



Children and Families Bill: Lords’ Amendments to Part 3 (Children and Young People in England with Special Educational Needs or Disabilities)

Standard Note: SN/SP/6815

Last updated: 7 February 2014

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Section Social Policy Section

This note covers the main amendments made to Part 3 of the *Children and Families Bill* during the House of Lords consideration of the Bill. Part 3 of the Bill relates to children and young people in England with special educational needs (SEN) or, as a result of amendments made at Lords’ Report Stage, with disabilities.

The House of Commons is due to consider the Lords’ amendments on Monday 10 February 2014.

When the Bill was introduced in the House of Commons, the SEN provisions were heralded as the biggest reform to SEN provision in 30 years. At the start of the Grand Committee debate on Part 3, over 200 amendments had been tabled on it.

This note covers the main Lords’ amendments relating to Part 3 only. All Government amendments introduced to Part 3 in the Lords were agreed. The note is not intended to be an account of every amendment discussed and then withdrawn; however, it does include those Lords’ amendments proposed to Part 3 that were pressed to a division. (These were defeated).

The Bill also seeks to reform the legislation on adoption and children in care; education for looked after children; aspects of the family justice system; the Office of the Children’s Commissioner for England; statutory rights to leave and pay for parents and adopters; time off for ante-natal care; and, flexible working. The Bill, as amended in the Lords, also contains provisions on free school meals, the regulation of retail packaging of tobacco products, and smoking in private vehicles.

This note does not cover these provisions nor does it cover the Lords’ debates on education issues more generally – for example, the debates in the Lords on sex and relationship education or the Government amendment that underpins the commitment to extend free school meals to pupils attending state schools in England in reception, and years one and two. For information on any of above or related subjects, please contact the relevant Library

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1 Introduction

The Government has proposed wide-ranging changes to the SEN system. These reforms are contained in Part 3 of the *Children and Families Bill*. Part 3 of the Bill, as introduced in the Lords¹, made provision for:

- replacing SEN statements and learning disability assessments with a new birth-to-25 education, health and care plan - setting out in one place all the support families will receive
- requiring better co-operation between councils and health services to make sure services for children and young people with SEN and disabilities are jointly planned and commissioned
- giving parents and young people with education, health and care plans the offer of a personal budget - putting families firmly in charge
- requiring councils to publish a 'local offer' showing the support available to all disabled children and young people and their families in the area - not just those with educational needs
- introducing mediation for disputes and trialling giving children and young people the right to appeal if they are unhappy with their support
- introducing a new legal right for children and young people with an education, health and care plan to express a preference for state academies, free schools and further education (FE) colleges - currently limited to maintained mainstream and special schools.²

The Bill followed consultation on the proposals and pre-legislative scrutiny of draft provisions carried out by the Education Committee. [Library Research Paper 13/11](#), written for the second reading debate in the House of Commons, provides background.

[Library Research Paper 13/32](#) provides an account of the Committee Stage debates in the Commons.

The Report Stage in the Commons was on [11 June 2013](#). The Bill also received its Third Reading on [11 June 2013](#) and passed to the House of Lords. [Lords Library Note 2013/018](#) provides background on these stages.

The Bill's Second Reading in the Lords was on [2 July 2013](#).

All the Bill's proceedings can be accessed via Parliament's website on [Bills before Parliament](#).

The expectation is that the Bill will receive Royal Assent shortly, and that the new legislation will be brought into force in England on 1 September 2014.

Provision is made for the detailed requirements of particular provisions to be set out in regulations, and a new statutory code of practice would provide guidance on the new framework for SEN.

¹ [HL Bill 32](#), 2013-14

² DFE Press Release, 27 December 2013, [Families happy with SEN reforms and £70 million for councils](#)

In October 2013, the DFE published the [Draft Special Educational Needs Code of Practice for 0 to 25 years](#), for consultation. This contained the proposed statutory guidance on how the new system would work. The consultation closed on 9 December 2013. Section 1.6 of the Draft Code of Practice noted the changes from the earlier, 2001 Code. There are also detailed associated Draft Regulations and other relevant documents available on the [DFE website](#).

2 Lords' Grand Committee

The Bill, as brought from the Commons was [HL Bill 32](#), 2013-14.

Part 3, clauses 19 to 73, of the Bill, as brought from the Commons, contained the SEN provisions. The Grand Committee considered Part 3 of the Bill during its 5th to 9th sittings and on the 11th and 12th sittings. Lord Low of Dalston observed that over 200 amendments had been tabled to Part 3 by the start of the Grand Committee debate on the SEN provisions. The following notes the main changes that were made to the SEN provisions in Grand Committee; however, it is not intended to cover every single amendment made to Part 3.

2.1 Support at school for children with medical conditions

Throughout the passage of the Bill, there has been much debate about children with long-term medical conditions, such as diabetes, asthma and epilepsy, who may not require educational interventions but may need medical treatment while at school. Responding to concerns, the Government introduced an amendment (241A) to place a new duty on the governing bodies of maintained schools (and proprietors of academies) to make arrangements to support pupils at school with medical conditions, and to have regard to statutory guidance on managing medicines at school, and to support pupils with medical conditions.³ This provision was added to Part 5 of the Bill.

