## CYPE(5)-07-17 – Papur 5: Tribiwnlys Anghenion Addysgol Arbennig Cymru

1. The SENTW would like to thank the Committee for giving it and other stakeholders involved in supporting the needs of children with special educational needs and disabilities the opportunity to comment on the Additional Learning Needs and Education Tribunal (Wales) Bill.

2. The response uses as headings the terms of reference and specific issues that the Committee is tasked to consider, as set out in the letter from the Chair of the Committee dated 15 December 2016.

3. The response does not deal with matters related to the very recently issued revised draft of the Code of Practice as it is understood that the Committee will consult separately on its scrutiny of the Code. However, as so much of the detail surrounding the proposed ALN framework will be included in the final Code and it is proposed that significant parts of the Code will have a statutory footing the SENTW would very much value the opportunity to revisit, if this is at all possible, the provisions of the Bill when it responds to the Committee's consultation on the Code.

**The general principles of the Additional Learning Needs and Education Tribunal (Wales) Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives.**

4. The SENTW broadly supports the general principles of the Bill and considers that if these principles are to be fully realized there is a clear need for legislation to deliver the Bill's stated core aims and principle objectives.

5. As indicated in its response to the Welsh Government's consultation on the draft Bill in December 2015 the

SENTW considers that there are many positive and innovative aspects to the proposed reforms that have the potential to improve the educational experiences of learners with ALN across Wales and the SENTW is therefore, with significant caveats, supportive of the Bill overall.

6. The SENTW seeks to make this clear from the outset since inevitably in addressing the terms of reference of the Committee and related questions in as succinct a way as possible the remainder of this response focuses on the key aspects of the Bill that in the view of the SENTW require further consideration and/or clarification and which may need to be amended.

**Any potential barriers to the implementation of key provisions and whether the Bill takes account of them.**

7. Please see below.

**Whether there are any unintended consequences arising from the Bill.**

Education Placements

8. In the view of the SENTW the Bill does not yet deal adequately with the very important issue of education placement for children and young people.

9. At the present time it is not clear from the Bill or the Explanatory Memorandum how education placements will be identified and allocated under the new ALN system and how the views and wishes of children and young people and parents will be taken into account in the decision making process. It is also unclear how determinative of the issue of placement the views of children and parents of children and young people will be and in the case of children and their parents which of their views, if any, is to take precedence.

10. Under current legislation parents are entitled to express a preference in regard to the maintained

school they wish their child to attend under Schedule 27 of the Education Act 1996 if their child has a statement or under s. 86 of the School Standards and Framework Act 1998 if their child does not. In each case local authorities and schools are obliged to comply with this parental preference unless the grounds for refusing parental preference stipulated in the respective statutory provisions are made out.

11. Parents of children with statements have a right to appeal against a refusal to comply with their parental preference to the SENTW and parents of children without statements (including children at School Action and School Action Plus) have a right to appeal to an Independent Admission Appeal Panel.

12. Further, when considering representations from parents of children and young people as to school placement generally, local authorities must have regard to Section 9 of the Education Act 1996 which stipulates that in exercising their powers under Education Acts education authorities are to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. This provision is currently of particular significance in determining whether a parental request for placement in an independent or non-maintained setting made by a parent of a child or young person with a statement should be granted.

13. In addition in the context of children and young people with statements Part IV of the Education Act 1996 stipulates that the name of the relevant school in which a child or young person is to be placed or a description of the type of school should be stipulated in the statement. This requirement does not apply to children and young people without statements.

14. In addition there are separate specific arrangements for admission to nursery provision and for admission into FEIs.

15. There are currently very limited provisions within the Bill dealing with how school placements will be dealt with under the new system (Sections 12 & 46) and these provisions appear to give the local authority the "upper hand" as it where in determining school placement and if and when a placement ought to be identified in an IDP and the Bill does not appear to address the issue of how early years placements or FEI education placements are to be determined. Further, as stated above, it is not clear how the duty to consider the wishes of children, young people and parents will work along side the provisions concerning school placement (Section 6). In addition the current repeal provisions within the Bill (Sch.1) appear to suggest that s.9 of the Education Act 1996 and aspects of the admissions process within the School Standards and Framework Act 1998 will be retained but there is no clarity on this and no pulling together of how any retained elements will work alongside the school placement provisions of the Bill and the duty to consider both the wishes of children and young people and parents.

16. It is extremely difficult therefore to see from the Bill or the Explanatory Memorandum what the new structure of identification of education placement will be and how it will work.

