



Draft legislation on provision for children and young people with special educational needs

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This note describes a system of provision for children with SEN which is in the process of being withdrawn, and is maintained for reference purposes. For information on the SEN system introduced from September 2014, see the Library standard note, [The reformed system for children and young people with Special Educational Needs in England, SN/SP/7020](#)*

The [Queen's Speech](#) on 9 May 2012 announced that the Government would propose measures to improve provision for disabled children and children with special educational needs (SEN). The Department for Education's [press notice](#) on the measures said that they would be contained in the planned *Children and Families Bill*, and that they were the biggest reforms to SEN provision in 30 years.

The announcement followed a period of consultation on the green paper, [Support and aspiration: a new approach to special educational needs and disability](#), published in March 2011. The green paper's main proposals included a new single assessment process for those with special needs and a combined Education, Health and Care Plan from birth to 25, a published 'local offer' of available services, and, a right for parents to be given, if they wish, a personal budget to meet their child's needs. A pathfinder programme is currently testing the key elements of the green paper's proposals.

On 15 May 2012, the DFE published its detailed [response](#) to the formal public consultation on the green paper and also set out the next steps to implement the measures set out in the green paper. It confirmed that the Government would include the measures in the *Children and Families Bill* that would be introduced in this session of Parliament, and would aim to publish a draft Bill on the SEN measures for consultation and pre-legislative scrutiny.

The draft provisions relating to SEN were published on 3 September 2012 in [Draft legislation](#)

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on Reform of provision for children and young people with Special Educational Needs (Cm 8438). The draft legislation extends to England and Wales although most of the provisions apply to England only. Education is a devolved matter, and the Welsh Assembly is currently consulting on proposed changes to the SEN system in Wales.

This Standard Note briefly outlines the main provisions in the draft legislation relating to England, and provides background information. Additional information on the green paper was provided in Library Standard Note [SN/SP/5917](#).

Update: The Education Committee has published its pre-legislative scrutiny [report](#).

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1 Background

1.1 The current special educational needs system in England

Disabled children and young people and children with special educational needs (SEN) are covered by a range of statutory provisions. They may be disabled as defined by the *Equalities Act 2010* or they may have SEN as defined by the *Education Act 1996*. If they are in further education or training they may have learning difficulties as defined in statutory guidance.¹

The following provides a brief overview of the current SEN system in relation to school-aged children. [Library Standard Note SN/SP/5781](#) provides a more detailed account.

A child has special educational needs if s/he has a learning difficulty which needs special educational provision to be made.² A child has a learning difficulty for these purposes if s/he has significantly greater difficulty in learning than the majority of children of the same age, or has a disability which prevents or hinders him or her from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the LA. The legal responsibilities of local authorities (LAs) and schools towards children with SEN are contained in the *Education Act 1996*, as amended. Guidance on the duties of LAs and schools is set out in the statutory [Code of Practice on the Assessment and Identification of Special Educational Needs](#).³

The Code of Practice sets out a graduated approach to SEN that recognises a continuum of SEN which may require increasing action by the school. Currently, there are three levels of intervention for pupils with SEN.

School Action – where the teacher or the school Special Educational Needs Coordinator (SENCO) decides to provide something for the child additional to or different from the school's usual differentiated approach to help children learn. In January 2010, 11.4 per cent of the school population were identified at School Action level, approximately 916,000 pupils;

School Action Plus – where the school consults specialists and requests help from external services. In January 2010, 6.2 per cent of the school population were at School Action Plus level, approximately 496,000 pupils; and

Statement – where the child requires support beyond that which the school can provide and the local authority arranges appropriate provision. In January 2010, 2.7 per cent of the school population or 221,000 pupils had a statement of SEN.⁴

For children aged under five, there is Early Years Action, similar to School Action, and Early Years Action Plus, similar to School Action Plus, as well as statements of SEN; however, most statements are made for school-aged children.

A statement of SEN describes the child's needs and the special provision needed. The *Code of Practice* sets out the detailed procedures relating to the assessment and statements of SEN.

¹ [Support and aspiration: a new approach to special educational needs and disability](#), Cm 8027, March 2011, Introduction, paragraph 23

² *Education Act 1996*, section 312

³ DfES 2001: <http://www.teachernet.gov.uk/docbank/index.cfm?id=3724>

⁴ [Support and aspiration: a new approach to special educational needs and disability](#), Introduction, paragraph 25

A statement is in six parts.

Part 1: Personal details, including the child's name and the name and address of parents.

Part 2: Details of the child's SEN in terms of his or her learning difficulties.

Part 3: Details of the special educational provision that should be made, including the long-term objectives to be achieved, and any arrangements for setting short-term targets and monitoring progress towards those targets.

Part 4: The type and name of the school where the SEN will be met, or the arrangements for education, other than in school.

Part 5: Details of all relevant non-educational needs, as agreed between the health services, social services or other agencies and the LA.

Part 6: How the non-educational provision required to meet the needs set out in Part 5 should be met, including the objectives of the provision and arrangements for monitoring progress in meeting these objectives.⁵

Parts 2, 3 and 4 of the statement are legally binding on the LEA. However, parts 5 and 6 are not. This means that there is a right of appeal to the First-tier (SEN and disability) Tribunal about parts 2, 3 and 4.

Local education authorities and maintained schools can refuse mainstream education, against parental wishes, only on the grounds that it would be incompatible with the efficient education of other children (where there are no reasonable steps to be taken to prevent incompatibility). Statutory guidance on this was issued in *Inclusive Schooling*, published in 2001 by the then Department for Education and Skills.

The [First-tier Tribunal \(Special Educational Needs and Disability\)](#) has issued a guide for parents on *How to Appeal against a SEN Decision*. This explains when parents can appeal to the Tribunal, and how to go about making an appeal.

The *Children, Schools and Families Act 2010* introduced provision for an additional right of appeal for parents where, following a review of a statement of SEN, the local authority decides not to make any changes. Library [Research Paper 09/95](#) and Library [Standard Note SN/SP/3375](#) provided background on the Labour government's policies on SEN.

