



Pre-Legislative Scrutiny: Special Educational Needs

Response to Education Select Committee questions from Disability Rights UK

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About Disability Rights UK

Disability Rights UK was formed through a merger of Disability Alliance, Radar and the National Centre for Independent Living on 1 January 2012. Disability Alliance took on the former Skill Helpline and policy work in 2011. We aim to be the largest national pan-disability organisation led by disabled people. Our vision is of a society where everyone with lived experience of disability or health conditions can participate equally as full citizens.

Introduction

Disability Rights UK welcomes the opportunity to contribute to the Education Select Committee's pre-legislative scrutiny of the Government's proposed reform of provision for children and young people with Special Educational Needs (SEN). We refer to this here as the bill.

This response focuses specifically on the 14-25 age group when young people need impartial information, advice and quality guidance on the full range of options available to make informed decisions on their education, training, employment and independent living. Our evidence comes from our Helpline callers and members – including in FE, training providers, local authorities (LAs) and Connexions.

We have responded below to the specific questions asked by the Committee; our response has been shaped by six core principles which are essential to ensuring that the proposed legislation meets the needs of disabled people.

- There needs to be a clear commitment to **equality** for disabled people; this should include supporting disabled people to achieve potential and aspirations.
- The **social model of disability** should inform the approach taken – this recognises that disability is the result of the attitudes and barriers created by others and not the result of individual differences.
- The best outcomes will be achieved by taking a **person centred** approach and ensuring that disabled young people are afforded the same level of opportunity as non disabled young people.
- The key to achieving these goals is to ensure the highest possible level of **involvement of disabled young people** in planning and decision-making.
- This needs to be reinforced through **transparency** as to what disabled people’s rights and responsibilities are and clear **accountability** on the part of those charged with providing support and services.
- Nobody should be worse off as a result of the changes introduced in the bill.

Consultation questions

General

1. *Does the draft Bill meet the Government’s policy objective to improve provision for disabled children and children with special educational needs?*

1.1 We broadly welcome the proposed approach. The reduction in the number of assessments, the integration of planning up to the age of 25, the emphasis on co-operation between agencies and the piloting of the right to appeal by children, all have the potential to improve provision.

1.2 A major improvement would be to place the duty around wellbeing at the centre of the whole bill – in line with the first clause of Care and Support Bill (herein referred to as the Care Bill). And, to then identify outcomes linked to this that can be monitored and all those supporting young disabled people can be held responsible for.

1.3 Accountability needs to be clearer so that disabled people and local agencies know who is responsible for what. This would go some way to preventing disabled people and their families having to ensure LAs and health services meet their obligations; addressing the current adversarial nature of the relationship.

1.4 The Bill has too little focus on what happens to young people post 16 and on helping people to prepare for the workplace or alternative options. We would therefore like to see a greater focus on careers guidance, supported employment and apprenticeships. We endorse the National Audit Office’s (NAO) recommendation that the Government should:

ensure that Education, Health and Care Plans place greater emphasis on longer-term outcomes and progression, and a fuller consideration of all viable placement options within the local offer.¹

¹ *Oversight of special education for young people aged 16–25*, NAO 2012

1.5 There should be a far greater focus on individual aspirations and involvement of the disabled person in deciding their own future. See also 14.4.

2. *Will the provisions succeed in cutting red tape and delays in giving early specialist support for children and young people with SEN and/or disabilities?*

2.1. One of the reasons for delay in giving appropriate support early enough is lack of funding. Consequently disabled people and their families often feel as though they have to fight to get the services they need. Government statistics show 67% of SENDIST appeals were conceded before hearing in 2009/10 suggesting that in some cases LAs may be using this as a way to delay meeting needs. The average time for an appeal to get to hearing in that year was 6.2 months². Regulations must establish a timescale that does not harm education. The new legislation must prevent this.

2.2. While mediation is to be welcomed, we are concerned this does not just create more delays and so needs to be monitored. It is also critical that mediation is truly independent to ensure that it gains the trust of disabled young people, their families and LAs.