17. The identification of an appropriate education placement is such an important issue to children and young people and their families and is often so intertwined with the delivery of appropriate ALN provision for the specific child or young person concerned that the SENTW is of the view that further detailed consideration needs to be given to this aspect of the proposed new ALN system and that key aspects of the new system ought to outlined on the face of the Bill and that the aspects of the old legislative system

that are to be retained need to be clearly signposted and thought through and that this ought not be left entirely to subordinate legislation via Regulation and/or the new Code of Practice.

Potential use of Gillick competence to refuse assessment

18. In the view of the SENTW there is the possibility that the new legislation may provide for the potential use of Gillick competence as a way to refuse further assessment during an appeals process.

19. The initial assessment process is carried out by the LA. The current special educational needs regulations made under the Education Act 1996 requires a statutory assessment to obtain reports from school, educational psychology service, social care and medical services. In complex cases, this will involve consideration of reports from speech and language therapists, occupational therapist, physiotherapists as well as psychiatrists and other medical consultants or specialist nurses. Where a statement is amended following an annual review, the LA may be relying on reports which are some years old, for instance the child may not have seen an educational psychologist and undergone formal assessment for several years. The Bill does not indicate an intention to move significantly away from that model of compiling evidence from assessment.

20. Once the statement is issued and the parents decide that they are not satisfied with the provision and/or placement identified, they may appeal and instruct privately commissioned professionals to prepare reports on the child. Parents, especially those who are legally represented, will regularly instruct a private educational psychologist, speech and language therapist and occupational therapist, even where the therapy services have not previously been involved with the child.

21. In the appeal, the LA is then presented with a raft of lengthy reports, making recommendations for a high level of provision which the LA has not had cause to consider previously. The LA will ask for consent for the child to be assessed by their own educational psychologist/NHS therapists to prepare their own reports for the tribunal. It is at that stage that the parents will state that the child is refusing to be further assessed and refuse consent to the LA. In England, the Tribunal Procedure Rules make provision for the Tribunal to direct that the child should be made available (by the parents) but they do not include any sanction for failure to comply, because if the child is Gillick competent and refuses to comply, or is a young person who is appealing in their own right, then the power is very limited. Neither the Tribunal nor the LA will be afforded access to the child in those circumstances, and it is almost impossible to identify whether the child is actually making an informed decision or whether the parents are denying access to strengthen their evidence to the Tribunal by preventing the LA from obtaining their own evidence to counter the professionals' recommendations.

22. There is a further complication, because the Upper Tribunal decided in 2009 that there was no requirement for the parents' legal representative to disclose the letter of instruction to the professionals (contrary to the well-established practice in the Family Court that letters of instructions to professionals must be disclosed) and consequently, the Tribunal cannot know what questions the professional has been asked to address within the body of the report.

23. The Tribunal would not wish to refer the issue to the Family Court for consideration under the powers it retains to direct assessment of the child under the Children Act 1989 because once again, that would engender unnecessary delays and additional formality to the process. There is also an argument that those powers would not cover the assessments sought for the purposes of the Tribunal.

24. As this has been found as an issue in England, this may want to be considered by the committee.

**The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).**

25. The SENTW is grateful for the additional financial information that has been included within the Explanatory Memorandum that supports the Bill as the information provided to support the draft Bill was lacking in detail.

26. The SENTW is also pleased that Welsh Government recognizes that there will inevitably be significant transitional costs to the SENTW in order to implement the new legislation and that Welsh Government has indicated its intention in the Explanatory Memorandum to allocate additional transition funding for the SENTW as a consequence.

27. SENTW acknowledges and is broadly supportive of the provisions in the Bill which are aimed at avoiding or resolving disputes. This should eradicate the need to appeal to the Tribunal in as many cases as possible. We also acknowledge that if the Bill has its intended effects these should be a significant reduction in some types of cases. Nevertheless the SENTW takes the view that the introduction of a unified 0-25 system of ALN that extends and considerably increases the rights of children, parents and young people to appeal to the Education Tribunal is unlikely to bring down appeals from their current levels of around 100 - 105 per year and is much more likely to result in a long term increase in Tribunal cases. As a consequence the SENTW is of the view that the reforms are unlikely to achieve cost savings or indeed be cost neutral for the new Education Tribunal for Wales over the long term.

28. In terms of the anticipated increase in the numbers of children, and young people who are likely

to have a statutory plan, figures in the Regulatory Impact Assessment (page 95 at para. 7.30 and page117 at para. 8.12) estimate that the numbers of children will significantly increase when IDPs are introduced from 13,318 statutory plans to 107,668 plans. The Assessment also estimates that there are approximately 9,323 young people who would identify themselves as having learning difficulties in the FE and Independent College Sector who potentially would be entitled to an IDP (page 119 at para. 8.14).