(During the Lords Report stage, Lord Kennedy of Southwark moved an amendment (57C) on co-operation between clinical commissioning groups, local authorities and schools in relation to the duty to support children with medical needs. However, Lord Nash said that the Government did not believe that further primary legislation was necessary, and outlined the duties to co-operate already in existing legislation and in the Bill's provisions. Amendment 57C was withdrawn.⁴)

2.2 Assessment of education, health and care needs

Under clause 36 of the Bill, as brought from the Commons, provision was made for regulations relating to education, health, care needs assessments, and for such regulations to require "the attendance of persons of a prescribed description in connection with an assessment." Baroness Hughes of Stretford, Baroness Jones of Whitchurch and Lord Nash tabled an amendment (139) to remove that particular requirement. Lord Nash said that the Government supported the amendment because it accepted that this particular requirement was not necessary.

Finally, we would like to support Amendment 139, tabled by the noble Baronesses, Lady Hughes and Lady Jones. The Delegated Powers and Regulatory Reform Committee said that imposing a requirement on anyone to attend assessment meetings, including the requirement on parents to present their child at such meetings,

³ [HL Deb 18 November 2013, Grand Committee, 11th day, GC 310](#) and [HL Deb 23 October 2013, Grand Committee 5th day, GC 386-390](#), and [HL Deb 20 November, Grand Committee, 12th sitting GC 496](#)

⁴ [HL Deb 29 January 2014, cc 1299-1307](#)

would be meaningful only if there was a corresponding sanction for failing to attend, mirroring current legislation. One of the central parts of the new system is that parents and young people will be involved more fully in the assessment and planning process, and from much earlier on. Clause 19 ensures that the views, wishes and feelings of children, their parents and young people will be listened to and respected, and that they participate as fully as possible in the decisions that affect them.

We do not want to impose a sanction in such circumstances, and after consulting the pathfinders we remain convinced that existing safeguarding legislation is the best route for any issues caused by parents not presenting their children for assessment, where there are welfare concerns. Given this, we do not believe, as do the noble Baronesses, Lady Hughes and Lady Jones, that a power to require attendance at assessment meetings, with a corresponding sanction, is absolutely necessary, with the exception of Amendment 139, which I am pleased to accept.⁵

2.3 Education, health and care plans: amending and disclosing plans

Clause 37 of the Bill, as brought from the Commons, set out what a local authority must do if the education, health and care assessment in clause 36 indicates that a child or young person requires an education, health and care plan for their special educational provision. Government amendments (148 and 149) to clause 37 relate to provision about amending and disclosing education, health and care plans. The Earl of Attlee explained the amendments as follows.

Government Amendments 148 and 149 enable regulations to make provision about amending and disclosing education, health and care plans. Equivalent provisions currently exist in paragraphs 2A(5) and 7 of Schedule 27 to the Education Act 1996. The amendments also require that any amendment to the plan applies to Clause 33, which requires that children and young people with a plan be educated in mainstream provision other than in specified circumstances.

Having the ability to make amendments to plans will ensure that local authorities will retain the flexibility to make minor amendments to keep plans up to date without the need for a full review or reassessment—for example, when a particular outcome in a plan has been achieved. Assessment and plan draft Regulations 26 and 27 set out how we would propose to use the powers on amendment, including requiring that local authorities consult fully with the parent or young person.

Regarding the regulation-making power and disclosing EHC plans, our proposed new regulations are in assessment and plan draft Regulation 17, which will be laid following consultation, subject to noble Lords' approval of these amendments. The regulations ensure that sensitive information in EHC plans must be protected and can only be disclosed with the child's or parent's or young person's consent except in specific circumstances, such as to share with schools and colleges.⁶

2.4 Mediation

Provision for mediation was contained in clause 52 of the Bill, as brought from the Commons. Government amendments (183 and 184) sought to ensure that the mediators would be independent of local authorities. Lord Nash explained the amendments as follows.

Government Amendments 183 and 184, regarding mediation, are in this group. It is important that the whole of the mediation process set out in the Bill is seen by parents and young people to be independent of the local authorities. There are two stages to

⁵ [HL Deb 4 November 2013, Grand Committee, 8th day, GC 6 and 22](#)

⁶ [HL Deb 4 November 2013, Grand Committee, 8th day, GC 43 and 46](#)

the mediation process. First, the parents or young people contact a mediation adviser to be given information about the mediation process. Currently, the Bill makes clear that the mediation adviser cannot be someone who is employed by a local authority. If the parent or young person decides to go to mediation, the local authority must arrange it within 30 days. Currently there is no parallel provision in the Bill to make clear that the person who conducts the mediation must also be independent of the local authority. These amendments make the necessary changes to the Bill to ensure that mediators will be independent.⁷

2.5 Making and approval of the Code of Practice

Clause 68 of the Bill, as brought from the Commons, sets out the procedure for making and approving the Code of Practice.⁸

In response to a recommendation from the Delegated Powers and Regulatory Reform Committee, Government amendments (210 and 211) provide that on the first occasion the new code is approved, it will be through the affirmative procedure, and for subsequent revisions, it will be through the negative procedure. Speaking to the amendments, Lord Nash said that they recognise the significance of the new code in reflecting the new legal framework. He stressed that the Government want the new code to be kept up to date and, he said, one of the main reasons why the current SEN code (issued in 2001) is so out of date is because currently the affirmative procedure process applies to any revisions of the code, no matter how small the change.⁹

2.6 Orders and regulations (personal budgets and direct payments; appeals etc.)

Clause 107(6) of the Bill, as brought from the Commons, made provision for a statutory instrument containing (whether alone or with other provision) an order made under section 55(1) which relates to appeals and claims by children to the First-tier Tribunal, or under section 108(1), which amends, repeals or revokes any provision in primary legislation, to be subject to the affirmative procedure.