The Local Government Ombudsman (LGO) may deal with certain complaints about local authority provision for children with SEN statements. Essentially the LGO is concerned with complaints about the SEN process - for example, where the LA has failed to follow the timescale for issuing a proposed statement of SEN or where the LA has failed to ensure that certain provision, as required in a child's statement, is provided. Further details about its remit are given in an LGO factsheet, *Complaints about special educational needs* (last updated 31 July 2012).

1.2 Concern about the operation of the SEN system

In recent years, there has been growing concern about the operation of the SEN system. In July 2006, the Select Committee on Children, Schools and Families reported on special educational needs, and highlighted strong concerns about parents' confidence in the SEN

⁵ [Guide to the Law for School Governors](#), May 2012

system. Library [Standard Note SN/SP/3375](#) provided background on the Committee's report and the Labour government's response to it.

Part of the Labour government's response to the issues raised by the Select Committee was to ask Brian Lamb, the chair of the Special Educational Consortium, to carry out an inquiry into how parental confidence in the SEN assessment process might be improved. A series of reports was published. (These are currently available on the [National Archives](#) website.)

In addition, a number of reports looked at specific aspects of SEN provision⁶ and an Ofsted review of SEN, *Special educational needs and disability review – a statement is not enough*, which was commissioned by the Labour government, was published on 14 September 2010.

The Ofsted review considered how well the legislative framework had served children with SEN, and reported on a range of concerns about the current system. The review found that just over one in five pupils – 1.7 million school-age children in England – were identified as having special educational needs. Since 2003, the proportion of pupils with a statement of special educational needs had slightly decreased from 3% to 2.7%, while the proportion identified as needing less intensive additional support at School Action or School Action Plus had increased from 14.0% in 2003 to 18.2% in 2010. Amongst other things, the review said that as many as half of all pupils identified for School Action would not have been identified as having special educational needs if schools had focused on improving teaching and learning for all, with individual goals for improvement.

The review emphasised that providing an SEN statement itself did not mean that a child's current needs were being met. The key implication of the review's findings was that any further changes to the system should focus not on tightening the processes of prescribing entitlement to services but should focus on improving the quality of assessment; ensuring that where additional support is provided, it is effective; improving teaching and pastoral support; developing strategy for specialist provision and services; simplifying legislation so that the system is clearer for parents, schools and other providers; ensuring that schools do not identify pupils as having special educational needs when they simply need better teaching; and ensuring that those providing services focus on the outcomes for the children and young people.

The review noted that the legislation, guidance and systems surrounding special educational needs had become very complex over the last 30 years with the result that the system had become difficult for everyone, especially for parents and young people, to understand and navigate. Part of the problem was the incremental nature of the changes, and the review said that any further changes to legislation or guidance should not add incrementally to the current arrangements. Instead, it said, changes should simplify arrangements and improve consistency across different services, and for children of different ages and levels of need. The review observed that the language of special educational needs had become highly contentious and confusing for both parents and professionals, and that the term 'special educational needs' was used too widely. [Library Standard Note SN/SP/5781](#) gives further background on the Ofsted review.

1.3 Post 16 provision

Most young people's special educational needs are identified before they reach the end of compulsory education, currently at age 16. A statement of SEN will stop if a young person

⁶ See [Library Standard Note SN/SP/5781](#)

leaves school at 16; however, if the person remains at school, the local authority can maintain a statement until s/he reaches 19 or until the end of the school year when s/he finishes the course. If the young person leaves school for further education, his/her SEN is assessed under a different process, the Learning Difficulty Assessment (LDA). This does not have the statutory rights and protections associated with statements of SEN.

The *Learning and Skills Act 2000* placed a duty on a local authority to arrange for a Learning Difficulty Assessment to be conducted for a young person with a statement of SEN who they expected to leave school and to receive post 16 education and for a young person who did not have a statement but appeared to have learning difficulties and was receiving, or was likely to, receive post 16 education. LDAs set out a student's learning goals and the support and learning provision needed to meet those needs. The powers and duties of local authorities in relation to LDAs are set out in DFE guidance, [Section 139a Learning Difficulty Assessments Guidance for Local Authorities](#).

In November 2011 the National Audit Office published a report [Oversight of special education for young people aged 16-25](#). This found wide local variations in the proportions of young people studying in different provider types. In some areas, almost all students aged 16 to 18 with SEN study in schools, while elsewhere further education predominates. Amongst other things, the report commented on problems with LDAs:

Local placement decisions for individual students

16 Learning Difficulty Assessments are key to local placement decisions, but require improvement. Ofsted found that these assessments were inconsistent, over-dependent on historic links with providers, and can lead to significant inequities in residential placement decisions. Only half of local authorities responding to our survey felt the assessments were very effective. Assessments should consider student and parental preference, but disputes about placement decisions can lead to appeals and unforeseen costs, particularly around high-value placements. Although information can help parental and student choice, only 25 per cent of local authorities responding to our survey said they routinely provide information directly to parents on education providers' outcomes, and only 20 per cent on quality.

17 Placement decisions for students with higher-level needs are not consistently informed by a full analysis of comparable costs, creating risks to value for money. When deciding between independent specialist provision and general further education, comparable costs may include elements not funded by education budgets, but nonetheless paid for by the public purse. For example, while many local authorities consider a range of costs, less than a third responding to our survey have data on health and social care costs for students in mainstream settings. Our analysis suggests that taking all comparable costs into account could influence whether local authorities choose mainstream or independent specialist provision.⁷

Library standard note [SN/SP/6341](#) provides a more detailed account of provisions for students with learning difficulties and disabilities in post-16 education in England.

2 The case for change and the green paper

The green paper, [Support and aspiration: a new approach to special educational needs and disability](#), was published on 9 March 2011. It contained wide-ranging proposals to respond

⁷ [Oversight of special education for young people aged 16-25](#) National Audit Office, 4 November 2011 HC 1585

to the criticisms of the present system. The Education Secretary announced the detailed proposals in a [Written Ministerial Statement](#) on the 9 March 2011.⁸

The current problems and how the proposals would address these problems were summarised in the [DFE press notice on the green paper](#). In particular it stressed that the Government wanted to address the following problems.

parents having to battle to get the support their child needs

SEN statements not joining up education, health and care support

children falling between the gaps in services or having to undergo multiple assessments

multiple layers of paperwork and bureaucracy adding delays to getting support, therapy and vital equipment

a confusing and adversarial assessment process, with parents' confidence in the system undermined by the perceived conflict of interest where the local authority must provide SEN support as well as assess children's needs

Ofsted and others suggest that too many children are being over-identified as SEN, which prevents them from achieving their potential because teachers have lower expectations of them.