2.3. As currently worded the disabled person or their parent has the right to make a written or oral submission at the point the draft plan is developed and they can then comment on the draft plan. We would like to see this strengthened to require active involvement of the disabled person in the development of the draft plan. We believe this will speed things up by ensuring the person's voice is heard early in the process.

2.4. Clause 6 (1) b of the Care Bill requires LAs to *contribute to the prevention or delay of the development by adults in its area of needs for care and support*. We would like to see a similar clause in this bill to encourage LAs to address issues before they arise, rather than look for ways to save money once costs have risen.

2.5. The bill should recognise that the need for early identification of support needs continues right up to age 25, for example where impairment develops later or changes require different support.

3. *What will be the cost?*

3.1. There is a strong economic case for investing in supporting young disabled people to achieve their potential.

3.2. Government data shows that disabled people are far more likely to be living in poverty and are almost three times as likely to have no qualifications as non disabled people.³ There is also a strong correlation between having a

² Special Educational Needs and Disability Tribunal reports 2009/10 Ministry of Justice

³ <http://odi.dwp.gov.uk/disability-statistics-and-research/disability-equality-indicators.php#a5>

statement at 16 and being Not in Education, Employment of Training (NEET) at 18.

- 3.3. NAO data shows that at the same time that there has been an increase in expenditure on post-16 special education since 2005/06 there has also been an increase the proportion of students with SEN attaining five GCSE A*–C or equivalent or above by age 19.⁴ Investment appears to have improved outcomes. The same report highlights potential long-term savings in social care and benefits through encouraging independence and supporting people into work.
- 3.4. The bill should require LAs to monitor the outcomes achieved by young people 16-25. This monitoring should inform LA planning and funding to meet their duties to make suitable provision available for all young people 16-19 and up to 25 for learners with learning difficulties and disabilities.
- 3.5 Achieving some of these savings will require LAs to think more widely about how to support people, including looking at areas such as transport planning and travel training which can enable young people to gain a greater degree of independence. We hope this wider approach will be required by guidance around EHCPs as it is in s139a statutory guidance (question 14).
- 3.6 There will be costs associated with transition from the current system to the new system which should be planned for (See question 5).
- 3.7 There are considerable increased costs for post-16 providers (See question 4).

4 *What impact will the draft Bill have on current institutional structures?*

- 4.1 Our main area of concern is around the way institutions work together. This is discussed below under question 13.
- 4.2 The NAO report on SEN⁵ highlights that current s139a assessments are often based on existing arrangements and not informed by the needs of the individual or cost effectiveness. As a result the quality varies from area to area. A move to a more truly person centred assessment process would require a change in this.
- 4.3 The proposals will place increased demands on all post-16 providers to liaise with three commissioners in each Local authority for each young person. Independent Specialist Providers (ISPs) will often work with 30+ LAs. While the principle of closer working is welcomed, a way of supporting providers to engage that does not detract from supporting disabled students is needed.

5 *What transitional arrangements should be put in place in moving from the existing system?*

⁴ *Oversight of special education for young people aged 16–25*, NAO 2012

⁵ NAO 2012 Op cit

5.1 Staff need to be supported through what will be major change. Time will be taken up in implementing the new system and in training staff. If we are to avoid a cohort of young people being subject to a confused and disjointed transition it must be properly planned and resourced.

5.2 Many disabled people and their families are frustrated and angry at the low level of support they receive. They will be looking to this Bill to improve things. However, a shift to a truly person centred approach will be delayed both by the challenge of bringing in a new system and because significant LA care funding is currently tied up in long term block contracts. This must be communicated clearly so people understand the reality of how long the change process will take.

5.3 The new system should not disrupt young people already in the process of choosing their post-school placement after year 9 transition reviews. This would be detrimental to the young person, and unsustainable for mainstream and specialist providers who have to plan ahead to make provision available and manage budgets. We would therefore like to see a planned transition to the new arrangements.