Peers expressed concern that, under the Bill as brought from the Commons, the regulations making provision for personal budgets and direct payments would be subject to the negative procedure rather than the affirmative procedure. Baroness Jones of Whitchurch said that she and other Peers had tabled amendments that reflected concerns flagged up by the Delegated Powers and Regulatory Reform Committee.¹⁰

Lord Nash said that the Government was responding to the recommendations of the Delegated Powers and Regulatory Reform Committee by introducing amendment (269) to clause 107(6).¹¹ The amendment made provision for the affirmative procedure to apply to the first regulations made under section 49 (*Personal budgets and direct payments*), an order made under section 54(1) (*Appeals and claims by children: pilot schemes*) or 55(1) (*Appeals and claims by children: follow up provision*), or an order under section 108 which amends or repeals any provision of primary legislation.¹² The new provisions were contained in clause 114(6) of the Bill as amended in Grand Committee.¹³

⁷ [HL Deb 6 November 2013, Grand Committee, 9th day, GC 68 and 71](#)

⁸ [HL Bill 32](#)

⁹ [HL Deb 6 November 2013, Grand Committee, GC 103 to 106](#)

¹⁰ [HL Deb 4 November 2013, Grand Committee, 8th day, GC 55-56](#)

¹¹ [HL Deb 4 November 2013, Grand Committee, 8th day, GC 57](#)

¹² [HL Deb, 20 November 2013, Grand Committee, 12th day, part 2 of 2, GC 496](#)

¹³ [HL Bill 59](#)

The Bill as amended in Grand Committee was [HL Bill 59, 2013-4](#).

3 Lords' Report Stage

Clauses 19 to 73 of the Bill, as amended in Grand Committee, contained the SEN provisions.¹⁴ Consideration of the provisions on Report started half way through the second day of [Report on 17 December 2013](#), continued on the third day on [7 January 2013](#), the fourth day on [28 January 2014](#), and the fifth day on [29 January 2014](#).

3.1 Disabled children and young people who do not have SEN

Throughout the passage of the Bill, there has been much debate about children with disabilities but who do not have special educational needs.

At Lords Report Stage, a number of Government amendments¹⁵ were made to bring disabled children and young people who do not have special educational needs within the provisions of the Bill – amongst other things the amendments require local authorities to identify and support the needs of all disabled children and young people, not just those relating to education. These changes are important concessions to address concerns expressed by MPs and Peers (in earlier proceedings on the Bill) and by pressure groups representing disabled children and young people. Lord Nash outlined the Government's amendments on this matter as follows.

In Grand Committee we had an extensive debate about the support for disabled children and young people and I know that this is an issue on which the noble Baroness, Lady Hughes, has reflected deeply, as have I since then. Many Peers expressed concern that disabled children and young people without SEN would miss out on the benefit of our reforms and, at the time of the debate, I introduced a government amendment to require schools to make arrangements for supporting children with medical needs. I also asked for help from noble Lords in understanding which groups of disabled children would not be supported by this Bill, the government amendment in respect of children with medical needs, the provisions of the Equality Act 2010 and Part 3 of the National Health Service Act 2006.

Following the debate, the Every Disabled Child Matters campaign sent some very helpful advice to the department in which it said:

“The Government rightly made the point in the debate yesterday that disabled children and young people are already protected by a range of other legislation, such as the Equality Act 2010, the NHS Act 2006 and the Children Act 1989.

We would like to stress that our concern is not about the rights of individual children and young people who may have a disability but no SEN. We completely accept that on an individual level they are protected under the Equality Act 2010 and other legislation. Our concern is about disabled children and young people as a group not being included in the joint commissioning arrangements, review functions, and local offer duty”.

It went on to suggest which clauses in the Bill might be amended to achieve this—Clauses 22, 24, 25, 26, 27, 30 and 32—and drafted a single amendment to deliver this. I am grateful to the noble Baronesses, Lady Hughes of Stretford and Lady Jones of

¹⁴ HL Bill 59, 2013-4

¹⁵ Government amendments 18A and 18B (c1199to 1200); 18D, 18E, 18F, 18G, 18 H, 18J, 18N (cc1205-6); 21A to 21C, 24A and 24B (cc1212); and, 25A to 25D (c1216).

Whitchurch, for their amendment, which is largely based on the Every Disabled Child Matters amendment.

We agree with Every Disabled Child Matters that the clauses identified should be amended. However, our view is that, by relating the provision for disabled children and the young people to special educational provision, a single amendment would not deliver the outcome that we all want, and that we need to amend each clause.

Clause 22 would be amended to require local authorities to exercise their functions with a view to identifying both the children and young people with SEN and disabled children and young people. Clause 24 would be extended to require health bodies to inform the child's parents and their local authority where they are of the opinion that a child under compulsory school age has, or probably has, a disability. Clause 25 would now require local authorities to exercise their functions with a view to ensuring the integration of education and training provision with healthcare provision and social care provision for children and young people with SEN and disabled children and young people, where they think that this would promote their well-being, including in relation to their participation in education, training and recreation. In Clause 26, the duties on local authorities and their partner commissioning bodies to make joint arrangements for the commissioning of education, health and care provision for children and young people with SEN would be amended to include disabled children and young people.

Clause 27, which currently requires local authorities to keep under review the special educational provision and social care provision for those with SEN, would be extended to cover provision for disabled children and young people. They will broaden it to cover all education and training provision, not just special educational provision, for children and young people who have SEN or are disabled.