The Government proposed to:

include parents in the assessment process and introduce a legal right, by 2014, to give them control of funding for the support their child needs;

replace statements with a single assessment process and a combined education, health and care plan so that health and social services is included in the package of support, along with education;

ensure assessment and plans run from birth to 25 years old;

replace the existing complicated School Action and School Action Plus system with a simpler new school-based category to help teachers focus on raising attainment;

overhaul teacher training and professional development to better help pupils with special educational needs and to raise their attainment;

inject greater independence from local authorities in assessments by looking at how voluntary groups might coordinate the package of support; and

give parents a greater choice of school and give parents and community groups the power to set up special free schools.

In relation to the last point, the green paper said that the Government would 'remove the bias towards inclusion' and improve the range and diversity of schools so as to:

give parents a real choice of school, either a mainstream or special school. We will remove the bias towards inclusion and propose to strengthen parental choice by improving the range and diversity of schools from which parents can choose, making sure they are aware of the options available to them and by changing statutory guidance for local authorities. Parents of children with statements of SEN will be able

⁸ [HC Deb 9 March 2011 cc63-5WS](#)

to express a preference for any state-funded school – including special schools, Academies and Free Schools – and have their preference met unless it would not meet the needs of the child, be incompatible with the efficient education of other children, or be an inefficient use of resources. We will also prevent the unnecessary closure of special schools by giving parents and community groups the power to take them over⁹

The Education Secretary said that central Government could not achieve the ambitious programme of reform set out in the green paper through directing and managing change itself; the proposals were for practical testing in local areas through local pathfinders, and the Government would set out detailed plans by the end of the year.¹⁰

2.1 Reaction to the green paper

Initial reactions to the green paper were mixed. There was general support for a creating a single system of assessment of needs, and the emphasis on training of staff was welcomed. However, some commentators raised concerns about funding and the delivery of support for pupils in a diverse school system. Some parents did not recognise the description of the system being biased towards inclusion in mainstream schools. There was also concern that any attempt to redefine what constitutes SEN could lead to less support for pupils. Library Standard Note [SN/SP/5917](#) includes a selection of the initial reaction made to the proposals.

The consultation on the green paper ran from 9 March to 30 June 2011.

On 16 August 2011 the House of Commons Education Committee published oral evidence taken on the SEN green paper on 17 May 2011.¹¹ Graham Stuart, chair of the Education Committee, said that the green paper had been broadly welcomed, and noted that the big question was whether the resources would be in place to deliver the reforms set out in the green paper. Responding, Sarah Teather, then Minister of State for Children and Families, Department for Education, said that she believed that the resources were available, and that the proposals were aimed at trying to use them more efficiently. She stressed the need for ‘a better quality of engagement between parents, local authorities and the health service at an earlier stage, so that you have a better quality of dialogue early and people have more confidence in the system and are less likely to move through the different stages to get to the end point of a tribunal, and also a focus on getting the whole system to work more effectively.’¹²

The subsequent questions and answers included discussion about school choice and the possibility of placements at independent or non-maintained schools; the role of Ofsted in holding schools to account for their SEN provision; the difference between the proposed education, health and care plans and the existing statementing system; the recruitment and role of health visitors; the funding and training of SENCOs; teacher training about SEN; the curriculum and SEN; alternative provision; provision for adults with SEN; the careers service and the needs of children with SEN; the use of personal budgets; the health service and proposed reforms; and, looked after children with SEN and multiple placements.

Introducing a [debate on SEN in Westminster Hall on 6 September 2011](#), Annette Brooke said that while she welcomed the green paper there were concerns particularly relating to the

⁹ [Support and aspiration: a new approach to special educational needs and disability](#), Executive summary, paragraph 7

¹⁰ [HC Deb 9 March 2011 cc63-5WS](#)

¹¹ [HC 1019-i, 16 August 2011](#)

¹² *Ibid.*, Q38

provision of SEN education by non-maintained and independent special schools, which she thought had been overlooked by policy makers.¹³

2.2 Pathfinders

On 30 June 2011 the Government invited bids from local authorities and their partners to become green paper pathfinders (SEND pathfinders)¹⁴ to test the core proposals from the green paper - namely, a single assessment process; an Education, Health and Care Plan; greater engagement of the voluntary sector; the use of personal budgets; and, improved transition planning for young adults.

20 pathfinders were announced.¹⁵ These cover 31 local authorities and their PCT and emerging Clinical Commissioning Group partners. A list of the pathfinders is available on the [DFE website](#). The Department announced the appointments of SQW to evaluate the pathfinder programme and Mott MacDonald to provide support to the pathfinders.

The terms of reference for the SQW evaluation and the evaluation framework were set out in an [Evaluation Briefing Report](#) published by SQW in January 2012.

2.3 Direct payments pilot scheme

On 1 November 2011, during the debate on the *Education Bill* (in the Report Stage fourth day debate in the Lords), Lord Hill of Oareford moved new clauses that were added to the Bill to allow local councils to test the use of direct payments for meeting special educational needs.¹⁶ The provisions for the pilot scheme are now contained in section 75 of the *Education Act 2011*. It inserted new provisions into the *Education Act 1996*. The new sections are summarised in the [Explanatory Notes on the Education Act 2011](#).

The details of the pilot scheme are set out in the [Special Educational Needs \(Direct Payments\) \(Pilot Scheme\) Order 2011](#), SI 2012 No 206. Schedule 2 of the Order lists those local authorities in the pilot scheme.

Library Standard Note [SN/SP/5917](#) provides further background and comment on the pilot scheme.

