

# **SPECIAL EDUCATIONAL NEEDS AND DISABILITY BILL**

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## **EXPLANATORY AND FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This Explanatory and Financial memorandum has been prepared by the Department of Education in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

### **BACKGROUND AND POLICY OBJECTIVES**

3. This Bill gives effect to the legislative changes required to support the policy for a revised special educational needs (SEN) and inclusion framework. The policy framework for children with SEN is set out in legislation and statutory guidance provided through a code of practice.
4. The policy intention is to ensure early identification, assessment and provision for SEN children in order for them to achieve their full potential with the child placed firmly at the centre of that process. In all matters within the framework it is expected that the grant-aided educational settings and the Education Authority (“the Authority”) would have the best interests of the child at the centre of all actions taken to address the child’s SEN.
5. Central to the revised SEN framework are objectives to: maintain and inclusive ethos within schools; ensure early identification, assessment and intervention of SEN; ensure that the special educational needs of children are met in a timely fashion; reduce bureaucracy; build the capacity of schools to address the SEN of most children; put a clear focus on learning and outcomes for pupils with SEN, ensuring that the views of pupils and parents are considered and ensure transparency and accountability for resources and outcomes.
6. The Bill will make amendments to existing provisions contained within the Education (Northern Ireland) Order 1996, as amended. It will strengthen the existing duties on the Authority and Boards of Governors of grant aided schools to address the needs of pupils with SEN and provide greater rights to parents and children over compulsory school age within the SEN framework and in respect of the Special Educational Needs and Disability Tribunal (the Tribunal). The Bill will also make amendments to the Special Educational Needs and Disability (NI) Order 2005 by providing a new statutory

right to a disabled pupil or prospective disabled pupil who is over compulsory school age to make a claim of unlawful disability discrimination to the Tribunal.

7. Details about the SEN framework are intended to be introduced through amendments to secondary legislation and in a revised statutory code of practice to which the Authority and Boards of Governors of grant-aided schools will have regard.
8. The financial case for change surrounds making the best use of the available resources. The Review is not about saving money or reducing budgets, but has a strong focus on delivering an efficient and effective system within the resources available to schools and the Authority.

## **CONSULTATION**

9. Formal consultation on “Every School a Good School: The Way Forward for Special Educational Needs and Inclusion” took place from August 2009 to January 2010. In June 2011 Departmental officials provided the new Committee for Education (“the Committee”) with a comprehensive briefing on the SEN and Inclusion Review. Following detailed consideration of the consultation responses, the Education Minister presented the broad direction of travel of the proposals to the Committee in January 2012 and issued a Summary Response document. From January to April 2012 officials undertook further engagement with stakeholders on the best ways to implement the amended proposals. During May and June 2012 the Education Minister engaged with Committee to present amended proposals in light of this post-consultation engagement to discuss and clarify a number of stakeholder concerns, which had been raised with the Committee. The Committee signalled that they were content for the Minister to seek Executive agreement to the revised policy proposals for SEN and Inclusion and to seek agreement to proceed to draft legislation.
10. In July 2012, the Minister presented his final policy proposals to the Executive on a revised SEN and Inclusion framework. Executive agreement was given to proceed with the Minister’s proposals and the preparation of the required implementing legislation, including the drafting of a SEN Bill. At that time the Minister also indicated to the Executive his intention to consider a number of associated policy areas allied to the SEN framework. These were issues considered as a result of developments in other jurisdictions or raised by stakeholders during consultation, including the: Northern Ireland Commissioner for Young People; Northern Ireland Human Rights Commission Equality Commission for NI; and Children’s Law Centre. The draft Bill therefore includes a number of clauses which have been considered following developments elsewhere or which reflect responses received from stakeholders.

## **OPTIONS CONSIDERED**

11. Various options were considered in relation to the existing SEN policy framework. Option 1, to maintain the status quo, was dismissed given the widespread evidence that the existing framework is not meeting the needs of all SEN children in a timely manner. Option 2, to develop legislation in line with the original proposals as set out in the formal consultation document, was also dismissed as a number of the original, core policy proposals attracted criticism from a broad range of stakeholders. Similarly,

Option 3, to develop legislation in line with the consultation responses from stakeholders, was dismissed given the many conflicting opinions expressed by respondents on core proposals.

