



The Law Society

Children and Families Bill

Law Society supplementary written evidence to the Public
Bill Committee

20 March 2013



Children and Families Bill

Supplementary written memorandum submitted by the Law Society of England and Wales

Part 3: Children and young people in England with Special Educational Needs

Summary

1. The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law. This evidence has been prepared by members of the Society's Mental Health and Disability Committee.
2. The Society is pleased to note that the Children and Families Bill has amended parts of the draft SEN legislation published in September 2012 following scrutiny by the Education Select Committee. In particular, the requirement for Education, Health and Care Plans ('EHCPs') to 'specify' rather than simply 'set out' provision in an EHCP, the extension of an EHCP to young people undertaking apprenticeships, the code of practice being subject to parliamentary scrutiny and the removal of the requirement for mediation to be compulsory are all to be welcomed.
3. However, the Government has not followed many of the Education Select Committee's recommendations such as that EHCPs should be extended to disabled children and young people who do not have special educational needs. Other significant concerns include that while there is a duty on education, social care and health to cooperate, only the education part of the EHCP is enforceable and only Local Authorities are respondents to tribunal proceedings; the local offer being neither enforceable nor measurable against a national standard; the lack of timetables in relation to statutory assessments and associated issues concerning rights of appeal and a weakening of various current provisions.
4. Furthermore, the Society questions how these new duties (which can extend to young people up to the end of the academic year in which they turn 25) can be delivered without a commitment for specific ring-fenced new money. This issue does not appear to have been addressed in the school funding reforms being introduced in April of this year.
5. The Society supports the amendments proposed by IPSEA (Independent Parental Special Education Advice) in its March 2013 written submission to the Public Bill Committee¹.
6. The Law Society has the following additional comments and proposed additional amendments:

The local offer

7. The local offer provisions are set out in Clause 30 but the detail of these provisions 'may' rather than 'will' be set out in regulations. The local offer will only be meaningful if it is up to

¹ [Associated Memorandum submitted by Independent Parental Special Education Advice \(IPSEA\) CF23](#)

date, meets a national standard and can be enforced if it does not comply with this standard or the primary or secondary legislation associated with it.

- 7.1. Clause 30(5) replace 'may from time to time revise it' with 'must revise it by 31 January every year before decisions about phase or other transfers are made or more frequently, if the information contained therein is no longer accurate'.
 - 7.2. Clause 30(8) replace 'may make' with 'must make'
 - 7.3. Clause 30(8)(a) add on 'which will be subject to a national standard set out in the regulations'
 - 7.4. Insert a new Clause 30(8)(f):

'how to ensure a local offer is put in place and the content of that offer'.
 - 7.5. Clause 30(9) replace 'may' with 'must'
8. Further, even though the Bill as currently drafted does not make the health and care parts of an EHCP enforceable, much of the provision set out in the local offer is of course also relevant for children and young people who have health or social care needs but who do not have SEN. This highlights the unfairness and inconsistencies which are the result of not extending EHCPs to these children and young people.

Education as the only enforceable component

9. The fact that special educational provision is the only enforceable component before the Tribunal, rather than all three parts of an EHCP, is a significant flaw in the Bill and a missed opportunity for streamlining processes for children, young people and parents.
10. The Society understands that in order to make the health and care parts of an EHCP enforceable, the duties under the NHS and Children's legislation would need to change from target duties to individual duties. However, it urges the Government to consider further how this could be achievable so that all the component parts of the Plan are equally enforceable and so that children and young people with health and care needs but without SEN or without an EHCP would have a right of appeal to the Tribunal in the same way as those with EHCPs. The duty to cooperate falls far short of achieving this or bringing about meaningful change to the current system.
11. A consequence of education being the only enforceable component is that the welcomed concept of single assessments appears to have been lost other than for those children and young people for whom it may be necessary to put in place special educational provision; other children and young people will continue to face multiple assessments.

Nationwide therapy service for children and young people

12. If the Government is not minded to make the health and social care parts of the EHCP enforceable, the Society recommends that consideration be given to establishing greater and properly integrated provision of, for example, occupational health, physiotherapy, speech and language therapy, sensory services, CAMHS and AMHS. This could be achieved via a national appropriately funded multi-disciplinary assessment service for children and young people available at the point of need, which would be accessible locally

and included in the local offer. This should be available to all children, not just those with SEN. This is imperative if anything positive is to change for the future as a consequence of not making the other parts of the EHCP enforceable. Experience has shown that an absence of these services at the appropriate time leads understandably to parental requests for Statements, (soon to be EHCPs), and that trend is likely to continue in the future under this Bill. Such a service may minimise the current difficulties faced by children and young people in accessing provision whilst not requiring changes to the legal framework of the NHS.

Detained children and young people

13. The overrepresentation of children and young people with SEN in the justice system has been well documented by, for example the Prison Reform Trust in publications such as *Punishing Disadvantage: A profile of Children in Custody*².
14. The Society considers that detained children and young people should be allowed access to the support available to children and young people with or without an EHCP. It proposes that Clause 69 be deleted and a new clause inserted which clarifies that responsibility for Part 3 provision for detained children and young people passes from a local authority to the Youth Justice Board or HM Prison Service as appropriate whilst they are detained.

The balancing exercise

15. Special educational needs case law since the Special Educational Needs Tribunal (now the First-Tier Tribunal (Special Educational Needs and Disability)) was established, demonstrates ongoing universal confusion about the balancing exercises involved in placement decisions.³ The Society is concerned that as currently drafted, the Bill will perpetuate these balancing exercise issues and unnecessary challenges will continue to be made as a result, to the detriment of all concerned but particularly children and young people.

² [Jacobson et al, \(2010\), *Punishing Disadvantage: A profile of Children in Custody*, London: Prison Reform Trust.](#)

³ Recent case examples include *Dudley MBC v Shurvinton & Ors* [2012] EWCA Civ 346; *EH v Kent CC* [2011] EWCA Civ 709; *Essex County Council v SENDIST (1) & S (2)* [2006] EWHC 1105 (Admin)