

Key changes between the draft SEN provisions and the Children and Families Bill

Please note: This document sets out the key changes between the draft SEN provisions and the Children and Families Bill. It is not designed to set out EDCM and SEC positions or priorities or provide a commentary on the Bill. It is purely a factual account of what has changed. It also incorporates statements made by the minister in his response to the Select Committee's pre-legislative scrutiny.

NEW Clause 19: General principles on involving children and young people

- This new clause establishes general principles which local authorities should abide by when undertaking their SEN functions. These principles relate to:
 - the importance of the child, young person and parent/carers participating as fully as possible in decisions and their views being taken account of; and
 - That information and support should be provided to enable their participation.

Clause 20: Definition of children covered by the Bill

- From the draft provisions, the Government has retained the same definition of SEN, the extension of entitlement to 'young people' over compulsory school age but under 25, and local authorities' responsibility for *all* children with SEN.

- Despite the Select Committee's recommendation, the Government has chosen not to include disabled children without SEN within the scope of the Bill. The Government argues that this is because they believe that most disabled children do have SEN, and that those who do not are covered by the Equality Act and social care legislation¹.

Clause 21: Definition of education, health and care provision

- The Government has added a new sub-clause (21(5)) setting out that any form of health or social care provision which is wholly or mainly for the purposes of the education or training is defined as educational provision. This is intended to establish in primary legislation what was previously in case law – that where a service (e.g. speech and language therapy) is designed to meet educational need it is a local authority's responsibility to provide.

NEW Clause 24: Duty of health bodies to bring certain children to local authority's attention

- This new clause places a duty on health services to:
 - bring children under compulsory school age to a local authority's attention if the health service thinks they may have SEN;
 - tell the parent if they think their child may have SEN and give the parent the opportunity to discuss it with them; and
 - Signpost the parent to any voluntary sector organisation they think is relevant.

This clause replicates clause 332 in the Education Act 1996 but it was not in the draft provisions.

Clause 26: Joint commissioning arrangements

- Local authorities and clinical commissioning groups "must" make arrangements for joint commissioning. This includes arrangements for

¹ See minister's response to pre-legislative scrutiny

considering and agreeing reasonable provision to meet the needs of all children with SEN in the area

- The Select Committee expressed concern that the joint commissioning arrangements would be insufficient to secure better engagement of health agencies and that there were no binding duties. The Bill has gone no further than the draft provisions in strengthening the joint commissioning arrangements. Instead, the Minister sets out how he is working with the Department of Health to “improve commissioning and delivery of services and redress”. These are:
 - Developing measures to ensure provision of coordinated advice and information services by local authorities and clinical commissioning groups;
 - Asking Healthwatch and the Care Quality Commission to explore how they could hold the NHS to account for how well it meets the needs of children and young people with SEN; and
 - Continuing to work with the Department of Health to develop further policy around the NHS Commissioning Board’s role².

Clause 27: Duty to keep education and care provision under review

- Local authorities will be required to keep education and social care provision under review, including whether local provision is “sufficient” to meet local need.
- On the list of who must be consulted during this review, the Government has added since the draft provisions:
 - Children and young people with SEN;
 - Parents/carers; and
 - Youth offending teams.

Clause 28: cooperation duties

- Named partners will be required to cooperate in relation to meeting the education, health and care needs of children and young people

² See minister’s response to pre-legislative scrutiny

with SEN. Local authorities will also have to make arrangements for cooperation between specific services.

- On the list of named partners who the local authority must support to cooperate, the Government has added since the draft provisions:
 - Youth offending teams;
 - The NHS Commissioning Board; and
 - Those involved in supporting transition to adulthood.

Clause 30: the local offer

- Local authorities will be required to produce information on the education, health and care services “it expects” to be available locally (the local offer).
- The Select Committee recommended that the Government establish a national framework for local offers to ensure consistency, together with accountability measures by which they can be evaluated. The minister responded that detailed requirements for the local offer will be spelt out in regulations. He argues that regulations will provide a common framework for local offers and help to ensure the consistency the Committee seeks³.
- From the draft provisions, the Government has added “provision to assist in preparing children and young people for adulthood and independent living” into the list of information which needs to be provided (clause 30(2)(e)). Provision to support children and young people for adulthood and independent living is defined as relating to housing, employment and participation in society (clause 30(3)).
- Since the draft provisions, the Government has added two new sub-clauses that place duties on local authorities to publish comments that have been made about their local offer and how the local authority responded (clause 30(6)). Comments will have to be anonymous (clause 30(7)).

³ See minister’s response to pre-legislative scrutiny

Clause 36: Education, Health and Care Assessments

- This clause in the Bill is substantially different from the draft provisions. The Government have re-instated the right of parents to request an assessment.
- Although not on the face of the Bill, the ministers states that provision has been made for timescales to be included in regulations, for the areas mentioned specifically by the Committee, including provision for aligning timescales for health advice⁴. This does not appear to be a commitment that timescales *will* be included in the regulations.

Clause 41: Independent special schools and special post-16 institutions

- This clause allows the Secretary of State to approve certain institutions for the purposes of allowing parents or young people to request those institutions are named on EHC plans. This clause is designed to get around the problem of defining independent special schools and independent specialist colleges in law. It would allow parents or young people to request that those institutions are named on EHC plans.

Clause 45: Ceasing to maintain an EHC plan

- The Government has changed this clause significantly in two ways:
 - An EHC plan will no longer automatically cease when a young person enters an apprenticeship. This would mean that a young person who still required educational support while completing an apprenticeship could still be entitled to an EHC plan.
 - An EHC plan would no longer automatically cease when a young person leaves education or training. Local authorities must consider whether “the educational outcomes set out in the plan have been achieved” before ceasing the plan (clause 45(3)). This could mean it could also mean that if a young person become NEET before completing their educational objectives (e.g. to go

⁴ See minister’s response to pre-legislative scrutiny

to college), the local authority might be required to maintain the EHC plan.

Clause 51: Mediation

- The Government has significantly changed this clause. In the draft provisions, parents and young people were required to attend mediation before making an appeal to the Tribunal. The clause in the Children and Families Bill requires parents to be provided with information about mediation and then to consider whether or not they wish to take it up. Mediation itself will not be compulsory.

Clause 67: approval of the new Code of Practice

- The Government has accepted the Select Committee recommendation that the Code of Practice should be laid before Parliament under the negative resolution procedures. Previous Codes were laid using the positive resolution procedures.

Matthew Dodd, February 2013