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Graham Stuart MP

Chair

Education Select Committee

House of Commons

London SW1A 0AA

Dear Graham

SPECIAL EDUCATIONAL NEEDS PROVISIONS

1. I enclose draft clauses on provisions for children and young people in England with special educational needs. It is intended that these will provide the statutory framework for the reforms we set out last year in our Green Paper, *Support and aspiration: A new approach to Special Educational Needs and Disability*.
2. It is intended that the provisions would form part of the package of children and families legislation announced in the Queen's speech and be introduced early in 2013 for carry over to the next session. This timing would enable us to take account of lessons learnt from the local pathfinders who are currently testing the reforms in practice and will continue to do so as legislation proceeds.
3. I understand that the Select Committee has expressed an interest in carrying out Pre-legislative scrutiny of these draft clauses; I would welcome this. Pre-legislative scrutiny is very important in helping us to get things right

before any legislation is introduced to Parliament, and the Committee is well placed to do this in view of the interest it has taken in the reforms to date. Should the Committee carry out Pre-legislative scrutiny I would welcome the opportunity to discuss special educational needs provisions with them.

4. I thought it might be helpful for the Committee to have, below, an idea of the approach taken to drafting the special educational needs provisions and a note of some particular issues where it would be helpful to have views (enclosed).

5. Should the Committee undertake Pre-legislative scrutiny I understand that it would invite views. In those circumstances, I hope that many people and organisations would take the opportunity to respond.

The special educational needs reforms

6. The Government is committed to improving outcomes for children and young people and support for them and their families. The Green Paper reforms are focused on these aims and on addressing the key issues with the present system. The draft special educational needs provisions reflect close working between Departments, particularly the Department of Health and The Department for Business, Innovation and Skills.

7. Too many children and young people who are disabled or identified as having special educational needs have their needs picked up too late, do less well than their peers at school and college and are more likely to be out of education, training and employment at 18. Schools and colleges can focus on the SEN label rather than on meeting the child's or young person's needs and aspirations and many teachers in schools and colleges can feel they lack the confidence to teach children and young people with special educational needs effectively.

8. Families often have to battle to find out what support is available and in getting the help they need from education, health and social care services. They don't feel properly involved and they lack control over their support.

When young people with a statement of special educational needs leave school for further education at 16 or 18 they are faced with another, different process, the Learning Difficulty Assessment (LDA), which does not maintain the statutory rights and protections available to young people in schools. There is little focus on the educational and life outcomes children and young people want to achieve, particularly independence and paid employment. Transition to adult life is not planned or managed well.

Supporting the reforms

9. Twenty local pathfinders (involving thirty-one local authorities and their Health partners) are testing ways of implementing the key reforms. Lessons learnt from the pathfinder programme have informed the development of policy relating to the draft clauses and emerging evidence will continue to be a critical resource for refining the policy, including in relation to draft regulations and statutory guidance to be made under the special educational needs provisions.

10. Two early evaluation reports which focus on the set-up and design phase are available on the Department's website and the evaluators are due to submit their next interim report, during pre-legislative scrutiny. This report will be about the early stages of recruitment and testing with families. Evidence of good practice and case studies emerging from the programme are available on the pathfinder support team's website (www.sendpathfinder.co.uk).

11. We are providing £6 million a year over two years to a range of organisations who will support local areas, including the pathfinders, in putting into practice some of the approaches we know work well in improving outcomes for children and young people. These include short breaks for families with disabled children; extending the Early Support approach to supporting families with young disabled children to those with older children and young people; developing training for key workers to provide support for parents; and helping young people with learning difficulties and disabilities

prepare for adulthood. We have also taken a number of steps to improve professional development opportunities for teachers in schools and colleges. We gave details of these developments in May 2012 in *Support and aspiration: A new approach to Special Educational Needs and Disability – Progress and Next Steps*.

The special educational needs provisions

12. The special educational needs provisions seek to establish a coherent statutory framework that works for children and young people from birth to their 25th birthday and enables them to get the support they need wherever they are educated.