3 Government's response to the green paper consultation and next steps

On 15 May 2012, the Government published its detailed response to the formal public consultation on the green paper: [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#).¹⁷ This confirmed that the *Children and Families Bill* would be introduced in this session of Parliament and that the Government intended to publish a draft Bill on the SEN measures for consultation and pre-

¹³ [HC Deb 6 September 2011 c55WH](#)

¹⁴ [HC Deb 20 July 2011 c1046W](#)

¹⁵ [HC Deb 17 October 2011 c609](#)

¹⁶ [HL Deb 1 November 2011 cc1197-1201 and c1210-11](#)

¹⁷ [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#), DFE, 2012

legislative scrutiny. A separate summary report of the consultation responses to the green paper was also published.¹⁸

In his [Written Ministerial Statement](#) to the House of Commons on 15 May 2012, Michael Gove said that the draft Bill would be informed by early lessons from the pathfinders and that

The practice developed by the pathfinders will be shared widely with other local areas. An interim evaluation of the pathfinders will be published by October 2012, with a final evaluation report following in 2013....

Our aim is to publish a draft Bill in the summer which would be informed by early lessons learned from the pathfinders. There would then be further opportunities for lessons learned from the pathfinders to inform the pre-legislative scrutiny stage and the Bill itself. Our intention remains, subject to Parliament's approval, to implement the reforms from 2014. Lessons learned from the pathfinders and evaluation of their activity will inform how the reforms are implemented.¹⁹

The following highlights comments on some of the key aspects of the proposals. Readers may consult the summary report of the consultation responses and the Next Steps document for information on any aspect not covered here.

A local offer of support

The DFE's summary report of the consultation responses to the green paper said that the idea of a locally published offer of support had been welcomed. It was suggested that it should cover education and health provision and access to various types of support.²⁰ The Government's response to the consultation on the green paper, [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#), said that while legislation would set out the broad national framework for the local offer, local areas would determine 'the shape, scope and content' of the offer in their areas in collaboration with local parents and local services.²¹ In her evidence to the Education Committee on 20 June 2012, Sarah Teather confirmed that some elements of the local offer would be stipulated in legislation.

A single assessment process and Education, Health and Care Plans

The green paper made it clear that the Education, Health and Care Plan (EHCP) would provide the same statutory protection to parents as a statement of SEN and would include a commitment from all parties to provide their services. The pathfinders are looking at how this can be achieved.

The DFE's summary report of the consultation responses to the green paper said that most respondents had agreed with the proposals for a single assessment process and an EHCP. Many respondents, it said, thought that this would lead to quicker access to services, a simpler process for parents and less bureaucracy. However, reservations had been

¹⁸ *Support and aspiration: a new approach to special educational needs and disability, Analysis of responses to the Green paper*, Public Communication Unit, DFE, May 2012. The House of Commons Library's Social Policy Section has received a copy in electronic form from the DFE. At the time of writing, there does not yet appear to be an online version available on the DFE website.

¹⁹ [HC Deb 15 May 2012 c24-25WS](#)

²⁰ *Support and aspiration: a new approach to special educational needs and disability, Analysis of responses to the Green paper*, Public Communication Unit, DFE, May 2012.

²¹ [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#), paragraph 2.9

expressed about the ability of the agencies to work together, the statutory basis of the EHCP and the capacity of the education, health and social care sectors. It was suggested that ‘a range of medical, educational, social and emotional assessments should be conducted.’ There was support for having a key worker for each family to guide them through the process and to co-ordinate services. There were mixed views on the role that voluntary and community sector bodies could play, with a general view that they would lack the capacity and expertise to conduct statutory assessments but that they were ideally placed to provide information, advice and advocacy for parents.²²

Support and aspiration: a new approach to special educational needs and disability - progress and next steps said that the Government was considering ways to ensure that children, young people and families would have confidence in seeking redress if they did not get the services set out in the Plan. It also said that the proposed legislation would seek to build on the *Health and Social Care Act 2012* to ensure that services for the disabled and those with SEN are planned and commissioned jointly between local authorities and clinical commission groups.²³

Personal budgets

The DFE’s summary report of the consultation responses to the green paper noted that there were mixed views on the proposals for an optional personal budget for parents.²⁴ Some felt that this would offer parents more choice; however about 60% of responses expressed concern that personal budgets could be an unwelcome extra responsibility for some parents unless support could be provided for them. Around 25% of respondents commented on funding; some felt that core provision should continue to be provided by the school, local authority or NHS and that a personal budget should be used for ‘add-ons’ only.²⁵

There have already been pilots of Individual Budgets for disabled children and personal health budgets in the NHS in England, and the green paper pathfinders are testing the use of direct payments for educational provision.

School preference

The DFE’s summary report of the consultation responses to the green paper said that there was no real consensus of opinion on whether the current statutory guidance on inclusion and school choice allowed for parental preference of school.²⁶

Support and aspiration: a new approach to special educational needs and disability - progress and next steps said that the responses to the green paper all supported the proposal to change the law to give parents of children with statements of SEN (and, in future, Education, Health and Care Plans) identical rights to express a preference for any state-funded school, including mainstream or special schools, academies or free schools, and have their preferences met by the local authority unless to do so would be unsuitable for the child, incompatible with the education of other children at the school, or an inefficient use of

²² *Support and aspiration: a new approach to special educational needs and disability, Analysis of responses to the Green paper*, Public Communication Unit, DFE, May 2012.

²³ *Support and aspiration: a new approach to special educational needs and disability - progress and next steps*, paragraphs 1.39 to 1.42

²⁴ *Support and aspiration: a new approach to special educational needs and disability, Analysis of responses to the Green paper*, Public Communication Unit, DFE, May 2012.

²⁵ *Support and aspiration: a new approach to special educational needs and disability - progress and next steps*, paragraphs 2.29 to 2.31

²⁶ *Support and aspiration: a new approach to special educational needs and disability, Analysis of responses to the Green paper*, Public Communication Unit, DFE, May 2012.

resources. Organisations representing independent and non-maintained special schools wanted the proposed change to be applied to parents wanting places for their children at those schools, and the Next Steps document said that the Government was discussing the implications of such a change with the sector.²⁷

The opportunity to express a preference would be extended to young people in the FE sector and this could have significant implications for local authorities and FE providers.

