

Our Ref: SMC/AB/AMA.White  
Extn. 34

24<sup>th</sup> July 2014

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Dear Sirs

**Re: Formal Response to the White Paper dated 22 May 2014 in relation to SEN Reforms**

We make representations in relation to the White Paper which you issued on 22 May 2014. As Education Law Specialists we believe that we are able to respond comprehensively to the consultation document, our views based on years of front line involvement in the area.

We do not consider that you have afforded sufficient time for such an important issue to be debated. There has been little to no media promotion of this consultation, yet the ramifications are huge. The rights of those under a disability require adequate time and proper consideration, for the issue to be properly discussed and debated. We have seen little media advertising in Wales over this, and we are concerned that change may be introduced by a consultation that is undertaken during a holiday period in which many of us are away on vacation. Change by stealth should be avoided.

We were very disappointed by much that is included within the White Paper. Some of the proposals represent a weakening of the current rights, indicating a rushed attempt to produce proposals without sufficient consideration. The Paper appears to make similar mistakes to those made by the English Government in the most earliest stages of the Bill that subsequently led to improvements within the now Children & Families Act 2014.

Before this Act became law, the English Bill resulted in substantial consultation involving a number of influential and hardworking specialist groups within England. These groups worked together with the English Government to improve the then proposed legislation. The Children and Families Act is the product of that consultation and specialist input. The population within England as compared to Wales in itself demonstrates that the majority of people who might be affected by changes to the legislation voiced their

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concerns when the English Bill was debated, and as such the final product was the product of majority opinion. A majority opinion should not be brushed aside. It naturally follows that Wales should be slow to ignore the reasons why England introduced this new legislation and should be equally slow to ignore the eventual result which is now contained in the Children and Families Act 2004.

The White Paper however fails to address the critical importance of adopting a holistic approach to a young persons needs. Instead it reflects what was once being proposed in the early stages of the English consultation, an approach which was sensibly subsequently abandoned. It is true that the Children and Families Act 2014, may require improving, but it is a welcome step in the right direction for the people of England. The Welsh public need at least the same as that in England but preferably a stronger series of protective measures, thereby ensuring that those burdened by disability are protected.

The extension of statutory rights up until the age of 25 is welcomed, but we must ensure that the legislation is not a set of well intended objectives without specific obligations. We have to date enough "target duties" within the existing legislation. Protection will not be properly afforded unless "specific duties" owed to individuals as opposed to target objectives afforded to groups are adequately created. It is imperative that people are afforded statutory protection with the new plans having legal weight in the form of specific duties, the breach of which will amount to a violation of statutory duty and should become enforceable in a court.

The new plans should be afforded the same protection as currently provided to young people who hold statements of special needs in accord with section 324(5) of the Education Act 1996.

The plans must however be the product of consultation and assessment of all of the young person's special needs to include educational but also their social and health care needs. It is inadequate to anticipate that concentration on solely educational needs will be sufficient to ensure that those with disabilities are afforded the same protection and equality as those without disability. Special Educational needs, more often than not include health and social needs. One cannot properly address one without needing to address the other. In England the relevant document is now referred to as an Education Health & Social Care Plan. It is unclear why in Wales one is focusing solely on educational needs without looking at the wider picture. It is unsatisfactory to rely on target objectives which expect inter agency cooperation, if those objectives do not involve specific duties to do so, thereby allowing individuals to enforce in circumstances of failure. A cohesive approach to needs is what is needed in Wales as opposed to compartmentalising need, whilst at the same time affording statutory protection for one area of need but not the other.

We therefore wish to make the following specific points for your consideration:-

1. We fail to see the purpose of introducing a new term "additional needs". The phrase itself promotes more questions than answers. It is argued in the document that the basis for a new definition is because of purported and/or

perceived problems that this creates in schools. It is argued that young people are accordingly stigmatised or bullied because of the use of this phrase. It is the disability that sadly creates the bullying and or intimidation thus it is the disability that requires protection not the definition. Protection is afforded by strong statutory language and duties; it is also afforded by better education. Not everyone wishes to be labelled "mainstream", but instead celebrate being a little different which is exactly what makes them special. It is the things that set us apart that are often the reasons why we may feel special and the reasons why we may feel special are often the reasons why we may be loved. The phrase "additional" presumes that "mainstream" provides a clearly defined starting point. It does not. The phrase special educational needs does not, in our view, contain any stigma whatsoever, and if there is evidence that it does in fact do so, then the answer is to address it through better education.