6 *What can be learned from the current pilot schemes and how can these lessons be applied to the provisions of the draft Bill?*

6.1 There are a number of important lessons from the Pathfinders that we highlight throughout our response. In addition:

6.2 It is clear that for some people it is not direct control over a budget that matters, but rather having transparency about the level of funding available. To make informed choices young people will need an indicative level of adult care package by age 16.

6.3 The work on Individual Budgets (IBs) highlights the issue of cooperation between agencies. For IBs to really work there needs to be clarity about the funding available across relevant funding streams. These budgets should be pooled so the individual has the freedom to develop a support package that meets their needs - and not overly limited by the regulations described in clause 26 (3). However, even making explicit the amounts of money available within different areas appears problematic:

Funding streams and services at present, in many areas, are siloed and ring fenced.⁶

6.4 This problem with co-operation across structures is a common theme and points to the question of accountability, which we do not believe has been adequately addressed in the bill (see remarks under question 1):

⁶ SEND Pathfinder Action Learning Network; Personal Budgets - 29th June 2012

There was consensus that accountability for the delivery of the plan is essential. However a number of issues and challenges were raised with this in a multi agency setting.⁷

6.5 The Pathfinders have also highlighted the importance of: engaging and involving people; of having a named individual supporting the disabled person (key worker); and, of planned workforce development. We expect future findings to inform the bill as it progresses into law.

7 *Is there anything missing from the draft Bill?*

7.1 Please see question 1.

7.2 We would like to see the expectation of professional development – not just for those who work primarily with young disabled people – but also those such as GPs and mainstream teachers in school and FE who should all expect to come into contact with disabled young people. In the case of GPs it is often they who may first inform a family about a child or young person's disability. It is important that they can help set a tone that focuses on the young person's aspirations and what they might achieve rather than on their limitations.

7.3 The bill seems to promote a medical model of disability that sees the person as less able and intrinsically limited; see clause 1 (2). As we discuss under the section on costs, this approach may mean we are missing the contribution disabled people can make, not least economically. Also see question 8, terminology.

7.4 In clause 3 of the Care Bill there is a duty on LAs to ensure a market in services so that people have a choice of high quality services to choose from. We are concerned that clause 7 of this bill only requires LAs to '*consider the extent to which the provision*' is sufficient. This may create specific issues for people with low incidence needs who require specialist services.

7.5 The bill does not appear to acknowledge clearly enough the need for those over 16 to be directly involved in making their own decisions about their futures. We would wish to see the requirements around involving young people in the process of developing and reviewing EHCPs strengthened.

7.6 The bill does not make clear accountability for those young people who currently receive support through School Action or School Action Plus. The LA needs to plan future provision for this group using school data to fulfil its duties to provide suitable provision. We believe young people with no EHCP and their parents should have transparent redress if their disability needs are not met.

⁷ SEND Pathfinder policy working group Single assessment process and Education, Health and Care Plan - 30th April 2012

Specific

8 *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?*

8.1 We would welcome a change in language. “Learning difficulties and/or disabilities” is more widely used outside of education and is closer to the term *disabled* used by many disabled people. However, the system should be considering people as individuals, identifying their individual support needs and not focussing on the label used.

9 *How the general duties on local authorities to identify and have responsibility for children and young people in their area who have or may have special educational needs (clauses 3 and 4) work with the specific duties in other provisions (clauses 5 to 11, 16 and 17 to 24)? Are they sufficiently coherent?*

9.1 While the new system will aim to be simpler, many people will still find it confusing, especially during transition. There is a need to ensure people have clear communication from the LA of what their rights are, where they are in the process and an explanation of all decisions taken. In addition people should be told how they can appeal against decisions they are unhappy with.

10 *Should the scope of the integrated provision requirement be extended to all children and young people, including those with special educational needs?*

10.1 The scope of the integrated provision should be extended to all children and young people. In 2012 there were 1,392,215 pupils with SEN **without** statements, 17.0 per cent of pupils⁸ - far higher than the number who receive a statement. This includes young people on School Action and School Action Plus with disability related support needs. In addition there will be young people at school whose learning difficulty has not yet been recognised or impairment acquired. We are concerned that the approach outlined will prevent these groups from being able to access the support they need.

