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**Dear Secretary of State for Education,**

**Response to ‘SEND Reform: Putting Children and Young People First’ Government Consultation**

**Risks and challenges for schools arising from proposed SEND reforms**

Stone King is a national law firm advising schools in relation to all education law matters. Our expertise includes advising schools in relation to issues arising in relation to pupils with special educational needs (“SEN”) (under the framework created under the Children and Families Act 2014 (the “SEN framework”), and disabilities (under the Equality Act 2010). We advise schools on:

- their legal obligations under the SEN framework, and resolving parental complaints they receive in relation to their children with SEN, insofar as they relate to the SEN framework;
- their legal obligations under the EA, and responding to disability discrimination claims submitted to the First Tier Tribunal;
- the Local Authority’s obligations under the SEN framework, including in relation to assessments, placements and funding, and escalating complaints in relation to LAs’ failures to comply with their obligations (whether through the LA formal complaints process, to the Secretary of State, or by way of a judicial review claim); and
- responding to LA consultations in relation to naming their school on a child’s EHCP plan.

We consider that we have a relatively unique experience in understanding the key flashpoints of the current system for schools, where improvements must be made in any future system, and the potential implications for schools of the proposed changes. We are responding to the government’s consultation, SEND Reform: Putting Children and Young People First on this basis.

We would start by saying that we broadly acknowledge the need for reform and welcome the proposals set out in the consultation document as a significant step in the right direction.

The following sets out our principal areas of concern:

**1. Increased responsibility: ‘best endeavours’**

The reforms place greater emphasis on meeting needs within mainstream settings, reducing reliance on EHCPs. Mainstream schools will be required to meet increasingly complex needs of children who may formerly have been eligible to be educated in special schools. Meanwhile, the legal obligations in relation to every child on the SEN register (most of them without EHCPs) under the new system will be far more extensive than they currently are: schools will have a legally mandated duty to produce and then annually review an Individual Support Plan (ISP) for each child.

Currently, while s. 66 and the SEND Code of Practice sets out a broad framework indicating how the best endeavours duty operates and the limits on that duty, the reforms do not specify

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whether this will be carried through into a new system or whether any duty will be placed on schools to implement ISPs or secure the specified provision.

Schools' ability to secure such provision is often curtailed by factors beyond their control (e.g. lack of access to external experts e.g SALT / OP / EP).

Without maintaining the 'best endeavours' caveat, there will be a potential imbalance between expectations and schools' ability to deliver on necessary provision to meet the needs of their pupils.

- **The 'best endeavours' caveat for schools contained in s.66 of the CFA should be maintained in the new system.**

## **2. Accountability : rise in school complaints and disability discrimination claims**

As EHCPs become more tightly focused on the most complex cases, more pupils will be supported at school level with statutory ISPs. Schools are therefore likely to face increased expectations around communication, transparency, and responsiveness.

There is a real likelihood for schools of increased numbers of parental challenges around the ISPs and the support being provided by mainstream schools for their children's SEN. This, particularly in a system in which parents have been 'used' to being able to mediate or to bring appeals in the First Tier Tribunal, avenues which will no longer be available to them if they 'only' have an ISP, rather than an EHCP.

Managing and responding to complaints and disability discrimination claims are already significant for schools (senior leaders and governing boards/trustees) and involve significant time, energy and public funds in their endeavours to respond to them. Other regulated processes (in the form of exclusions and admissions) also require significant such expenditure, with parents increasingly seeking third party support.

The reforms must provide clarity on the requirements of complaint and other avenues of appeal to ensure that these are effective mechanisms for resolving disputes for both schools and parents and avoid those processes becoming an unnecessary side show to the key focus of meeting need.

We would add that greater clarity around Equality Act duties and the correct interpretation of the reasonable adjustments duty is also required sooner rather than later. A concern expressed in conversation with schools has been that an unintended consequence of the reforms may be to reduce the number of SEND Tribunals against local authorities with an increasing number of disability discrimination claims against schools. Greater clarity around duties under the framework may assist in reducing the likelihood of complaints arising and then escalating into claims.

- **Specific proposals should be introduced for fair but manageable complaints processes, with a focus on keeping the expenditure of senior leadership and governor time, energy and public funds to a minimum.**

## **3. Lack of Clarity**

One comment which has been made numerous times in our conversations with schools is that they want more detail as soon as possible. We have mentioned the need for clarity around school responsibilities towards ISPs and the need for fair and manageable processes to deal with complaints. The required clarity goes much wider than that. The National Inclusion Standards and the revised SEND Code of Practice need to clearly set out what is required of schools at all levels of support from Universal to Specialist and, as far as possible, the types of need and provision expected at those levels. Consideration perhaps should be given to increasing the duty from having regard to the SEND Code to acting in accordance with the Code – this would bring it into line with the School Admission and Appeals Codes.

There will also need to be greater clarity on the interface between the revised SEN Framework and the Equality Act.

- **The National Inclusion Standards and/or the SEND Code of Practice need to be clear on the requirements placed on schools at each level of support.**

#### **4. Complexity of operating dual systems**

The move from current systems to the new model will require careful management. The reforms indicate that during the transition period (to 2035), schools will need to operate parallel systems and processes, which will lead to confusion, duplication, and inefficiency. We understand the care taken by the government in these proposals not to 'remove' EHCPs from children who will have them when the new system starts, but this must be balanced with the workability for schools (and, indeed Local Authorities and Tribunals) in managing children on the 'old' system (with EHCPs) alongside those being admitted to the 'new' system (with SPPs + EHCPs / ISPs). This directly relates to schools' reasonable capacity, particularly in relation to staffing, specialist expertise and time, as well as evaluating the adoption of the new system in individual schools.

- **Children to be needs assessed for the 'new system' (SPPS + EHCP / ISP) at their next annual review following the introduction of the reforms.**

#### **5. Workload and Implementation Pressures**

The introduction of new processes, including the production of legally mandated ISPs, their formal annual reviews, for all pupils on the SEN register will increase administrative workload for SENCOs. Such expansion of workload will sit alongside the production also of legally mandated Inclusion Strategies. Such workload is likely to be so significant that additional staffing will be required in many/most schools to support SENCOs, in the form of a 'team around the SENCO', and many SENCOs will also require up-skilling to incorporate strategic leadership into their portfolio of skills for the purposes of providing meaningful input into an 'Inclusion Strategy'. This is particularly concerning given the difficulties so many schools have in recruiting and retaining staff to such roles.

- **Consider reduced frequency of, or 'light touch' ISP reviews for stable cases and/or lower levels of need.**

#### **6. Risk of Inequality Across the System**

When the reforms come to fruition, schools in different local authority areas will need to manage their implementation in the context of very uneven support. This is largely due to the 'backlog' resulting from local authorities' differing capacities in the 'old system'. The reforms do not address how this will be achieved or addressed.

- **The reforms to identify which areas will require additional support as a result of such backlogs.**

#### **Conclusion**

In summary, while the SEND reforms present an important opportunity to strengthen inclusive practice, they also introduce a range of operational and strategic challenges for schools. The most significant risk lies in the potential gap between increased expectations and the capacity of schools to meet them, or indeed parents' perceptions relating to that capacity.

We trust this response to consultation is helpful in informing the planning and implementation of the SEND reforms. We would be happy to participate in any further discussions with you.

Yours sincerely

A handwritten signature in black ink that reads "Stone King LLP". The signature is written in a cursive, flowing style with a large initial 'S' and 'K'.

Stone King LLP