It is not clear what would therefore be meant by "additional" needs. Pupils who have English as an additional language have an additional learning need. Seemingly, this is either a deliberate or an accidental weakening of the phrase special educational needs in an attempt to shoe horn those who need something different to achieve their optimum to accept what is provided for within mainstream. The term "additional" is a very broad phrase. We entirely agree with those stakeholders because the phrase additional learning needs is extremely wide and it seems to add nothing. Changing the definition in this manner will result in a substantial amount of administrative work and cost not to mention opening up unnecessary litigation.

Furthermore we should not demonise the phrase "special" as it exposes those who have used the phrase up to now as one that rightly applies to them, to cruel ridicule. By rephrasing it, you lose the argument, as it suggests that the state interprets the phrase in the same way as those who victimise others because of it.

2. We note that you intend to introduce individual development plans (IDPs) to replace statements of special educational needs. It is surely not a coincidence that the phrase IDP is very similar to the phrase IEP which is the current document which supports all pupils who have school action and school action plus support. Pupils with statements of special educational needs also currently have an IEP. The difficulty therefore in relation to the name is that it weakens the strength of having a legally enforceable document in place and it would leave parents to believe that the new document has no legal force. An IEP has very little to no legal force whatsoever.
3. One of the most concerning aspects is that you indicate that the legal force will be afforded by schools being obliged to "use their best endeavours" to ensure that the relevant support is put in place for a child. The current legislation uses similar language ("best endeavours"). Yet this phrase will rarely provide statutory protection to those who are failed. It is another target non enforceable obligation in practice. This is precisely why those with particular learning needs, require full

statutory protection. Your suggested legal definition therefore is concerning because it implies that there will simply be a general duty in relation to young people who have an IDP. You indicate on page 20 of your document that a code of practice should be issued and that may include "mandatory requirements in accordance with which relevant bodies ... must act". The SEN code of practice is, in legal practice, rarely a document that is expected to fill the gaps of primary legislation. Guidance documentation is treated as guidance. It is not appropriate to suggest that protection should be afforded within a guidance document when there is opportunity to afford the protection in statute. Generally local authorities are expected to "have regard" to guidance. Rarely does statute bind the authority to "comply specifically" with guidance and neither should it, as to do so, will remove discretion which the law would generally expect. Therefore there is every need to afford proper and specific protection within the statute itself, to ensure that IDPs are properly enforceable. The current statutory duty in the case of statements of SEN confirms clearly at Section 324 (5) of the Education Act 1996 that a LEA must maintain a statement of SEN.

4. The extension of one document covering 16 up until the age of 25 is one of the positives of the proposals. However, you do not seem to have taken into account that there is a substantial difference between statements of SEN and learning difficulty assessments. At the moment if a child has a statement of SEN it is legally enforceable. For pupils post 16 and post 19 who simply have a learning difficulties assessment they are not given proper statutory protection. One is left having to construct legal arguments from a range of different pieces of legislation. It is highly expensive, and inappropriate. The Welsh Government now has an opportunity to better support those with disability. It should do so in the law to protect the enforceability of a document that is supposed to recognise what a young person actually "needs". A "best endeavours" obligation will not do this. A failure to identify that there is a substantial difference pre 16/19 and post 16/19 is concerning.
5. It is not clear who will contribute towards the IDP assessment process. At the moment IEPs are prepared informally within schools with very little specialist support. It is not set out anywhere in the document as to how an IDP assessment would be conducted and whether or not an educational psychologist or other experts will need to be involved. We would have great concerns if you simply leave this issue vague and allow schools and LEAs to complete their own assessment. There should be multi agency involvement.
6. At the moment a parent of a child with SEN requests that the LEA complete a statutory assessment if they are concerned in relation to their child's progress in school. If that request is refused a parent has a right of appeal to the tribunal. A request for an IEP is an entirely different procedure made to the school on a more informal basis with no right of appeal. It is not clear whether or not you are advocating that parents will have to request an IDP from their school or whether they would approach the LEA to make such a request. Your new IDP process seemingly will cover all pupils who previously were classed as school action or

school action plus and it therefore seems very difficult to imagine how administratively an LEA would consider every request being made by a parent for an IDP. Seemingly therefore you are going to ask schools to specifically consider the relevant requests. However, there is no indication as to who within the school has to make the final decision as to whether or not an IDP is necessary. Indeed this is the type of administration that schools could do without. It is burdensome and likely to promote hostility between parents and schools damaging relationships that are essential for good child progression. We doubt that head teachers would embrace the idea that they should be expected to turn down parental requests and face parental objections. Further it is unclear whether, if it is going to be the school whether they would have the appropriate training to make such a decision. There is also no indication given as to the timescales that should be involved in relation to such a request.