The amendments also require local authorities to consult disabled children and young people and their parents when carrying out that duty. The provisions in the local offer would include disabled children and young people, both in relation to the information to be published and in developing and reviewing the local offer and publishing comments. In Clause 32, the requirement on local authorities to arrange for young people with SEN and parents of children with SEN to receive advice and information on SEN would be extended to include provision for disabled young people and the parents of disabled children to be provided with information about matters related to disability. I have also tabled an amendment, which we shall come to later, to extend the requirement to cover children themselves as well as their parents. Clause 73 would make it clear that the definition of disability applied to the provisions covered by these government amendments is that in the Equality Act 2010.

Noble Lords will also be aware from commitments that I made in Committee that we are looking at ways of strengthening links to the Equality Act duties, including those to make reasonable adjustments in the SEN code of practice. The amendments that I am speaking to today will sharpen the focus on the Equality Act duties considerably. Since the code of practice is statutory, the guidance that it provides cannot be ignored.¹⁶

A number of consequential amendments were made during the third and fourth days of Report.¹⁷

3.2 Health or social care

Government amendment (17A) amended clause 21 to provide that health care or social provision that educates or trains a child or young person is to be treated as special

¹⁶ [HL Deb 17 December 2013 cc 1195-1197](#)

¹⁷ [HL Deb 7 January 2014 - e.g. c1415, c1426, cc1430-3, and c1434; HL 28 January 2014, c1118](#)

educational provision. Case law has already established that under the present SEN system health provision, such as therapies, can be educational, non educational or both, depending upon the individual child and nature of the provision. Speaking for the Government, Baroness Northover explained that the purpose of amendment 17A was to maintain the position established in case law.

We all share the aim of carrying the current established position through into the new system, but this is complicated legal territory and it has not been straightforward to find the right formulation. We are grateful to the noble Lord, Lord Ramsbotham, for his personal interest here and for his involvement with the Royal College of Speech and Language Therapists, which kindly shared and discussed its legal advice with the department. We have taken that advice into account in drafting government Amendment 17A, which we believe would maintain the position established in case law that we all seek.

In our view, a local authority and, where relevant, a tribunal, in considering whether healthcare provision or social care provision was to be treated as special educational provision, would ask themselves whether it was educational, taking the approach set out in the current SEN code of practice in respect of speech and language therapy. We have carried this into the new landscape of the Bill in relation to education and training.¹⁸

3.3 The local offer

A Government amendment (33C) to clause 30(6) provides for local authorities to make it clear what action they intend to take in response to comments on the local offer from children, young people and parents.¹⁹

3.4 Provision for detained children and young people

The Government introduced a group of amendments intended to strengthen provision for children and young people with SEN in youth custody. Lord Nash explained the amendments as follows.

The noble Lord, Lord Ramsbotham, has tabled Amendment 50, which I support, removing Clause 70 of the Bill, which currently disapplies Part 3 of the Bill to children and young people in detention. The Government's amendments would replace Clause 70 with new provisions after Clause 65, which would enable education, health and care assessments to take place for a detained child or young person; require home local authorities and health service commissioners to use their best endeavours to arrange the special education and health provision specified in a plan during the period in custody; and require relevant youth custodial institutions—that is, young offender institutions, secure children's homes and secure training centres—to co-operate with the home local authority when arranging support for young offenders with SEN. These changes will ensure that needs are identified and assessed at the earliest opportunity, that the best possible support is provided to young people in custody, and that there is a single point of accountability before, during and after their period in detention.

The first clause affected by this group of amendments is Clause 28, hence our consideration at this time. However, in the interests of clarity, I will firstly explain the substantive amendments that we would introduce after Clause 65. The point at which a child or young person is first detained is a crucial opportunity to identify special educational needs. Amendments 47B and 47C would allow the custodial institution,

¹⁸ [HL Deb 17 December 2013 cc1197-1199](#)

¹⁹ [HL Deb 7 January 2014 c 1411 and c1426](#)

and the detained person or their parent, to request a full, statutory education, health and care assessment from the detained person's home local authority. Under our amendments, a home local authority must also determine whether to conduct an assessment when a detained child or young person has been brought to its attention by someone else—for example, a professional working with the child or young person. This will support early identification of needs; it will also make best use of the time that a young person is in detention so that an assessment can get under way and support be put in place immediately upon release.

Amendment 47D would extend the right to appeal to a detained young person or a detained child's parent when they were unhappy with a local authority decision not to carry out an assessment or a decision not to make provision following an assessment.

Amendment 47E would require a child or young person's home local authority to use its best endeavours to arrange the special educational provision specified in the EHC plan while they are in custody. This is a strong and robust statutory duty, requiring the home local authority to do everything in its power to arrange the specified provision, or provision corresponding as closely as possible to it, or other appropriate provision while the individual is detained. Placing this duty on the home local authority will provide continuity and stability that is not present under existing arrangements. It will significantly improve accountability and ensure that, wherever a child or young person is detained, there remains a single point of accountability and a single contact for their families. It also creates a strong incentive for the home authority to arrange the best possible provision, as it will remain responsible for that child or young person throughout their period of detention and afterwards when they return home.

Amendment 47E would also create a parallel requirement for a detained child or young person's health services commissioner to use its best endeavours to arrange the healthcare provision specified in an EHC plan. Where a child or young person is detained in custody, the relevant health services commissioner would be NHS England. This is a new duty, which would require the health service commissioner to do everything in its power to arrange the specified provision, or provision corresponding as closely as possible to it, or other appropriate provision while the individual is detained.