12. The remaining options can be summarised as follows:

Option 4: Develop legislation that, while embracing the key principles of the review and the responses from stakeholders, achieves a middle ground in addressing core difficulties with the current framework. This option: addresses strategic shortcomings within the existing primary legislation on a small number of core areas allows for amendment to key aspects of subordinate legislation; and enables other matters to be developed within a revised statutory code of practice. It does not consider associated policy areas.

Option 5: Develop primary and subordinate legislation and a revised statutory code of practice in line with Option 4, but also include provision on associated policy areas following consideration of developments in other jurisdictions and responses to consultation.

13. Option 5 is the Department's preferred option as it was considered the best balance between the opposing views of the different stakeholder groups and presents a rounded package of proposals. It brings in a number of additional matters aligned to the SEN framework, draws on approaches in other jurisdictions and also brings into domestic legislation a number of aspects of the United Nations Conventions on the Rights of the Child (UNCRC) and on the Rights of Persons with Disabilities (UNCRPD). At the same time it enables key issues within the current framework to be addressed through a blend of primary legislation, subordinate legislation and statutory guidance.

## **OVERVIEW**

14. This Bill contains 16 clauses and a Schedule. A commentary on these provisions follows. Comments are not given where the wording is self-explanatory.

## **COMMENTARY ON CLAUSES**

15. For the most part the Bill amends Part 2 of the Education (Northern Ireland) Order 1996 ("the 1996 Order") (children with special educational needs) as amended by the Special Educational Needs and Disability (Northern Ireland) Order 2005 ("the 2005 Order"). In the Bill the reference to "the Tribunal" relates to the Special Educational Needs and Disability Tribunal as defined in Article 22 of the 1996 Order and Article 21 of the 2005 Order. The Bill takes account of the establishment (by the Education Act (Northern Ireland) 2014) of the Education Authority ("the Authority") to replace the education and library boards.

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

This clause places a general duty on the Authority to seek and have regard to the views of the child in decisions that affect the child surrounding his or her special educational needs. It provides that in relation to all functions within the SEN framework the Authority should also

have regard to the importance of the child participating in decisions and for the child being provided with information and support necessary to enable participation in those decisions.

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

This clause inserts Article 6A of the 1996 Order which places a duty on the Authority to prepare and publish a plan setting out arrangements to be made or proposed to be made in relation to special educational needs provision.

New Article 6A (2) of the 1996 Order requires that the plan should include a description of the resources and the advisory and support services the Authority proposes to make available in discharging its functions in relation to special educational provision and the description of the arrangements for training of staff in grant aided schools. The Authority must review the plan at least once a year and may revise it, having consulted with such bodies or persons as the Authority thinks appropriate. The Authority must publish the plan so as to bring it to the attention of people likely to be affected by the plan.

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

This clause amends Article 8 of the 1996 Order by making a small number of important changes to the existing duties on Boards of Governors of ordinary schools.

Clause 3 (2) (a) recognises that people, other than teachers, such as classroom assistants and playground assistants, working within a school may be involved in supporting a pupil's education and, where this is the case, they should be made aware of the child's special educational needs.

Clauses 3 (2) (c) and 3 (4), respectively, place a new duty on the Boards of Governors of ordinary schools and of special schools to maintain a personal learning plan for each registered pupil with SEN.

Clause 3 (2) (c) also places a duty on Boards of Governors of ordinary schools to ensure that a teacher in the school is designated as a "learning support co-ordinator". Clause 3 (4) places a corresponding duty on the Board of Governors of a special school. Regulations may require a Board of Governors to ensure that the learning support coordinator has particular experience or qualification or both.

Clause 3(2)(c) also places a new duty on the Boards of Governors of ordinary schools to secure that parents of SEN children of compulsory school age and children over compulsory school age are made aware of the arrangements for the avoidance and resolution of disputes between them and the Board of Governors.

Clause 3(3) amends Article 8 of the 1996 Order providing a power to the Department to make regulations to prescribe the circumstances and the manner in which a Board of Governors shall notify the Authority of changes regarding a child for whom the Authority is making special educational provision.

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

This clause amends Article 14 of the 1996 Order to impose a duty on the Authority to request help in all cases where it considers that the Regional Health and Social Care Board or a health and social care trust could help in the exercise of its functions. This Clause also takes the opportunity to reflect the current structures within the health and social care sector.

#### **Clause 5: Assessment of needs: reduction of time limits**

Clause 5 (1) makes amendments to Article 15 of the 1996 Order by shortening the period of time to not less than 22 days in which the Authority can receive written evidence from parents of children of compulsory school age or, from children over compulsory school age when the Authority is considering whether to undertake a statutory assessment. The Authority will be able to continue with a statutory assessment of a child's needs before the expiration of the 22 day period with the written consent of a parent, if the child is of compulsory school age, or of the child himself or herself, if over compulsory school age.