7. It is extremely concerning that at the moment there seems to be no right of appeal against the refusal to conduct an IDP assessment. This was originally also a concern in relation to the English legislation before the legislation was properly consulted upon and finalised. At the moment you indicate that there is a right of appeal to the Tribunal against a decision not to put an IDP in place. However, that seems to relate to the decision that would be made after the statutory assessment process had been completed. If an LEA or indeed a school refused to complete an IDP assessment then in those circumstances a parent must be given a right of appeal to the SEN Tribunal otherwise they will be prohibited from ever challenging the decision made by the LEA or the school. The assessment duty strikes at the root of the problem. Without an assessment a child may very well be left without adequate support. Delay in a child's educational life can be extremely damaging. As indicated, there was confusion about the original English law before the Children and Families Act 2014 was finalised and that problem has now been rectified. It is concerning that you seemingly have not dealt with this issue when you prepared the White Paper. This is one of the many reasons why it appears that your new White Paper follows the old English proposals rather than the finalised Children & Families Act 2014. The relevant aspects of the Children & Families Act 2014 that were changed in the process of consultation were changed because they were necessary. The majority of the UK population called for these changes. We respectfully suggest therefore that you should pay due regard to those changes.
8. Another concerning aspect is in relation to mediation. Again, in England this was originally a concern before the finalised Act was put in place. Parents were informed that they must engage in the mediation process. However, the new Act deals with this simply by indicating that parents in England will now have to contact the relevant mediator to get further information and confirm that they do not wish to engage in the mediation process. Mediation therefore is not and should not be made compulsory. It would otherwise mean yet another expensive layer of bureaucracy that causes unnecessary delay. When a failing 6 year old child is depressed and in need of specialist services, he/she should not be expected to wait for his/her parents to pursue mediation and then a long tribunal

process. It is a sad fact that in the years that we have been dealing with these cases, unmet special needs or indeed delayed action, promotes the chances of the child getting a lot worse. We have even experienced the tragedy of children sometimes even taking more extreme steps to include self harm. Delay should never be promoted in the case of children. Forcing parents through mediation processes when they do not wish to do so is unfair and unnecessary. We note however that your suggested proposals are in many respects even worse than the original proposals that were made in England because you suggest that parents should use not only mediation but local complaints processes prior to appealing to Tribunal. Such complaints processes are notoriously always very slow and difficult to follow. We would strongly advocate that you adopt instead the same procedure as in England. In England at the moment parents are informed of their right to go to mediation but they are allowed to elect not to attend mediation if they do not wish to do so.

9. A more general point is that seemingly almost everybody with a disability will be entitled to an IDP. All pupils on school action or school action plus will now be able to have an IDP and pupils who have statements will also have an IDP. At one point in your White Paper however you indicate that just because a pupil is diagnosed this does not mean that they will be entitled to an IDP. This seemingly correlates with the arguments that we have advanced above about what exactly will be meant by the term "additional needs"? However, a pupil who is diagnosed with dyslexia will obviously require additional support. Under the current system it appears that they would get support at school action or school action plus but they may require greater protection. A pupil with a diagnosis of autism would also be entitled to additional support at school action or school action plus and close monitoring. Will they get an IDP? It is difficult to envisage a situation where a young person has a disability who does not need the protection of a legally enforceable IDP. It is therefore unclear as to who you actually expect to receive an IDP. Further a child with complex social or health care needs, but relatively clear learning needs, may not receive an IDP it seems. Within the documentation you refer to pupils who are currently on school action or school action plus but you make no attempt to define who actually should receive such a document.
10. In relation to the rights of appeal to the Tribunal you indicate that an appeal can be lodged regarding a refusal to review an IDP. However you do not appear to allow a right of appeal against a decision that is made after an annual review. This is exactly what you should be suggesting because such a right of appeal has existed in England since 2010. It is extremely concerning that in Wales there is currently no right of appeal after an annual education review.
11. You have made no attempt to deal with the very complex issue of transitional arrangements. In England the current proposal is that all statements of SEN will be converted into Education, Health & Care Plans and likewise all learning difficulty assessments will be converted within a 4 year period, if necessary. This will cause substantial confusion and it will be a difficult process. Will those currently holding a statement now have to urgently renegotiate with their