Amendment 27A to Clause 28 and Amendments 33HA to 33HK to Clause 31 would require relevant secure institutions—young offender institutions, secure children's homes and secure training centres—to co-operate with the local authority. These amendments will require governors of young offender institutions or those in charge of other establishments in the youth secure estate to work with local authorities to deliver the best possible support for those in custody. These new statutory requirements will give local authorities the backing they need to ensure that custodial institutions play their part. This also reflects the Government's ambition to place education at the heart of youth detention, set out in the Transforming Youth Custody consultation paper.

In addition to these substantive changes, we have also made a series of technical supporting amendments to Clauses 36 and 48, and to Schedule 3. These supporting amendments also include adding a new clause, "Application of Part to detained persons", which includes a regulatory power to apply further provisions to detained people. These regulations, along with a revised section within the code of practice, will allow us to set out more detail about how we expect these new duties to operate in practice, and the relative roles and responsibilities of each party.

Amendments to Schedule 3 make consequential amendments to the Education Act 1996 to reflect the fact that these new provisions would replace existing provisions in England, but not in Wales. The Government, in consultation with the Welsh Ministers,

would have the power to amend provisions by regulation. This package of amendments represents a much more robust statutory framework for detained young people, which responds to the valuable contributions and issues raised by noble Lords, for which, as I say, I am extremely grateful. I beg to move.²⁰

Lord Ramsbotham said he felt that “we are almost there on children in detention, but not quite” as he thought further work was needed to ensure that the intent outlined in the Government’s amendments came to pass.²¹ Lord Nash stressed that the Government amendments would result in vastly improved provision for children and young people with SEN in custody, and said that he would be happy to discuss the matter further.²²

3.5 Advice and information

Government amendments to clause 32 provided for children themselves to be provided with advice and information. Baroness Northover explained that

...the Bill already provides for local authorities to be responsible for ensuring that parents of children with special educational needs, and young people with special educational needs, are provided with advice and information. It also already requires local authorities to take appropriate steps for ensuring that parents of children with special educational needs, and young people with special educational needs, know about the advice and information available to them. These government amendments extend that local authority responsibility to children with special educational needs.

In Grand Committee, I said that we were sympathetic to the views of a number of noble Lords about the need for consistent references throughout the Bill and the code to the inclusion and participation of children, where that is appropriate. Where there is a specific decision-making responsibility in relation to children, as distinct from young people, it is, of course, right that we vest that in parents. However, as Clause 32 relates to the provision of information and advice, it is appropriate to make a specific reference to children in it. These amendments do that.²³

3.6 Young people aged over 18: education, health and care needs

Government amendments supported by Baroness Sharp of Guildford and Baroness Cumberlege were aimed at removing the explicit requirement in the Bill for local authorities to have regard to a young person’s age when making decisions about education, health and care plans for a young person aged over 18. Lord Nash explained that

...there has been genuine concern about the provisions in the Bill that require local authorities to “have regard to” the age of young people aged 19 to 25 when determining their support. We had a particularly helpful round-table discussion on this when a number of noble Lords, including my noble friends Lady Sharp and Lady Cumberlege and the noble Baronesses, Lady Hughes and Lady Howarth, made a number of really helpful comments in this regard. Noble Lords have particularly expressed their fears that the Bill as currently drafted would provide local authorities with an excuse to deny or cease support to a young person based solely on their age. This is not, and has never been, our intention. Young people with SEN aged 19 to 25 should be supported to remain in formal education where this will enable them to complete or consolidate their learning, achieve their outcomes and make a successful transition to adulthood. In achieving this important aim we must not inadvertently

²⁰ [HL Deb 7 January 2014 cc1415 to 1425, c1431, c 1434, 1454 and cc1476 to 1480](#)

²¹ [HL Deb 7 January 2014 c1417](#)

²² [HL Deb 7 January 2014 c1425](#)

²³ [HL Deb 7 January 2014 cc 1431-34](#)

create an entitlement or expectation that all young people with SEN remain in education until age 25. That would not be in the interests of many young people, who may need just one or two years of additional education to progress into adult life and work.

I have listened carefully to the concerns of noble Lords, both during debate in Grand Committee and subsequently. In particular, I have listened to concerns that the focus on age is unhelpful or unclear in its intention and could lead to support being denied on the basis of a young person's age alone. I have therefore tabled government amendments to clarify our intention in the Bill. I am pleased to be presenting these amendments with the support of my noble friends Lady Sharp and Lady Cumberlege, who spoke incisively on this issue in Grand Committee.

The amendments remove the explicit requirement to have regard to a young person's age, instead requiring local authorities to consider whether a young person aged over 18 needs more time to complete their education when determining whether to make an EHC plan, and whether they have achieved the outcomes specified in their plan before determining that it should end. As ever, local authorities must make that judgment in close consultation with young people, who will have access to mediation and can appeal to the SEN tribunal if they are unhappy with the decision.

I am grateful also to the noble Baronesses, Lady Hughes and Lady Jones, for their amendments seeking to require consideration of "educational progress" rather than age. I am pleased that we have achieved such a degree of consensus. I hope that noble Lords will support my proposed amendments, which represent a very positive improvement to the Bill and reflect the very constructive and helpful debates that we have had in this House. I beg to move.²⁴

3.7 Technical and consequential amendments

Various Government amendments were made that were technical or consequential.

Baroness Northover explained that Government amendment (38A) was necessary to correct unintended consequences of drafting changes relating to where parents or a young person make alternative arrangements for special educational provision to be made, for example, in an independent school or college or at home.