Clause 5 (2) also makes similar amendments to Article 20A of the 1996 Order (inserted by Article 10 of the 2005 Order) in relation to requests to the Authority for statutory assessments, originated by a Board of Governors of a grant-aided school, or the proprietor of an independent school.

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

This clause amends Articles 18(1)(c) and Article 19 of the 1996 Order. It introduces a new right of appeal to the Tribunal for parents of children of compulsory school age and the child himself or herself if over compulsory school age in circumstances where, following an annual review of a statement of special educational needs, the Authority decides not to make any changes to the statement. The Authority must provide a copy of any advice given to it on which that decision was based and must provide information as to the right of appeal to the Tribunal. Article 19 provides that all statements must be reviewed within the period of 12 months beginning either with the date on which the statement was made or the date of the previous review.

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

This clause amends Article 21 of the 1996 Order and inserts a new Article 21ZA of that Order, providing a new right of appeal to the Tribunal for the parents of SEN children under age 2. The appeal may be against the Authority's decision not to make a statement, or about the description in the statement of the Authority's assessment of the child's special educational needs and the special educational provision specified in the statement. The new Article 21ZA provides that a Tribunal may dismiss an appeal, order the Authority to make and maintain a statement or remit a case to the Authority for consideration.

#### **Clause 8: Mediation in connection with appeals**

This clause amends Article 21B of the 1996 Order (resolution of disputes) (inserted by Article 5 of the 2005 Order) and requires the Authority to make arrangements for the

provision of an independent mediation service to a person who intends to appeal to the Tribunal. A person appointed for the purpose of mediation and for the existing function of facilitating avoidance or resolution of disagreements cannot be an employee of the Authority. The Authority must participate in mediation if a person requests mediation.

This clause also inserts a new Article 21C, which provides that a person intending to bring an appeal to Tribunal must first seek and be provided with independent information and advice about pursuing mediation. The clause provides for the issue of a mediation certificate to enable a person to lodge an appeal with the Tribunal.

This Clause also provides the Department with regulation-making powers concerning mediation, including about giving notice, imposing time limits, those who may attend mediation, about ascertaining the views of the child, the provision of advocacy and other support services, qualifications, training and experience of mediation advisors and the Authority's action following mediation.

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

This clause makes amendments to Part 2 the 1996 Order, as set out in the Schedule, to confer on a child over compulsory school age, who has or may have special educational needs, rights within the SEN framework which were previously exercisable by a parent. The new rights for a child over compulsory school age include the right to request a statutory assessment and the right to appeal to the Tribunal against certain decisions of the Authority. This clause also provides regulation-making powers for cases where a child over compulsory school age lacks, or may lack, capacity to exercise the new rights. These include making provision to determine whether a child lacks capacity in relation to the exercise of his or her rights, and for the parent of the child to exercise those rights where it is determined that the child lacks the capacity to do so.

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

This clause amends Article 22 of the 2005 Order (jurisdiction and powers of the Tribunal) to provide a disabled pupil or a prospective disabled pupil, over compulsory school age, with a statutory right to make a claim to the Tribunal that a school or the Authority has unlawfully discriminated against him or her on the grounds of disability. This right would have previously been exercisable by a parent. A parent will retain the right to make a disability claim for a disabled pupil or a prospective disabled pupil of compulsory school age. This clause also amends Article 23 of the 2005 Order (procedure of the Tribunal) to provide a power to make regulations about proceedings of the Tribunal including the assistance and support for a child, over compulsory school age, to pursue a claim; arrangements to determine whether the child over compulsory school age lacks capacity to pursue a claim; and arrangements for the parent of a child over compulsory school age to pursue a claim where it is determined that the child lacks capacity to do so.

**Clause 11: Appeals and claims by children: pilot scheme**

This clause gives the Department a power to make regulations, a draft being laid before and approved by the Assembly, to establish and conduct a pilot scheme to enable children who have not attained the upper limit of compulsory school age to make, in their own right, a special educational needs appeal against the Authority's decision or a disability discrimination claim to the Tribunal. The SEN appeals include those about the Authority's decision: not to make a statutory assessment; not to make a statement; the contents of a statement; and not to change the school named in a statement. The appeal can be made following a request for assessment, a review or a reassessment.