11 *Should other types of schools and institutions be included in the duty on schools to admit a child with an education, health and care plan naming the school as the school to be attended by the child?*

11.1 The starting point should be the expressed wishes of the young disabled person. Disabled people should have as wide a range of choices

⁸ DfE Statistical First Release July 2012

available as possible with no options excluded. We support the inclusion agenda and mainstream is the preference for many disabled young people.

11.2 We are concerned that Independent Specialist Providers (ISPs) cannot currently be a named provider, given that for some low incidence, high cost needs they are the only providers able to meet some complex needs. This omission will mean some young people will be worse off and some LAs may not be able to meet their statutory duties including the local offer.

11.3 As mentioned in 1.4 there is not enough focus on post-16 choices in the bill, in particular the value of local FE, training provider and apprenticeships on leaving school. The current trend is to encourage young people to stay in school to age 19 instead of college and as a result young people miss out on work related and independent living skills.

11.4 The system should encourage co-operation and allow for options such as mixed provision where that might be appropriate. LSIS Cluster pilots show value for money and improved outcomes.⁹ An approach that allows that knowledge and experience to be shared would help optimise outcomes. Specialist providers should be invited to contribute to EHCP plans and reviews where relevant.

12 Do the provisions for 19 to 25 year olds provide a suitable balance between rights, protections and flexibility?

12.1 The bill is currently worded that if a young person leaves education or training or enters an apprenticeship they no longer have the right to an EHCP; clause 24 (3). We recommend this is reviewed.

12.2 We do not understand the logic of explicitly excluding people in apprenticeships, particularly as they include accredited training with a training provider. This creates a false distinction and may act as a disincentive to people taking this route due to differences in support available.

12.3 It is not obvious how someone who has perhaps dropped out at a specific point in their education can find their way back into being supported to continue their education if they so decide, yet the LA has a duty to encourage participation. Some learners tell us they have become NEET because the support in post-16 or school has not met their needs.

12.4 People's needs continue to change based on the setting they are in (and also due to changes relating to an impairment) or linked to developing an impairment later in life. The system needs to be suitably flexible to keep people's needs under review and to allow for later entry or re-entry into the system without delay.

⁹ The Green Paper Project: Support and Aspiration Overall Project report. LSIS undated

13 *Do the provisions achieve the aim of integrated planning and assessment across agencies?*

13.1 This bill represents significant progress in creating the framework for integrated planning across agencies. However, there remain some barriers. The Pathfinders highlighted integration as a key concern.

13.2 These barriers can in part be addressed by identifying outcomes, sharing these across services and monitoring them. In turn this would need to be reflected in the approach to funding across the agencies.

The majority of Pathfinder's agreed that ideally there should be one personal budgets policy across three agencies and therefore there would need to be consistency between the three in terms of funding, delivery and improved monitoring.¹⁰

EFA funding (to LAs) for high support needs should be included in the mix when looking at a shared approach to budgets and be transparent to the student.

13.3 In the Care Bill there is a wider range of partners listed and there is a general duty on the LA to cooperate with *anyone engaged in activities, in the authority's area relating to adults with needs for care and support or relating to carers*. This wider duty around cooperation should be in the Children and Families Bill.

13.4 Accountability is not clear where there is a failure to cooperate. The current silo culture suggests this is a critical issue; accountability was raised by Pathfinders:

As the local offer would contain information across the three services some pathfinders thought that a strategic message from all relevant services should be included and that clear accountability for these services is stated.¹¹

14 *How could the power given to the Secretary of State to make regulations with regard to the practicalities of the assessment and planning process be best utilised to achieve the aim of integrated support?*

14.1 While we make recommendations for regulations here, we would ideally like to see these explicitly referenced in the Bill itself.