Government Amendment 38A is a technical amendment to Clause 42. In the current system, set out in the Education Act 1996, when a statement is maintained for a child or young person the local authority is under a duty to secure the special educational provision specified in it. If a local authority names an independent school or college in the statement as special educational provision it must, under Clause 59, meet the costs of the fees, including any boarding and lodging where relevant. However, the local authority is relieved of its duty to arrange the special educational provision in the statement, including securing a place in a school or college named in a statement of SEN, if the parents or the young person have made suitable alternative arrangements for special educational provision to be made, for example, in an independent school or college or at home.

The Bill introduced to Parliament in February 2013 retained this provision, but when government amendments were introduced in Committee in the other place to place a duty on health bodies to arrange the healthcare provision specified in an education, health and care plan, Clause 42 was amended so that, under Clause 42(5), local

²⁴ [HL Deb 7 January 2014 cc 1435-41 and c1451](#)

authorities' and health bodies' duties to secure and arrange specified provision would not apply,

"to the extent that the child's parent or the young person has made suitable alternative arrangements".

We made this change with the intention of ensuring that, in cases where a parent or young person had made suitable alternative arrangements only for education provision, the duty on responsible health commissioners to arrange required health provision would remain in place. On reflection, that wording is problematic and could have unintended consequences, since it could be interpreted to mean that when a parent or young person makes alternative arrangements for only some of the provision the local authority or health body is only relieved from its duty to make that provision and must secure and arrange the remainder. This would not be sensible or fair.

Amendment 38A would address this issue and ensure that local authorities have a clear duty to secure the special educational provision in a child or young person's education, health and care plan; it would enable parents or young people to make alternative arrangements; it would require local authorities to satisfy themselves that those arrangements are suitable; and it would enable local authorities to assist parents in making their own arrangements suitable, if they consider it appropriate, without imposing any duty on them to do so. It has not been sufficiently clear that local authorities can assist parents in this way until now and I am pleased that this amendment gives me the opportunity to clarify the position.

Where parents or a young person make alternative arrangements, the local authority must satisfy itself that those arrangements are suitable before it is relieved of its duty to secure the provision. It can only conclude that arrangements are suitable if there is a realistic possibility of them being funded for a reasonable period of time. If it is satisfied, the authority need not name its nominated school or college in the plan and may specify only the type of provision. This is to avoid the school having to keep a place free that the parents have no intention of taking up. If the local authority is not satisfied that the parent or young person's alternative arrangements are suitable, it could either name another appropriate school or college in the EHC plan or assist parents in making their arrangements suitable, including, if they consider it appropriate, through a financial contribution, though it will be under no obligation to meet the costs of those arrangements.

Where parents make suitable alternative arrangements for educational provision, the health commissioning body is still responsible for arranging the healthcare specified in the child or young person's EHC plan. If parents make alternative arrangements for healthcare provision, then the health commissioning body would need to satisfy itself that those arrangements were suitable. If the arrangements were not suitable, they would arrange the provision specified in the plan or, if they felt it appropriate, assist the parents in making their own arrangements suitable. We will, of course, clarify this position in the SEN code of practice. I beg to move Amendment 38A.²⁵

Various technical and/or consequential amendments²⁶ were made to schedule 3 of the Bill, including an amendment (50A) to section 23E of, and Schedule 2 to, the *Children Act 1989* relating to pathway plans for a looked after child leaving care to include, for England, assessments under Part 3 of the *Children and Families Bill*.²⁷

²⁵ [HL Deb 7 January 2014 cc 1449-51](#)

²⁶ [Amendments 50ZA to 50ZC; HL Deb 7 January 2014 c1489](#)

²⁷ [HL Deb 7 January 2014 cc 1489-90](#)

A number of amendments were also made on the meaning of various terms relating to detained persons and youth accommodation, and children and young persons with a disability.²⁸

3.8 Other amendments on SEN and disability debated and pressed to division

Many other amendments were discussed and subsequently withdrawn. This note does not cover these; however, it does note those amendments tabled to Part 3 that were pressed to a division.

Inclusion

During the second day of the Lords' Report Stage there was a division on an amendment (16A), moved by Lord Low of Dalston, to place the principle of inclusion for disabled children in the Bill amongst the general principles set out in clause 19. Other Peers spoke in favour of the amendment. Baroness Warnock said that there was a lack of clarity as to how children who do not get an Education, Health and Care (EHC) Plan will be placed. Baroness Wilkins said that the amendment would reassure those who are concerned that elements of the SEN provisions in the Bill could weaken the right of disabled children with SEN to be included in mainstream education.

Speaking for the Government, Lord Nash resisted amendment 16A. While he acknowledged that the amendment followed a recommendation by the Joint Committee on Human Rights, he noted the existing provision to prevent discrimination of disabled people. He said that the Government did not believe that it was necessary to add to the principles set out in clause 19. However, he said that the Government would consider how the links to the Equality Act duties in the Code of Practice on SEN could be further improved. The Minister also referred to the amendments that the Government had tabled to include disabled children and young people in the scope of a number of key provisions in the Bill (see above). Lord Low pressed his amendment, which was defeated by 222 votes to 205.²⁹

The local offer

During the third day of Lords' Report Stage there was a division on an amendment (33D), moved by Lord Low of Dalston, which sought to require the Secretary of State to lay draft regulations setting out the standards and quality of special educational provision, health care provision and social care provision which local authorities must meet in their local offer. The amendment was defeated by 258 votes to 197.³⁰

The Bill as amended on Report was [HL Bill 83, 2013-14](#).