The clause provides that a pilot scheme would be initiated within 10 years of the date on which the Bill receives Royal assent with the pilot operating for at least 2 years. Regulations under this clause cannot be made unless a draft has been laid before and approved by resolve of the Assembly.

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

This clause provides a power for the Department to make regulations to provide for children, who have not attained the upper limit of compulsory school age, to bring a SEN appeal or a disability discrimination claim to the Tribunal. The Department may not use this power until the pilot scheme (under clause 11) has been in place for at least 2 years. The clause establishes that regulations may include, in particular: the age from which a child may bring an appeal; arrangements about mediation; access to information and advice; advocacy and other support services. The follow-on regulations and associated right of appeal to Tribunal will be determined by the outcome of the pilot. Regulations under this clause cannot be made unless a draft has been laid before and approved by resolve of the Assembly.

**Clause 13: Definition of "child" for the purposes of special education**

This clause amends Article 3(8) of the 1996 Order to make provision to allow the Authority to maintain a SEN statement, to the end of the school year following the child's 19<sup>th</sup> birthday. This will enable a child with a statement, who reaches the age of 19 years during a school year, to remain in school until the end of that school year, subject to the Authority maintaining the statement.

**Clause 14: Interpretation of this Bill**

This clause contains interpretations.

**Clause 15: Commencement, transitional provisions, etc**

This clause contains provisions for the commencement of the legislation

**Clause 16: Short title**

This clause contains the short title of the legislation.

## **SCHEDULE**

This Schedule makes amendments to the 1996 Order, as amended by the 2005 Order, in relation to a child who is over compulsory school age. In particular, it transfers rights within the existing SEN framework from the parent to the child over compulsory school age. These rights include the right to request a statutory assessment and make representations to the Authority. The Schedule imposes duties on the Authority to serve notices and a proposed and amended statement on the child over compulsory school age rather than the parent, to provide advice and information to the child and make arrangements for mediation. The Schedule also places a duty on the Authority to provide the parent of a child over compulsory school age, but under the age of 18, with a copy of notices served on the child and to notify the parent when a proposed or amended statement has been issued to the child.

## **FINANCIAL EFFECTS OF THE BILL**

16. The proposals do not have any significant financial implications for the Department. The duties proposed for Boards of Governors serve to place on a statutory basis, functions that are broadly comparable with those already set out as good practice in statutory guidance. The duty on the Authority in relation to the preparation and publication of a plan in connection with special educational provision serves to add transparency to the information already held by the Authority on the services for schools and SEN pupils. The overall thrust of the proposals is to make the best use of the funding available, so that the same level of resources can be used as effectively as possible. It is envisaged that some modest costs to implement the proposed pilot arrangements, in due course, for children's appeals to the Tribunal would be able to be contained within existing budget, since a reduction is expected in the overall level of appeals as a result of the new mediation arrangements. Costs arising from the new rights of appeal for parents of children under age 2 and for parents and children over compulsory school age following annual review will largely depend on the effectiveness of the Authority's management of the new framework, the exercise of the new right of appeal and the uptake of mediation arrangements by potential appellants.

## **HUMAN RIGHTS ISSUES**

17. Informed by advice from Departmental Solicitors Office, the Department considers the provisions of the Bill to be compatible with the European Convention on Human Rights.

## **EQUALITY IMPACT ASSESSMENT**

18. In accordance with the duty under section 75 of The Northern Ireland Act 1998, an equality screening exercise has been undertaken on the revised SEN policy proposals. The screening exercise has established that there are no detrimental impacts on any of the section 75 groupings, since the revised framework will be predicated on the needs of the individual child. The decision of the screening exercise was not to conduct a full equality impact assessment because no equality issues were identified. The revised



SEN framework will continue to be based on identification, assessment and provision to meet the special educational needs of the individual child.

## **SUMMARY OF THE REGULATORY IMPACT ASSESSMENT**

19. The effects of this Bill have been assessed and it is concluded that the provisions will not result in savings for or costs to businesses, charities, social economy exercises or voluntary bodies.

## **LEGISLATIVE COMPETENCE**

20. The Minister of Education had made the following statement under section 9 of the Northern Ireland Act 1998:

*“In my opinion the Special Educational Needs and Disability Bill would be within the legislative competence of the Northern Ireland Assembly.”*

## **SECRETARY OF STATE CONSENT**

21. The Secretary of State’s consent is not required as the Bill deals only with transferred matters.