13. They replace and extend provisions currently in Part 4 of the Education Act 1996 and associated schedules and regulations, and section 139A to 139C of the Learning and Skills Act 2000, which will be repealed in England. They retain safeguards for children, young people and parents provided by the current system in relation to assessments, Education, Health and Care Plans and appeals to the Tribunal. Regulations will set out the detailed requirements of particular provisions where indicated in the draft clauses. The draft clauses indicate where regulations are to be made and the scope of those regulations.

14. We have deliberately left the detail for regulations and guidance because we want those to be informed by the local pathfinders testing the reforms in practice and by the pre-legislative scrutiny process. We will provide the Select Committee with evidence from the pathfinders which will help to develop our thinking on the provisions to be made in regulations as this becomes available during the pre-legislative scrutiny process. Indicative regulations will be provided to Parliament to inform debate, particularly during the Committee stage. These will take account of pre-legislative scrutiny and debate during the passage of any legislation, as well as learning from the pathfinders.

The draft clauses

15. The draft clauses provide a framework for identifying, assessing and making provision for children and young people with special educational needs and their families.

16. Clauses 1 and 2 set out when a child or young person has special educational needs and what constitutes special educational provision. They include disabled children and young people and cover the age range from birth to a young person's 25th birthday. Clauses 3 and 4 set out when a local authority is responsible for a child or young person under the special educational needs provisions. It would be helpful to have views on those clauses as I have indicated in the enclosed note.

17. We will introduce a new requirement on local authorities and local health bodies to work together to promote integrated services (clause 5) and to plan and commission jointly services for disabled children and young people and those with special educational needs (clause 6). This will bring a real commitment across agencies to ensure that services included in the local offer and set out in Education, Health and Care Plans are available. It will ensure that families no longer find themselves caught between different parts of the system waiting for a particular service. Local authorities and their partners will have duties to co-operate across the special educational needs provisions (clauses 8 to 10) and local authorities will keep services under review (clause 7).

18. Local authorities will be required to publish a local offer of services for disabled children and young people and those with special educational needs (Clause 11). This will provide families with information about provision available locally from their local authority, schools, colleges and health and care services, and how to seek more specialist support if their child's needs are not being met. We are prescribing the key requirements but leaving local authorities to develop their local offer with parents, children and young people and with other partners.

19. We will introduce a better integrated assessment process which is more streamlined and involves children, young people and parents more effectively (clause 16). To achieve this, professionals will have to work together more closely, involving parents, children and young people, to arrive at a suitable needs assessment which avoids unnecessary repetition for parents. Local pathfinders are testing out the best ways of achieving the changes in culture and in processes to support this. We want to reflect lessons learned from the pathfinders in the regulations that will support the special educational needs provisions.

20. We will introduce an Education, Health and Care Plan for children and young people with more complex needs who would have statements or Learning Difficulty Assessments in the current system (clauses 17 to 27). This will set out in one place the education, health and care services they will receive for their support and create a new focus on outcomes, including future employment and independent living. Again, the pathfinders will inform the development of regulations.

21. The combination of the local offer, the single assessment process and single Plan, and the requirement for joint commissioning will give parents and young people greater confidence in the system. We will also give young people and parents of children with an Education, Health and Care Plan the option of a personal budget (clause 26). This will mean that they can be much more involved in how resources for support are allocated, either through a 'notional budget' or through direct cash payments. Parents and young people will not have to take up this option – but their entitlement to it, combined with the reforms to the assessment process and new Education, Health and Care Plan, will mean that agencies will have to be clear about the level of support a child or young person is getting and why they are getting it.

22. The special educational needs provisions apply directly to Academies rather than through their funding agreements. They enable young people and parents of children with Education, Health and Care Plans to express a

preference for Academies, Free Schools, further education colleges and non-maintained special schools in the same way as they can now for maintained special or mainstream schools (clause 18) and the local authority will be obliged to name their preference unless it would not meet the child's or young person's special educational needs, or would be incompatible with the efficient education of others or the efficient use of resources. Once named in an Education, Health and Care Plan the school or college would be under a duty to admit the child or young person.