4 Lords' Third Reading

Part 3, clauses 19 to 79, of the Bill, as amended at Lords' Report Stage, contained the provisions relating to children and young people with SEN or disability.³¹ The following notes the main changes made to Part 3 during the Bill's [Third Reading debate in the Lords on 5 February 2014](#).

²⁸ [HL Deb 28 January 2014 c1117](#)

²⁹ [HL Deb 17 December 2013 cc 1179-1194](#)

³⁰ [HL Deb 7 January 2014 cc 1426-1430](#)

³¹ [HL Bill 83, 2013-14](#)

4.1 Education, health and care plans: social care

Throughout the Bill's proceedings there has been much discussion about social care. During the Lords' Report Stage, Lord Nash said that the Government intended to bring forward amendments at Third Reading to address concerns that social care services specified in an Education Health Care Plan would be provided by local authorities.³² Accordingly at Third Reading, Government amendments (2 and 3) were made to clause 37 of the Bill.³³ Baroness Northover explained the amendments as follows.

We welcomed the high-quality debate in Grand Committee and on Report on social care and recognise the important issues that were raised. On Report, we committed to bringing back an amendment to include the Chronically Sick and Disabled Persons Act 1970 in the Bill as a means of, first, providing assurance that assessed social care needs for disabled children will be met under the existing duty in Section 2 of the CSDPA; and, secondly, ensuring that the EHC plan includes all the relevant social care services needed by disabled children.

Following Report, there have been further productive discussions between my noble friend Lord Nash, officials, Peers and representatives of the Special Educational Consortium, to ensure the legislation is amended to meet these important aims.

We are pleased to bring forward amendments to Clause 37 to require that the EHC plan includes all services assessed as being needed for a disabled child or young person under 18, under Section 2 of the CSDPA, regardless of whether it relates to the learning difficulty or disability which gives rise to the SEN. The duty for local authorities to provide services to disabled children where it is decided that they are necessary under the CSDPA will apply. We will ensure that the SEN code of practice provides an explanation of the services under Section 2 of the CSDPA that must be included in the EHC plan, and explains the existing duties to provide those services, to give clarity and reassurance to both parents and practitioners.

Specifically, where the local authority decides that it is necessary to make provision for a disabled child under Section 2 of the 1970 Act following an EHC assessment, this amendment will mean that the local authority must, first, identify which provision is made under Section 2 of the 1970 Act; secondly, specify clearly that provision in the EHC plan; and, thirdly, deliver that provision.

In addition, the Bill continues to require that any other social care provision which is reasonably required by the learning difficulty or disability that gives rise to the SEN must be included in the EHC plan. This covers provision made under Section 17 of the Children Act which is not covered by the CSDPA—for example, residential short breaks.

It will also cover adult social care provision for young people aged 18 to 25, where a care plan is drawn up under provisions in the Care Bill. The adult care plan should form the social care part of the EHC plan for young people over 18, and the Care Bill includes a duty to meet assessed needs in the adult care plan. Again, we will set out clearly in the code of practice the social care services that must be included in the EHC plan.³⁴

³² [HL Deb 7 January 2014 c1448](#)

³³ [HL Bill 83 \(as amended on Report\)](#)

³⁴ [HL Deb 5 February 2014 cc207-11](#)

4.2 Appeals, mediation and resolution of disagreements

Lord Nash indicated during the Lords' Report Stage that the Government would give further thought to what more should be done better to integrate complaints across services. He said that it was a matter of concern to Ministers in both the Department of Health and the Department for Education. In particular he said that he wanted to look at: the role of mediation, including the scope to extend the arrangements in the Bill to cover health and social care as well as special education (notwithstanding the concerns he had previously set out about this); whether there could be a role for the tribunal in joining up redress across education, health and care; and what arrangements should put in place to review how redress works once the new system is bedded in, and in the light of wider reforms to complaints in the health service.³⁵

At Third Reading the Government introduced a group of amendments (4, 5 to 8, 9 to 15, 16 to 21, and 33) to address these issues. Having outlined the Bill's exiting provisions for appeals, mediation and local disagreement resolution services, Lord Nash said:

...

However, the Bill as currently drafted means that health and care provision is excluded from the disagreement resolution, mediation and appeal processes. Noble Lords have rightly raised their concerns about this. Following the commitment that I gave on Report, we have worked with colleagues at the Department of Health and the Ministry of Justice to develop a package of proposals to address this issue. These amendments provide that package.

The amendments will widen the disagreement resolution and mediation arrangements to cover health and social care and will require the holding of a review of the complaints and redress arrangements for those with education, health and care needs, with the review including pilots to test the tribunal making recommendations about health and social care.

On disagreement resolution and mediation, all local authorities currently have to make disagreement resolution services available. We will widen these so that when an assessment or reassessment is being carried out, or an EHC plan being drawn up or reviewed, parents and young people will be able to ask for disagreement resolution on health and social care complaints as well as on education complaints. As with the current arrangements, engaging disagreement resolution services will be voluntary on both sides—the parent or young person and the local authority or CCG. Similarly we are proposing to widen mediation to cover health and social care. This will mean that after an EHC plan has been drawn up, parents and young people will be able to go to mediation about the health and social care elements even if they did not have a concern about the education element. If they wanted mediation on health or social care, the CCG and local authority, respectively, would have to take part.