Mediation

The Government want to promote the role of mediation so that parents and local authorities try to resolve issues before a parent can register an appeal with the Tribunal.

The DFE's summary report of the consultation responses to the green paper said that most respondents supported the idea of mediation believing that it could be a useful means of avoiding tribunals. There was some concern however that mediation would bring additional costs and further delay. Providing mediation across education, health and social care was supported provided it was conducted by an independent party and advocacy was available for parents.²⁸

Support and aspiration: a new approach to special educational needs and disability - progress and next steps said that the current timescales for registering an appeal would be retained so that parents who wished to appeal to the Tribunal would not face any delay. Exploring how mediation could improve parents' and carers' experience of the system is one of the elements which all of the green paper pathfinders will be testing.²⁹

Mediation and the right to appeal would be extended to cover young adults up to the age of 25.

Giving children the right to appeal

Currently, the *Education Act 1996* and the *Equality Act 2010* give only parents the right to appeal to the Tribunal and make disability discrimination claims. The Government wish to work with the First-tier Tribunal (SEN and Disability) to pilot giving children the right to appeal and making disability discrimination claims in two or three local authorities with a view to extending the right to all children across England. *Support and aspiration: a new approach to special educational needs and disability - progress and next steps* said that the Government would seek a power to conduct the pilots.³⁰

4 Oral evidence taken before the Education Committee, 20 June 2012

The Education Committee took evidence from Philippa Stobbs, Vice Chair (Policy), Special Educational Consortium; Jane McConnell, Chief Executive, IPSEA; Professor Brahm Norwich, Professor of Education Psychology and SEN; University of Exeter, Martin Bacon, Principal, Swavesey Village College; Debbie Jones, Director of Children's Services,

²⁷ *Support and aspiration: a new approach to special educational needs and disability - progress and next steps*, paragraphs 2.17 to 2.22

²⁸ *Support and aspiration: a new approach to special educational needs and disability, Analysis of responses to the Green paper*, Public Communication Unit, DFE, May 2012.

²⁹ *Support and aspiration: a new approach to special educational needs and disability - progress and next steps*, paragraph 2.42 and 2.43

³⁰ *Support and aspiration: a new approach to special educational needs and disability - progress and next steps*, paragraph 2.47

Lambeth, and President, ADCS; and, Sarah Teather, then Minister of State for Children and Families.³¹

There was discussion about whether draft legislation should be delayed until more information about the pathfinders is available, especially as many of the pathfinders are in the early stages. Parental concerns were raised about the changes taking place at a time of local authority funding cuts. In addition to funding issues, there was discussion about the 'voice of the child', the local offer, assessment of needs and the single plan, the issue of independence of assessments, personal budgets, and better use of existing resources. Other issues raised included SEN and academies, exclusion as an indicator of SEN, planning for the transition to adulthood, the changing role of local authorities in the context of academy conversions and a reduction of in-house expertise as local authorities move to become commissioning authorities.

In reply to a question from the Chair about the timing of the introduction of draft legislation, the Minister stressed that there would be time for proper scrutiny:

We are not talking about an academies-style speed of getting through the Commons; we have time to go through that-time during the Committee phase and Report stage. We do not expect to receive Royal Assent until 2014, and then we need to think carefully about how we implement, to make sure that we are doing that right. In terms of the evaluation, SQW, who are our partners for this, are doing regular updates; as it happens they are publishing another update next week, which is a couple of months out of date. Our first proper evaluation will come in time for you to do pre-legislative scrutiny, but regular updates will be published all the way through, so it is not as though this is going into a black box and we are waiting for the answers to come out the other end.³²

There was discussion about the single assessment, and the Minister noted that what is being proposed is a 'single assessment process rather than a single assessment.' The Minister outlined the new approach as follows.

I want to tell you a bit about the re-engineering of the whole system; it is worth thinking about what we are doing in the whole to give you a sense of the big picture, as it is quite a big document, as you said. First of all, the local offer, laying out what parents should expect, should change the relationship right from the beginning. Instead of starting with a blank sheet of paper, you are starting with an offer of services about what is involved, involving everybody-from early years, professionals, schools, right up to colleges, health, and social care-and better earlier identification. We have already begun putting some of those steps in place with the new early years foundation stage curriculum and the two and two-and-a-half-year-old check. There is better training for teachers, which I can talk to you about in a minute.

The protections are being extended downwards; the statementing process at the moment normally only begins when you start at school. The last Government tried to discourage areas from using the statementing process in the early years. This is explicitly 0-25, and we are effectively formalising some of the triggers that exist in the system where it works well, so that health professionals can refer in to the system, for example. We want team around the child and early support, which is really good practice, to become best practice right from the beginning, so that instead of fighting for the first four or five years, until your child starts school, that should be in place right

³¹ [Oral evidence taken before the Education Committee](#), 20 June 2012, HC 147

³² *Ibid.*, Q61

from the beginning. We are extending the age ranges, extending those statutory protections from 16 to 25, which is new.

There is a more integrated, streamlined assessment process, working with parents from the beginning, and that is really important in what is being tested. We have a joined-up plan, making clear who will pay; joint commissioning and duties on health for the first time, to make it clear that you have to plan and commission services together with the local authority, so that for the first time you might actually have the right types of services available that are needed by families and children in a particular area. The personal budget is not just about giving more choice to parents; it also requires people to set aside the money, and not just stick it in a plan and then not come up with the money to pay for it. Mediation will become a compulsory part of the process.

The whole system is designed to make sure that we can reach agreement at an earlier stage—that we are less likely to have to go all the way through to the end, fighting the process. Nevertheless, we intend to leave in the statutory protections that exist in the current statementing system, so you still have recourse to the tribunal. Our purpose is to try to prevent everybody from having to go all the way to the end, and to make sure that we are more likely to get agreement, and put safeguards in place from the very beginning. This is a very big, radical change, and it involves lots of different pieces of the jigsaw.³³

The Minister noted that local offers will vary but that the Government will stipulate the kinds of things that should be included.