23. The provisions on mainstream education in clauses 13 and 14 provide a framework for deciding where children with special educational needs are to be educated when they do not have an Education, Health and Care Plan or they have a Plan but no preference for a particular school or college. Those without Education, Health and Care Plans must be educated in mainstream settings with certain exceptions (for example, if they are placed in a special school or college to be assessed for a Plan). Those who have an Education, Health and Care Plan but no preference for a particular school or college must be educated in a mainstream setting unless this is against the wishes of the parent or young person or it would be incompatible with the efficient education of others. Mainstream schools must make sure that individual children with special educational needs can take part in the activities of the school with other children (clause 15).

24. Parents and young people will also continue to be able to make representations for places at independent schools or Independent Specialist Providers and nothing in these provisions affects those arrangements.

25. We aim to introduce independent mediation before appeals can be brought (clause 29) and to help tackle disputes early on we aim to provide arrangements for resolving disagreements between a local authority or school or college and parents or young people (clause 30); we will extend the right to appeal to the Tribunal to young people in further education and aim to pilot giving children the right to make appeals (clause 31) and introduce this more generally if the pilots are successful (clause 32). The Equality Act will be

amended to enable young people over compulsory school age to bring disability discrimination claims in their own right (clause 33).

26. The draft special educational needs provisions will work alongside the duties that local authorities, schools, colleges and other public bodies have towards disabled children and young people under the Equality Act 2010 to promote equality of opportunity, to make reasonable adjustments to their policies and practice and to plan to increase access for disabled people.

Implementing the special educational needs provisions

27. The draft provisions do not contain clauses on the transitional arrangements for moving from the current system to the new system. We are currently considering a number of options with the aims of making the process manageable for local authorities and while enabling children, young people and parents to move to the new arrangements as soon as possible. We will share our thinking with the Select Committee and would welcome their views.

28. The new provisions retain a requirement for a Code of Practice giving statutory guidance to schools, local authorities and others on the new arrangements (clause 44). In making a new Code to reflect the new provisions, we will be including other guidance, such as the current statutory guidance on *Inclusive Schooling*, and extending its range to cover further education and training. We will be involving a wide range of interested parties as we develop the new Code of Practice. We will then consult on a draft during the passage of the Bill and take account of the responses and debates in Parliament in the final version. We would aim to complete this process soon after Royal Assent, giving parents, schools, local authorities and others time to familiarise themselves with the new Code before the provisions come into force in 2014.

29. The special educational needs provisions extend to England and Wales as does Part 4 of the 1996 Education Act which it replaces. However, as indicated in the draft clauses themselves, almost all of them will only have

effect in England. Education is a devolved matter and Wales has legislative competence in the area of additional needs. The Welsh Government is currently consulting until October on changes to the special educational needs system in Wales and will bring forward an Assembly Measure to amend Part 4 of the Education Act as it affects Wales. The Welsh Government has agreed the draft clauses which have implications for Wales.

Issues on which it would be helpful to have views

30. The reforms are wide ranging and I am sure there are many different issues on which the Committee and those it consults will have views. There are some specific issues which it would be particularly helpful for the Committee to explore so that we can make sure that the provisions work in the best way to improve outcomes for children and young people with special educational needs and their families. I enclose a note on those issues and would welcome the Committee's consideration of them as part of the pre-legislative scrutiny process.



Sarah Teather MP
Minister of State for Children and Families

ISSUES IT WOULD BE HELPFUL FOR THE COMMITTEE TO CONSIDER

1. Special educational needs or learning difficulties and disabilities?

The clauses use the current terminology of “special educational needs”, a term which, in schools and early education contexts, refers to a child with a “learning difficulty or disability”.