On Report we had an extensive discussion about the merits of a review of redress in the system. I am pleased to have tabled Amendment 33 today, which will establish such a review. The Secretary of State and the Lord Chancellor will hold the review to look at how well the redress arrangements under the Bill are working; and more widely at other complaint arrangements relevant to children and young people with education, health and social care difficulties. The review will take account of the Francis and Clwyd reviews of complaints in the health service. We will involve other organisations

³⁵ [HL Deb 7 January 2014 c1462](#)

which have an interest, such as the tribunal, Healthwatch, the Local Government Ombudsman, the Health Service Ombudsman and Parent Carer Forums.

The Secretary of State and the Lord Chancellor will report back to Parliament within three years of the implementation of the SEN provisions making recommendations as to the future of redress and complaint arrangements, including recommendations on the role of the tribunal. We believe that we would have to give sufficient time to build up the evidence on which to make recommendations. However, three years is a maximum and if the review felt it had the evidence in less than that time it could report to Parliament earlier. I estimate that we might have sufficient evidence by the summer of 2016, so I can say that the review would report no less than two years from the implementation of the Bill and no more than three years.

Part of the review will involve pilots testing the tribunal making recommendations on the health and social care aspects of plans where parents and young people have complaints about them and they are already appealing to the tribunal about the special educational element of the plan. This would mean that they could have their complaints about the plan considered as a whole rather than in isolation. The recommendations would not be binding on CCGs and local authorities as social care providers but we would expect them to consider seriously any recommendations the tribunal made. The pilots would begin in the spring of 2015 as the first appeals about EHC plans begin to be heard, be carried out in at least four local authority areas and would last for two years while it builds up evidence on which to base any recommendations about the future role of the tribunal.

I believe that, taken together, this is a strong package which addresses the need to provide parents and young people with a more joined-up way of dealing with complaints which go across education, health and social care. I beg to move.³⁶

4.3 Detained children and young people

The Government introduced a group of amendments (22, 23 to 27, 28 to 31, 32 and 34) to build on the changes made at Lords' Report Stage to support the needs of young offenders in custody. Baroness Northover summarised the amendments as follows.

I am pleased that noble Lords accepted the Government's amendments on Report. That means that today's debate is, I hope, starting from a strong position. The Bill already ensures that: young offenders, their parents and professionals working with them can request an assessment for an EHC plan and those assessments can now start in custody; EHC plans will provide up-to-date, current information on entry to custody, owing to the requirement for local authorities to maintain the EHC plans of those under 18 who are not in education, employment or training for any reason; both home local authorities and relevant NHS health service commissioners are under a duty to use their best endeavours to arrange the education and health provision set out in an EHC plan for children and young people in custody; EHC plans must be kept by the home local authority while a young offender is detained and must be reviewed and maintained again immediately on release; and both youth offending teams and relevant custodial institutions are required to co-operate with the local authority.

This is a significant set of improvements over the current system. However, now we want to go even further to address the remaining concerns expressed by noble Lords during our previous debate on this subject—namely, that “best endeavours” seemed, certainly in the mind of the noble Lord, Lord Ramsbotham, not to create a strong

³⁶ [HL Deb 5 February 2014 cc211 -221 and cc 225-226](#)

enough obligation on local authorities and health commissioners, and that youth custodial institutions should be required to have regard to the code of practice.

Following productive discussions between our officials, the Special Educational Consortium and the Standing Committee for Youth Justice, we are delighted to be able to say that through Amendments 28 and 29 we are strengthening the “best endeavours” duty so that it now says that local authorities and relevant health commissioners must arrange appropriate special educational and appropriate health provision.

Not only that, but Amendments 30 and 31 amend the definition of “appropriate provision” so that it is clear that local authorities and health service commissioners must first seek to arrange the provision that is in an EHC plan. Where that is not practicable, they will arrange provision that corresponds as closely as possible to the EHC plan. Where what is in the EHC plan is no longer appropriate, the local authority or NHS health commissioner must arrange an alternative that is appropriate.

Amendments 22 and 32 also require both relevant youth accommodation and youth offending teams to have regard to the code of practice. This means that we can set out in statutory guidance how we expect them to fulfil their duties to co-operate with the local authority in ensuring that children and young people with EHC plans receive the support they need while in custody.

These changes will be further strengthened in future by commitments in the Ministry of Justice’s response to the Transforming Youth Custody consultation published in January. I know that my noble friend Lady Walmsley—I see that she is not in her place, but I hope she will hear this—will be pleased to hear that, in response to an e-mail from her, this document makes it clear that the arrangements for the new providers of education in young offender institutions, due to be in place by November this year, will require them to co-operate with local authorities in regard to young offenders with EHC plans. They will also retain the existing responsibilities that the current providers have for identifying and supporting young offenders with SEN. The document also makes it clear that identification and support for those with SEN will be part of the new secure colleges that the Government will set up through forthcoming legislation.

Finally, Amendment 34 will remove Clause 76, previously Clause 70. Due to an oversight, the amendment to delete this clause was inadvertently not moved following the debate on Report. I am sure that that was entirely my fault.

Taken together, these amendments will strengthen the changes that noble Lords agreed on Report and will ensure that children and young people with EHC plans in custody will receive the support that they need. I hope that noble Lords will be happy to support them.³⁷

The Bill was given a Third Reading in the Lords on [5 February 2014](#).

The entire Lords’ Amendments to the Bill are contained in [Bill 171, 2013-14](#). Please note, that the page and line references are to [HL Bill 32, 2013-14](#), the Bill as first printed for the Lords.

The House of Commons is due to consider the Lords’ amendments on Monday 10 February 2014.

³⁷ [HL Deb 5 February 2014 cc 221-26](#)