14.2 There needs to be regulations setting the standard of services and support available in the local offer. This will aid movement between LAs with the same or similar care package, but also help reduce the post code lottery in the support available. This was identified by the Pathfinders as important:

¹⁰ SEND Pathfinder Action Learning Network; Personal Budgets - 29th June 2012

¹¹ SEND Pathfinder policy working group Local Offer – May 2012

Pathfinders agreed that an overarching framework to set the minimum requirements and parameters of the local offer should be prescribed nationally to ensure quality and a minimum standard across areas.¹²

- 14.3 An essential element of this local offer should be the *key worker* who can support and guide the young disabled person and help coordinate the range of agencies involved in providing support. Key workers would need the core skills and expertise to carry out the role and the ability to bring in appropriate expertise as required (for example careers advice).
- 14.4 The positive elements of the current statutory guidance on s139A assessments should not be lost with the introduction of the new EHCP. Specifically the following should be retained in statutory guidance or regulations: an emphasis on early identification at any age 0-25; a requirement to take account of individual aspirations; linking the support programme directly to progression towards employment or greater independence (including looking at elements such as travel); the duty to ensure that young people and their parents understand their rights; provision of impartial information; and the power to carry out assessments for those without EHCPs.
- 14.5 Similarly we would like to see the positive elements of the SEN Code of Practice reflected in new guidance related to EHCPs and transition issues. Specifically, the requirement around assessing needs of those young people who have special educational needs but not a statement. The Code requires that a transition plan is produced in Year nine and that young people are provided with information on *education and vocational or occupational training*¹³ (see 10.1 above). There is a clear duty to seek and take into account the child's views in this Code which should be reflected in future regulations.
- 14.6 There should be clear guidelines for the nature and content of information services. These should extend to supporting families and individuals around managing IBs and related issues such as employing care staff. These guidelines need to recognise that working with those over 16 requires a different approach than that required for working with school age children. All information must be accessible and impartial.
- 14.7 We have already stated that the bill would be improved by requiring LAs and their partners to work towards a set of shared outcomes and for these to be monitored. The details of these should be laid out in regulations.

15 What impact will the new powers provided for in the clauses have on young people's transition into adult services?

¹² SEND Pathfinder policy working group Local Offer – May 2012

¹³ <https://www.education.gov.uk/publications/eOrderingDownload/0581-2001-SEN-CodeofPractice.pdf>

15.1 The EHCP provides a powerful communication tool to support transition if used properly.

15.2 While the Care Bill states that support should continue to be provided under an EHCP until adult services have been able to assess the young person, this is not reflected in the Children and Families Bill. Reciprocal wording should be included to ensure people are not left unsupported if they drop out or the LA decides the student has met their educational objectives (a decision that should only be taken in full consultation with the young person and provider).

15.3 There is a risk that adult services do not assess someone before their 25th birthday and the legal obligation to provide support under the EHCP disappears at this point. Regulations and accountability should be clear to ensure this cannot happen.

15.4 Including adult services both in the overall development of the local offer, and also in the process of developing and reviewing individual EHCP plans once the young person is over a certain age would improve transition.

15.5 The proposed change to the Children Act removes the ability of LAs to continue support to those young people who do not have an EHCP post 18. As already stated a large number of disabled people will not be covered, transition is already problematic and this has the potential to make this worse for that group.

16 Should the provisions in this bill relating to portability of social care support reflect those for adults contained in the Care and Support Bill?

16.1 We welcome any measures that increase the portability of support packages. However, the Care Bill includes the provision for receiving authorities to reassess people when they move to their area. Given that an assessment is about the individual not the LA, we would want to see an assumption that the previous package of support would be continued, unless there had been a significant change in circumstances.

16.2 It should be recognised that someone may need support from one LA where they study (eg at college or university students) and another where they live during holiday periods.

17 How could the provisions in the bill be used to reinforce protections for young people with special educational needs who are in custody or who are leaving custody?

17.1 We would expect a young offender's disability support needs to be assessed and met prior to leaving custody so that the LA fulfils their duties and so the young person is supported without delay up to age 25. People with learning difficulties are disproportionately represented in offender institutions.