectorate to evaluate and inspect the SEN practices and provision in schools. PLPs should be subject to such scrutiny to ensure they are effective and monitored to aid educational progress.

Additionally SENAC remains concerned that there are outstanding issues from the SEN consultation regarding reform of education plans which in SENAC's opinion have not yet been satisfactorily addressed and require further consideration in relation to the revised Code of Practice and SEN Regulations. These are common issues and concerns expressed by the families we support and have also been outlined for further consideration in relation to SEND reform in the Assembly Research and Information Bill Paper May 2015:

- *How, if at all, PLPs will differ from Individual Education Plans in practice?*
- *The capacity of teachers to develop and review robust and effective PLP?*
- *What plans exist for the review, monitoring and evaluation of PLP?*
- *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 (e) 'designate a teacher on the staff of the school (the 'learning support co-ordinator') as having responsibility for coordinating the provision of education for those pupils attending the school who have special educational needs.....'

During the SEN consultation concern was expressed that the LSC's role may be compromised in their ability to perform their duties effectively without being a member of a school's senior management team. This remains a concern. In our contact with schools and families over many years we know how important it is to have a Coordinator who is supported in their activities by the school leadership to deliver the educational resources and support identified for the child's needs in a school environment of competing demands and needs. It is positive however that SEN Regulations will require Board of Governors to ensure the LSC will have the prescribed qualifications and/or experience. However without sight of the Regulations the level of these criteria is unknown. Given the importance of this role it is hoped the criteria would require both qualification and experience in SEN.

Part of the current role of the SENCO is to ensure all staff within school are aware of need. Parents report to us that often teachers do not always take on board the advice or information from the SENCO in relation to pupil's needs. This is an important indicator of the need to ensure the LSC is regarded as the lead in relation to SEN and teachers are expected to respect and respond appropriately to the LSC's advice and instruction on the SEN requirements of pupils within their class, should that involve differentiation of teaching and learning, using and managing resources etc. Concern remains that without the LSC having sufficient status within school management this role may be compromised.

It is also important to use this response as an opportunity to highlight the need for training for LSCs on positively managing relationships and communication with parents where genuine concerns have been expressed by the parents on aspects of learning and teaching and to highlight the need for Coordinators to be supported in their demanding and responsible role by the school leadership.

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

The change in this duty from 'may' request to 'shall' request is a positive stronger duty on the Authority to request the relevant help. This is positive as it means the Authority will undertake such requests for individual children rather than a parent having to contact the health and social care board when necessary.

This duty however is dependent on the ability of the HSC board's ability to comply both in terms of resources available and the boards own duties and obligations. This remains a concern in terms of delay and access to provision when required to progress SEN assessments and SEN provision.

This again highlights the need for joint planning and working between health and education bodies in relation to services and information for SEN and a duty to cooperate between the relevant government departments. The ability of the Authority to fully meet the children's needs quickly and effectively will remain compromised until the means to ensure the HSC Bodies comply with their requests for help based on need not resources.

Time limits for assessment of educational needs

Clause 5: Assessment of needs: reduction in time limits

SENAC welcomes this reduction in the time limit to enable decision regarding assessment. As part of the wider framework relating to the length of process from statutory assessment to statement any intention to quicken access to the SEN provision a child requires is positive. It is also positive that the Bill enables the Authority to proceed with statutory assessment before the expiry of the new timeframe of 22 days for parent representations. There is a degree of concern however that this reduction may put additional pressure on parents to submit their representations within a shorter time frame. SENAC has much experience supporting parents to make their representations and understand the pressure parents feel at this time. Overall however this is a welcome development.

Appeals

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

This is a very welcome new right of appeal as often at Annual Review amendments will be requested by parents and/or schools with supporting evidence which does not result in an amendment with no right of appeal. However if the Minister proceeds with his proposal to amend the Regulations in relation to Annual Reviews this will impact on the opportunity to amend statements. The proposal to review statements only at key transitional stages or where a parent or school requests a review to be held means parents may not request an annual review where the need for amendments could have been identified within the process.