Sarah Teather: It is inevitable, and in some ways desirable, that local offers should be different, because it is a local offer, not a national offer. We intend to stipulate the kind of elements that should be in the local offer, and the legislation will do that, and you will be able to see that.

Q87 Ian Mearns: So you will have a minimum standard?

Sarah Teather: That is not quite what I said. We intend to stipulate the kinds of things that should be included in the local offer—that it should include an offer of services from early years, from schools and from colleges. I would like to see areas that are really good at something championing that in their local offer, and not just making it something that you need to reach a threshold in order to attain. There are areas that are genuinely good at something. I know that we do not believe that, because we believe that the current system is so completely broken, but in fact the local offer comes out of experience in one local authority who tried this out and who had worked with parents in different ways. Some elements will be stipulated in legislation, but this is intended to be additional. You still have the statutory system, which functions through the education, health and care plan, which replaces statements and LDAs; however, this is intended to be an additional offer.³⁴

The Minister commented in some detail on the pathfinder experiences. Other issues covered included: mediation, funding issues, the role of health visitors, direct payments and local providers, speech and language therapy services, inclusion guidance, special schools, school exclusions, alternative provision, new duties on health to jointly plan and commission provision, the role of voluntary organisations and the issue of separating assessment and the funding of provision.

³³ Q67

³⁴ Q86 and Q87

On 2 July 2012, the Minister wrote to the committee with further information about issues that were raised during the evidence session.³⁵

5 Draft legislation

5.1 The Queen's Speech

The [Queen's Speech](#) on 9 May 2012 announced that

My Government will propose measures to improve provision for disabled children and children with special educational needs.

The Department for Education's [press notice](#) on the announcement said that the measures would be contained in the planned *Children and Families Bill*.

5.2 The draft legislation

The draft provisions relating to SEN were published on 3 September 2012 in [Draft legislation on Reform of provision for children and young people with Special Educational Needs](#) (Cm 8438). The [Written Ministerial Statement](#) announcing publication of the draft provisions summarised the proposed changes as follows.

New education, health and care plans which will ensure more streamlined and integrated support for children, young people and families than the current statement and learning difficulty assessment.

A new duty for joint commissioning which will require local authorities and health bodies to take joint responsibility for providing services.

A requirement on local authorities to publish a local offer of services for disabled children and young people and those with special educational needs.

New protections for young people aged 16 to 25 in further education and a stronger focus on preparing them for adulthood.

Parents and young people, for the first time, to be entitled to have a personal budget, extending their choice and control over their support.

Further education colleges for the first time and all academies, including free schools, to have the same duties as maintained schools to safeguard the education of children and young people with special educational needs (SEN).

Previously further education colleges had not been subject to SEN duties. The provisions relating to academies reflect the requirements currently in the majority of funding agreements signed since the introduction of the Academies Act 2010. Placing these requirements on the face of the legislation will give greater clarity to academies, parents and young people and will ensure further education colleges face the same requirements for the first time. The draft provisions would ensure that parents, young people and children are on the same footing whether they attend (or wish to attend) a maintained school, an academy, or a further education or sixth form college.³⁶

The draft legislation consists of 51 clauses, and *Explanatory Notes* on them have been prepared by the DFE. Both the clauses and *Explanatory Notes* are contained in Cm 8438: [Draft legislation on Reform of provision for children and young people with Special](#)

³⁵ [Sarah Teather letter following Special Educational Needs session](#), 2 July 2012 (as taken from the [Education Committee website](#)).

³⁶ [HC Deb 3 September 2012 c9-10WS](#)

Educational Needs. The *Explanatory Notes* also refer to four economic impact assessments covering: the single assessment process and the Education, Health and Care Plans and the changes to parental choice of schools; the local offer; the option for personal budgets; and children's rights to appeal, and compulsory mediation (*Explanatory Notes*, paragraph 168).³⁷

The following highlights the main provisions relating to England, drawing on the *Explanatory Notes*, which give further details.

Clauses 1 to 4 cover which children and young people the provisions relate to, what is meant by special educational provision (SEN), and when a local authority is responsible for a child or young person with SEN. The definition of SEN remains the same as that currently contained in *Education Act 1996*, section 312.

Clauses 5 and 6 make provision for promoting the integration of special educational provision with health and social care provision (EHC). **Clause 6** requires a local authority and partner clinical commissioning groups to make 'joint commissioning arrangements' in relation to education, health and care provision for children and young people who have special educational needs.

Under **Clause 7** a local authority must keep SEN and social care provision under review.

Clause 8 to 10 require co-operation between local authorities and a range of bodies commissioning and providing services for children and young people with SEN.

Clauses 11 and 12 require local authorities to provide information about services available to local children and young people with SEN. A 'local offer' must be published, and regulations may make provision about the information to be included, how it is to be published, who is to be consulted by the authority when drawing up the offer, and how parents and children with SEN are to be involved. Clause 11(5) states that the regulations may require a local offer to include certain information. This includes information about an education, health and care assessment.

Clauses 13 and 14 set out the action a local authority must take regarding education placements in mainstream provision for children and young people with SEN.

Clause 16 makes provision for assessing children and young people with SEN.

Clauses 17 to 27 set out the duties on local authorities for preparing and delivering Education, Health and Care Plans. Local authorities must give parents of children with plans and young people with plans the chance to say where they want to be educated. Commenting on the provisions, the *Explanatory Notes* state that

14. They largely replicate provision in the Education Act 1996 but increase the range of institutions which parents and young people can request to be named in the Plan and extend the scope of a statutory plan to those in further education or training (up to the young person's 25th birthday when appropriate).

Clause 26 makes provision for personal budgets. Regulations may make detailed provision relating to personal budgets and direct payments. Clause 26(4) provides that regulations authorising direct payments must require the consent of a child's parent or a young person before direct payments are made.

³⁷ At the time of writing, the impact assessments have not yet been posted on the DFE website.