However, once a child has left school the term “special educational needs” is not used formally and they would currently be described as a young person with “a learning difficulty” or a learner with “a learning difficulty and/or a disability” (where they are subject to a Learning Difficulty Assessment). In both cases, however, the definition of “learning difficulty” is the same.

The new legislation will continue to include children and young people with learning difficulties and, for those below compulsory school age, this includes those with developmental needs. It will also include children and young people who have a disability which either prevents or hinders them from making use of educational facilities of a kind generally provided for people of their age in schools and colleges within the area of the local authority or by institutions providing education or training for persons who are over compulsory school age (clause 1).

The term ‘special educational needs’ is embedded in law and common usage. But since it is currently closely associated with children in schools, and not with young people in Further Education or other Post-16 provision it may not be so well suited to a new system which runs from birth to a person’s 25th birthday and involves much closer working between professionals across education, health and social services.

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.

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

Clause 3 gives local authorities a general duty to identify children and young people in their area who have or may have special educational needs. Clause 4 makes clear that a local authority is responsible for a child or young person if they are in the local authority's area and have been identified by the authority or brought to their attention as having or probably having special educational needs.

The provisions are intended to work in an environment in which many children and young people are educated in schools and colleges that have no direct funding relationship with the local authority and capture situations where a child or young person lives in a local authority's area but may be educated in another area (for example, a child or young person with an Education, Health and Care Plan in a school or college in a neighbouring area or in an independent school or college further away).

They interact with other provisions which impose specific duties on local authorities on integrating and jointly commissioning provision (clauses 5 and 6), keeping special educational provision and social care provision under review (clause 7); co-operating with others (clauses 8 to 10), publishing a local offer of services (clause 11), making decisions about undertaking assessments (clause 16), drawing up, maintaining and ceasing to maintain Education, Health and Care Plans (clauses 17 to 24).

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

3. Integrated working

The requirement on local authorities to promote integration of special educational provision, health care and social care in clause 5 is expressed specifically in terms of children and young people with special educational

needs. There may, however, be a case for extending them to all children and young people.

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.

4. Extending choice

Clause 18 makes provision for young people and parents of children with Education, Health and Care Plans to express a preference for Academies, Free Schools, further education colleges and non-maintained special schools in the same way as they can now for maintained schools (special or mainstream) and have their preference met unless it would not be suitable for meeting their special educational needs, or would be incompatible with the efficient education of others or the efficient use of resources. Clause 20 makes clear that where a school or further education college is named in an Education, Health and Care Plan they will be required to admit the child or young person.

Under the new arrangements parents and young people will still be able to make representations for independent schools or Independent Specialist Providers (for young people over 16) but, as now, there will be no duty on a local authority to name such an institution in the Education, Health and Care Plan and no duty on the school or provider to admit the child or young person.

Following the publication of the Green Paper, organisations representing independent schools and non-maintained special schools approached the Department to explore being included in the range of schools for which parents could express a preference. As a result of those discussions the draft provisions would give parents the right to express a preference for a non-maintained special school and impose a duty on such a school to admit a child with an Education, Health and Care Plan naming the school as the school to be attended by the child. Independent schools expressed mixed

views on whether they would wish to be included in the provisions and therefore we have not included them at this stage. We know that some young people would like Independent Specialist Providers to be included and will be exploring this with the organisation that represents those providers. Our view is that only institutions which have a duty to admit a child or young person should be included in these provisions.

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

5. Making provision for 19-25 year olds

Staying in education or training until they are 25 may not be in the best interest of a young person. But some young people with special educational needs require longer than others to make the transition to adult life and it is important that local authorities are able to continue an Education, Health and Care Plan until a young person's 25th birthday if that is what they need. This may be to complete a course of study or undertake additional education or training. Because it is important for young people to make the move into adult life when they are able clauses 13 and 14 require local authorities to take into account the age of young people aged 19 or over who will be ready to leave education and training and make the transition into adult life at differing ages when deciding whether to assess that person and whether to maintain an Education, Health and Care Plan for that person. This will also be a consideration when deciding the point at which the local authority should cease to maintain a Plan. Young people aged 19 or over will have the right to request an assessment for an Education, Health and Care Plan and to appeal to the Tribunal if this is declined or if a local authority ceases to maintain a Plan.