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

A welcome new right of appeal and an important development to secure the appropriate provision for children's needs as early as possible.

Clause 8: Mediation in connection with appeals

To enable informed comment on this duty further information is required on the detail and processes associated with the development of this service as yet unavailable as the procedures and detail will be contained within the Regulations which have not yet been prepared. In Scotland ahead of the Education (Additional Support for Learning) (Scotland) Bill the local education authorities commissioned several organizations to pilot a mediation service and other mediation initiatives with a view to resolving disputes around special educational needs. The evaluation of these pilots enabled the shaping of the type and form of mediation to be effective in its purpose in relation to SEN. (Govan Law Centre Essential Mediation 2004) A similar pilot may have been useful here to aid scrutiny of the potential impact of this new development to progress the interests of the children in accessing the special educational needs required.

There are important core aspects of the mediation proposed which require consideration ahead of the Regulations being developed and should be subject to consultation and informed by the evaluation of the SEN mediation services already in operation in Scotland and England. For example impact of time limits for appeal, matters of confidentiality, prescribed steps the Authority may take following the conclusion of mediation and who may attend. It is difficult to conclude if this duty will be a positive development to ensure the needs of the children are appropriately provided for and the impact on the number of appeals, without such information. There should also be recognition that within the current SEN decision making process there is already opportunity for parents and the Authority to work positively together to discuss and negotiate the support available to the child ahead of an appeal. Often such constructive discussion enables agreement which avoids the need for appeal. The NI Assembly SEND Bill Research and Information Paper 2015 outlines that in 2013/14 the Special Educational Needs and Disability Tribunal heard 42 appeals, of which 27 were against the contents of a statement and 15 were against the decision not to make a statement. It would be useful to know when considering the need and impact of mediation within the SEN framework how many appeals to SENDIST were lodged but following further discussion and negotiation between the Authority and parents, agreement was reached ahead of an appeal.

Consideration must also be given to the reality that much of the challenge to provide the appropriate SEN provision may be influenced by the availability of resources. Mediating between parties who do not have equal access to resources, information and decision making powers such as parents and the Authority may make agreements from mediation challenging and may even be questionable under scrutiny.

However if mediation can reduce the need for appeals and progress more quickly the means to secure the appropriate help for the child then it may be a positive new development but currently the evidence and information on the nature of this service is not sufficient to enable this conclusion.

Rights of child over compulsory school age

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

This is a welcome development enabling further participation of young people in decisions which impact on their education and futures. However where a young person does not lack capacity but does not wish to manage the processes related to this duty it is unclear if they can assign their responsibilities to their parent or a representative if they chose to do so.

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

Similarly, this is a positive development.

Appeals and claims by children

Clause 11: Appeals and claims by children: pilot scheme

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

For these clauses this pilot and the information coming forward from the pilot will determine the impact of this development and the nature of support required for the children to progress their interests and ensure this is an effective development for the children's educational needs. Both are positive developments.

Interpretation

Clause 13: Provision to allow the Authority to maintain a statement of the end of the school year after the 19th birthday of the young person.

This is a very welcome development.

Conclusion

There are also a number of Articles of the 1996 Order which have not been amended by the SEND Bill but will be subject to proposed amendments to the Regulations and will change the processes related to the implementation of these duties. SENAC remains concerned about these changes to the Regulations which require further consideration given the concern expressed during the SEN Consultation in relation to these changes. These are:

- Setting out the format of statements as Coordinated Support Plans (CSPs)
- Changes to Annual Review of Statements from yearly reviews to transition times and key stages.

Further consideration is needed on these especially as during the SEN review consultation support for these changes was low. In relation to the change in format of statements the tick box responses indicated 25% disagreed and 27% strongly disagreed with the proposals on CSPs with only 22% in agreement and only 10% of overall comments supported the introduction of CSPs. It is concerning therefore that the Department of Education's correspondence to the Clerk of the Education Committee in March 2015 outlines the intention to continue to take forward this proposal for amendment in the Regulations.