Clauses 28 to 32 set out the circumstances in which parents and young people can appeal to the independent First-tier Tribunal (Special Educational Needs and Disability) where they do not agree with the decisions made by their local authority in relation to assessing SEN and making SEN provision. **Clause 29** introduces a new requirement for parents or young people to take part in mediation before appealing to the Tribunal. **Clause 30** provides arrangements for resolving disagreements between a local authority or school or college and parents and young people. Use of those arrangements would be voluntary. **Clause 31** empowers the Secretary of State to establish pilot schemes to enable children themselves to make appeals to the Tribunal, and **clause 32** would enable this to be introduced more generally if the pilots were successful.

Clauses 34 to 38 set out the local authority's powers and duties in relation to arranging and/or funding special educational provision for individual children or young people outside schools, post-16 institutions or providers of early years education in England and in specialist institutions outside England and Wales; supplying goods and services to others to help them make special educational provision; and accessing schools and other institutions to monitor education and training provided for children or young people with Education, Health and Care Plans.

Clauses 39 to 42 set out the specific duties of schools and other institutions in relation to children and young people with SEN. Governing bodies of mainstream schools (both local authority maintained schools and academies), maintained nursery schools, further education colleges and sixth form colleges, proprietors of 16 to 19 academies and alternative provision academies and management committees of pupil referral units must use their 'best endeavours to secure SEN provision'. The clause replaces and expands section 317 (1)(a) of the *Education Act 1996*, and takes account of the extended age range of the new SEN provisions and applies the duty to academies, further education institutions and pupil referral units.

Clause 40 replaces existing provision relating to Special Educational Needs Co-ordinators. **Clause 41** makes provision for informing parents and young people when SEN provision is being made for a child or young person who does not have an Education, Health and Care Plan. (Those who have a Plan already know that SEN provision is being made.)

Clause 42 imposes a duty on the governing bodies of maintained schools, maintained nursery schools and proprietors of Academy schools to prepare a report containing 'special educational needs information'.

Clause 43 requires the Secretary of State to use his information-gathering powers to secure special needs information that would assist him or others in improving the well-being of children and young people under 19 with special educational needs.

Clause 44 requires the Secretary of State to issue a code of practice giving guidance to local authorities in England, the governing bodies of schools and further education institutions (further education colleges and sixth form colleges), the proprietors of Academies, the management committees of pupil referral units and persons providing relevant early years education about their responsibilities under the proposed provisions. The clause replaces existing provision relating to the code on SEN, and widens the scope of who must have regard to the code.

Clause 45 changes the definition of a ‘special school’ to provide that a special school is a school specially designed to make special educational provision and can be maintained by a local authority or be an academy or non-maintained special school.

Clauses 46 to 49 contain various supplementary provisions including provision relating to parents and young people lacking mental capacity, and the position of children and young people in custody.

Clauses 50 and 51 cover commencement and extent. On the extent and application of the draft provisions, the *Explanatory Notes* state:

24. These provisions extend to England and Wales, but the majority only apply in England. There will be some cross border effects, where a child or young person in England attends a school or institution in Wales, and the amendments made by clause 45 will apply in Wales. A legislative consent motion will be sought.

25. The provisions do not extend to Scotland or Northern Ireland, and so have no effect there.

Paragraphs 165 to 167 of the *Explanatory Notes* comment on the provisions’ anticipated effects on public expenditure, and paragraphs 169 to 170 comment on the compatibility of the provisions with the European Convention on Human Rights.

5.3 Pre-legislative scrutiny

Sarah Teather wrote to the Education Select Committee inviting it to carry out the pre-legislative scrutiny of the draft clauses. The letter summarised the draft clauses and set out specific issues where it would be helpful to have views should the committee carry out the pre-legislative scrutiny.³⁸ The letter also noted that the draft provisions do not contain clauses on transitional arrangements for moving from the current system to the new system; however, it said that the Government is currently considering a number of options and would also like views on transitional arrangements.

The following highlights the main areas on which the Committee’s views are sought, but readers should consult the DFE’s letter for full details.

Use of terms ‘special educational needs’ and ‘learning difficulties and disabilities’

Views would be welcome on whether it would be appropriate to move away from ‘special educational needs’ and use the term ‘learning difficulties and/or disabilities’ instead in the new system.

When a local authority is responsible for a child or young person

How do clauses 3 and 4 work with the specific duties in other provisions. Are they sufficiently coherent?

Integrated working

Views on whether to extend the scope of the integrated provision requirement to all children and young people. including those with special educational needs, would be welcome.

³⁸ [Letter from Sarah Teather, then Minister of State for children and Families to Graham Stuart, chair of the Education Select Committee](#), DFE

Extending choice

We remain open to considering the range of schools and institutions included in the new duty and would welcome views.

Making provision for 19-25 year olds

It would be helpful to know whether the provisions provide a suitable balance between rights, protections and flexibility.

Social care

We would welcome views on whether the provisions achieve the aim of integrated planning and assessment across agencies. We would welcome views on how the regulations could best be utilised to achieve the aim of integrated support. We would welcome views on these new powers and the impact they will have on young people's transition into adult services.

Approach to ensure 'portability' of the social care support children receive as they move from one local authority area to another

Children and young people in or leaving custody

Consideration of how provision could be used to reinforce protections for young people with special educational needs who are in custody or who are leaving custody.

5.4 Some initial reaction to the draft legislation

The following notes a selection of initial comment (available at the time of writing) from SEN and disability organisations; Members who are interested in particular organisations not covered below may ask the Library to seek further information.

Nasen³⁹ has welcomed the draft legislation:

Lorraine Petersen, nasen's CEO says: The initial SEND Green Paper (March 2011) the Next Steps document (March 2012) and this resulting draft legislation will have a radical impact on how schools support children and young people with special educational needs and disabilities in the future. I welcome this commitment from the government to improve the SEN system and thus improve the life/educational chances of our most vulnerable young people. We need to ensure that all the work that is currently taking place especially within the Pathfinders and the voluntary and community sector is not wasted and will support the final legislation as it passes through Parliament. We have a real opportunity to make sure that this legislation secures a better future for all children and young people.