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

6. Social care

Through the special educational need provisions, we expect that assessments for Education, Health and Care Plans will cover social care provision. By this, we mean that there should be a multi-agency approach to assessment and planning, and that an Education, Health and Care Plan should reflect social care support being provided (for example short breaks provided to a child in need under section 17 of the Children Act 1989). The provisions require the local authority and its health partners to commission jointly education, health and care provision for children and young people with special educational needs.

We would welcome views on whether the provisions achieve the aim of integrated planning and assessment across agencies.

The provisions provide the Secretary of State with the power to make regulations with regard to the practicalities of the assessment and planning process (for example the interaction with other plans and assessments, timescales within which assessments for Education, Health and Care Plans should be carried out and such Plans prepared and whether particular roles should be assigned).

We would welcome views on how the regulations could best be utilised to achieve the aim of integrated support.

Through the Care and Support Bill the Government is improving the outdated adult social care framework in order to improve parity of access and funding. The draft Care and Support Bill proposes that young people should start to receive adult services once they turn 18, includes draft provisions for adult social care services to assess a young person before 18 and to ensure that Section 17 services do not end before adult services start (or a decision is made that no adult services will be provided). We think these changes will help to prevent there being a gap in care when a young person turns 18 and is required to access adult services. Through the draft special educational

needs provisions, we also intend to give local authorities the power to continue to provide Section 17 services to young people with Education, Health and Care Plans after they turn 18 and for as long as the authority considers it appropriate. This should again ease the transition between services and help young people with the most complex needs move into adult services at a pace and time appropriate to them rather than the decision being governed by their age alone.

We would welcome views on these new powers and the impact they will have on young people's transition into adult services.

The majority of respondents to the Green Paper believed that the new single assessment process and Education, Health and Care Plans could be a vehicle to improve the “portability” of the social care support children receive as they move from one local authority area to another. Some of the local pathfinders will be looking at this. Better commissioning arrangements across local authorities, combined with the new plans, may lead to improvements in portability of this support without the need for legislation. However, following the recommendations of the Law Commission on the portability of social care for adults and the White Paper, we would not want children to have weaker rights in this area than adults and we will work with the Department of Health to ensure that provisions in this Bill and any associated regulations reflect those in the Care and Support Bill.

It would be helpful to have views on this approach.

7. Children and young people in or leaving custody

The special educational needs provisions do not apply if a child or young person is detained because of a court order, or by order of recall made by the Secretary of State. This would, for example, include children or young people subject to a custodial sentence in a young offender institution or a young person in prison. But provision is made for when a child or young person who

is released from a custodial sentence (clause 25). If they previously had an Education, Health and Care Plan, the local authority that is responsible for child or young person on their release (which may not be the same local authority that prepared and maintained the Plan originally) must maintain the previous Plan and review it as soon as is practicable. We aim to set out in regulations circumstances under which it is not necessary to review a plan. This is likely to include cases where the period in custody is short and a review has been carried out prior to the period of custody.

It is also the case that where a young person's special educational needs are identified for the first time while in custody, a relevant professional could bring this to the attention of the local authority (clause 4) who could then consider whether an assessment was necessary (clause 16).

Section 562 of the Education Act 1996 makes provision for special educational support to be provided to children and young people who are in detention and for the passing of information about their special educational needs between local authorities. The draft provisions do not change this in any way.

We would like to explore how the provisions could be used to reinforce protections for young people with special educational needs who are in custody or who are leaving custody, for example, to ensure that young people with an Education Health and Care Plan receive the right level of support when they leave custody. We will work with the Ministry of Justice, Youth Justice Board, and education providers to consider this.

We would appreciate the Committee's views and those of all interested parties on how these aims could best be achieved.