respective local authorities? There has been careful consideration in England to this issue. We are unclear as to whether or not you are suggesting that such transitional arrangements should be put in place in Wales or whether you are suggesting that pupils who currently have statements of SEN will simply continue to have such stated support. You will need to carefully consider the issue of transition and how you intend to deal with it. It is a complex and difficult process in relation to such widespread changes to the law. The phraseology that you are electing to use also will not assist this transitional process as we may have children on school action, school action plus, statements, IEPs and IDPs all at the same time. It is unrealistic to expect parents to understand the difference between an IEP and an IDP if both systems run together for a period.

12. We are concerned that you are intending on restricting the ability of parents to elect for their children to be educated within an independent school unless it is specifically registered to take children with disabilities. In some cases independent schools have been an excellent way forward for a child who has sensory difficulties or mild autism because they offer the young person smaller classes in a mainstream type of environment. These schools are not necessarily always registered as being able to accept pupils with special educational needs. However this does not mean that the school placement is unsuitable. Page 24 therefore causes some concern because you are proposing that LEAs would be specifically prohibited from placing children at an independent school that has not been registered to provide the specified type of additional learning provision. Kings Monkton School in Cardiff, for example, is able to offer young people with disabilities a smaller class environment and a more quiet environment overall. It is not necessarily a school that is registered to support pupils with autism but it is able to do so. We should maintain flexibility of this kind, and we should certainly be avoiding the type of unnecessary and slow bureaucracy (long abolished in England) which suggests that the Welsh Government should somehow be better placed than our schools and teachers to determine what is best for children. Politics should respect professional opinions. Restricting a child's ability to attend at an independent school solely based on their relevant registration is completely unnecessary and could be quite damaging to a number of pupils. Each pupil must be considered individually.
13. We note within the white paper that you make no attempt whatsoever to involve the Health Authority in relation to your proposals. In England the law in this respect has dramatically changed because if health provision is set out in an Education, Health & Care Plan the relevant Health Authority has a legal obligation to provide that support. This, in particular, will be a substantial change for young people prior to the age of 5 who require speech and language therapy, occupational therapy and possibly also ABA support. Far too many children in need of health services in Wales are being deprived of speedy or adequate support. One merely has to ask why so many children in our schools in need of speech therapy or occupational therapy do not receive it. One should only consider the long waiting lists and stretched resources within the CAMHS teams. So many children in need of good mental health services have to wait far too

long, only to find that there is no service for them after all. It is not clear why you have disregarded this aspect addressed within the new English legislation. It should be incorporated in Wales. Your current proposals are that the new statutory provisions will come into place in 2016 and therefore it will have taken Wales 20 years to effect change. Refusal to deal therefore with health provisions represents a missed opportunity.

For these reasons might we very respectfully ask that we all look across the Severn to learn what is happening there, and improve the situation further for the people of Wales. Affording support to those under a disability is not a privilege but a right. We respectfully suggest that a lot of money and time could be saved if we simply adopt the wording contained within the Children and Families Act 2004, and then go further by improving it.

We therefore trust that you will take the above into account. We note within the White Paper that you indicate that you will publish a summary on your website in relation to the responses. However, can you please ensure that a copy of this letter in full is published on your website so that other professionals and parents can see the concerns that we are raising. We say this because we are one of, if not the only firm in Wales that has specialised in this field of the law for so many years.

Please confirm receipt of this letter. If you wish to meet with us to properly consult in relation to the issues that we have raised then we will be absolutely happy to participate. This, as you may appreciate happens to be a matter close to all of our hearts here at SinclairsLaw and we will continue to advocate strongly for the vulnerable groups that we have represented for so long.

The white paper requires substantial re-consideration before any law is drafted. We call for a national conference to debate the issue. We would certainly wish to participate if not organise it. We would invite all of our partner organisations who work with vulnerable people to attend. We ask that a member of Government also participate.

Yours faithfully



**SINCLAIRSLAW**