The initial points to highlight are:

Legal definition of special educational needs remains the same

Local authorities and clinical commissioning groups must make arrangements for jointly commissioning services for children with SEN in their area

³⁹Nasen formerly the National Association for Special Educational Needs was formed in 1992 when the National Association for Remedial Education (NARE) amalgamated with the National Council for Special Education (NCSE). Further details about it are on its website: <http://www.nasen.org.uk/about-nasen/>

Local authorities must produce their 'local offer' of available education, health and care services

Education, Health and Care Plans (0 – 25) replace statements of SEN

Section 139A assessment (Learning Difficulty Assessments) cease to apply and is replaced by a re-assessment /annual review of the EHC Plan

All of the provisions of the Bill will apply to all schools including Academies and Free Schools

Schools must still have an SEN Co-ordinator

Right to a mainstream education remains the same

Local authorities must prepare personal budget in relation to an EHC plan where a request has been made by the parent or young person

Compulsory requirement for a parent or young person to participate in mediation before they can appeal to the Tribunal

There will be a revised Code of Practice

Nasen will be making a more detailed response to the draft legislation after consulting with its members and other interested parties.⁴⁰

IPSEA's Chief Executive, Jane McConnell, commented as follows.

Now is the time to consider the system of support these draft provision are looking to create and assess whether they will improve and enhance those that are already in place for children, young people and their families across education, social care and health. It is time to be clear and transparent about what can and cannot be expected to be provided by any system. This needs to be a system that works for all children and young people – not just those that have parents to “police” and enforce it. We look forward to working closely with the Government to make the most of this opportunity.⁴¹

Julie Jennings, Chair of the Special Educational Consortium, issued the following statement on the draft legislation.

As Chair of the Special Educational Consortium, I welcome the Government's clear commitment to improving outcomes for disabled children and children with SEN. The draft provisions on SEN and disability published today, which will form part of the Children and Families Bill, represent a clear opportunity to address some of the current problems in the system. For example, I am very pleased that the new framework will be applied directly to academies.

The concept of a multiagency plan covering young people from birth to 25 is central to the draft provisions and has been broadly welcomed by the sector. We will now be examining the detail of the Education, Health and Care plan to ensure that this does not dilute the strong entitlements currently provided by a statement of SEN and, crucially, strengthens the entitlements to social care and health services and to the support young people have during their transition into adulthood.

⁴⁰ [Nasen response to the draft legislation on reform of provision for children with Special Educational Need](#), 4 September 2012

⁴¹ [IPSEA Press release regarding draft legislation on reform of provision for children with SEN](#), 3 September 2012, Independent Parental Special Education Advice (IPSEA)

Other parts of the draft Bill require local authorities to set out a 'local offer' of services available for parents and young people and to develop better joint commissioning arrangements across agencies. These proposals have also been welcomed, but SEC will be working to ensure that accountability for delivering these improvements is clearly built into the law.

SEC looks forward to engaging with Parliamentarians, ministers, and officials to ensure this Bill will deliver the best possible framework for disabled children and children with SEN to get the support they need.⁴²

The Council for Disabled Children is planning to release a special bulletin on 19 September 2012 that will include an update on the SEND Pathfinders' progress.⁴³

Every Disabled Child Matters (EDCM) said:

Every Disabled Child Matters (EDCM) welcomes the provisions requiring local areas to set out a 'local offer' of services available for parents and young people as well as provisions to improve joint commissioning arrangements across agencies.

However, EDCM remains concerned that the single assessment process and Education, Health and Care Plan will only be available to children who need support in education. This will mean that disabled children whose primary need is for social care or health support will miss out.⁴⁴

John Dickinson-Lilley, Deputy Head of Public Policy at Sense⁴⁵ said:

"Sense welcomes the principles driving the draft clauses published today, however we are deeply concerned that a legal obligation on health is not included in the proposed single plan. We are calling on the Government to ensure the single plan for children with special education needs and disabilities is legally enforceable on education, social care and health providers.

We recognise the complexities of joining up education, health and social care but it's essential that the health needs of deafblind children are not only identified but met by the proposed system - without this their education could be at risk.

Sense looks forward to working with the Government on its reforms because the current statementing system is extremely fraught and complex: Parents of deafblind children tell Sense they have to fight for up to two years to obtain a statement for their deafblind child."⁴⁶

Jolanta Lasota, Chief Executive of Ambitious about Autism, said:

⁴² [Statement from Julie Jennings, Chair of the Special Educational Consortium, on draft provisions relating to children and young people with SEN or a disability](#), 3 September 2012

⁴³ Council for Disabled Children, [Government publishes draft SEN and disability provisions as part of the Children and Families Bill](#), 3 September 2012

⁴⁴ Every Disabled Child Matters, [Government publishes draft SEN and disability provisions as part of the Children and Families Bill](#), 3 September 2012 (EDCM is a campaign to get rights and justice for disabled children.

⁴⁵ Sense is a national charity that supports and campaigns for children and adults who are deafblind.

⁴⁶ [Press release: Sense comment on SEN reforms](#), 3 September 2012

We welcome the aspirations in today's Draft legislation to reform provision for children and young people with Special Educational Needs (SEN) but call for Government to go further to support young people to access further education, training and employment.

"We support the aim for a 0-25 education, health and care plan, as extending legal rights to educational support beyond school is one of our *Finished at School* campaign's aims.

"However, we urge the Government to go further than the draft legislation currently does in order to fully deliver on the stated aspirations for young people. The draft legislation states that support will only be provided to young people in education or training. This means support will fall away if young people 'drop-out' or are excluded from education. Many disabled young people are excluded from education and this is when they need support the most.

"The proposed new duties on colleges and other post-16 settings to admit and support young people with SEN and disabilities are a very positive step forward. The broader definition of 'education and training' post-school, rather than just 'education', is also welcome. This could be a real boost to young people with autism, many of whom learn better 'on the job' due to difficulties in transferring learning from a classroom to the workplace.⁴⁷

6 Library contacts for further information

School-related policy: Christine Gillie

Further and higher education: Susan Hubble

Health policy: Thomas Powell

Social Care: Robert Long

Statistics on any of the above areas: Paul Bolton and Feargal McGuinness

⁴⁷ [Ambitious about Autism response to Children and Families Bill Draft Clauses](#), 3 September 2012