29. Each IDP will carry with it the right of the child or young person concerned and/or the child's parent or parents to appeal either directly to the Educational Tribunal or indirectly following a reconsideration of the disputed issue by the Local Authority. There are also a number of separate decisions relating to an IDP that may be challenged. In addition, it will be possible to bring appeals to Education Tribunal that concern whether or not a child or young person has ALN and should have an IDP in much the same way that appeals can be brought under the current system against refusals to assess and to issue a statement. Therefore arguments and disputes around whether or not a child or young person needs a statutory plan of some kind (a statement under the current system: an IDP under the new system) are still likely to occur.

30. In addition, there is a possibility that the introduction of the new legislation may make cases legally more complex as the legislation is tested out and this may increase the length of hearings and therefore result in an increase in costs over the medium term.

31. If there is an increase in the numbers and in the complexity of cases coming to Tribunal as a result of the new reforms then the SENTW takes the view that other stakeholders involved in the tribunal process are likely to incur an increase in costs as well.

32. More broadly the current system of support for SEN and LLD is extremely stretched and in the experience of the SENTW disputes are often fuelled by a lack of resources across education authorities, education providers, health services and social care to make appropriate provision for children and young people.

33. The new proposals are quite rightly ambitious and if they are to be more successful than the current system of support the SENTW is of the view that additional resources will be needed across the new system, not just during the transition but subsequently.

**The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of part 1 of the Explanatory Memorandum).**

34. The powers as identified are considered appropriate.

35. So as to further the aims and objectives of the Bill further regulations may be required in regard to the following areas:

- The Structure of IDPs – a fixed format and more specifics concerning the matters that the IDP should include are considered essential

- Admissions – to support the new system of allocating education placements for children and young people with ALN

- Making complaints processes and appeal processes more compatible – in regard to which please see below

- The Constitution of a Tribunal Panel – to prescribe the circumstances in which less complex cases could be dealt with by a 2 member panel or by way

of paper exercise so that cases can be dealt with as proportionately and expeditiously as possible

- The Monitoring and Enforcement of Tribunal Orders – in regard to which please see below

- The Appointment of Case Friends and Assessments of Capacity – both highly complex issues, which need further clarification.

**Whether the Welsh Government's three overarching objectives (listed at paragraph 3.3 of the Explanatory Memorandum) are the right objectives and if the Bill is sufficient to meet these.**

36. The SENTW considers that the 3 overarching objectives are the right objectives and that with the significant caveats that are more fully explained in other parts of this response the Bill goes a long way in meeting them.

**Whether the Welsh Government's ten core aims for the Bill (listed at paragraphs 3.5 – 3.16 of the Explanatory Memorandum) are the right aims to have and if the Bill is sufficient to achieve these.**

37. Again the SENTW considers that the 10 core aims for the Bill are the right aims and that with the caveats that are more fully explained in other parts of this response the Bill goes a long way in meeting them.

**The provisions for collaboration and multi-agency working, and to what extent these are adequate.**

38. If the new ALN system is to function well and deliver on its 3 overarching principles and 10 core aims it is the view of the SENTW that securing effective collaboration and multi agency working between those delivering services to children and young people is absolutely essential.

39. A lack of effective collaboration and multi agency working is one of the biggest weaknesses in the current SEN and LDD systems and notwithstanding the implementation of numerous policy initiatives to try to improve this aspect of the current SEN and LLD systems problems persist.

40. Welsh Government has accepted that effective collaboration and multi agency working should form a central part of the new ALN system. Indeed, the Explanatory Memorandum states that one of the core objectives of the Bill is to secure "an integrated, collaborative process of assessment, planning and monitoring which facilitates timely and effective interventions" and one of 10 core aims of the Bill is to increase collaboration (pages 7-8 paras. 3.3 and 3.12).

41. The SENTW acknowledges the considerable amount of work that Welsh Government has devoted to exploring ways in which this centrally important feature can be delivered.

42. The SENTW also welcomes the inclusion in the Bill of a specific obligation on LHBs following a referral from the local authority or FEI to consider whether there is "any treatment or service that is likely to be of benefit in addressing a child's or young person's ALN" and if considered necessary to secure that provision and which also enables the provision to be included in an IDP (Sections 18 &19) and it is pleased to see that at least some of the consent caveats that had underpinned this provision in the draft Bill have now been removed.

43. The replacing of the previous none statutory DMO role and the none statutory SENCO role with the statutory roles of DECLO (Section 55) and ALNCO (Section 54) and the reiteration of the duty upon services to cooperate and the new duty to share information (Section 58) which are all aimed at improving collaboration and multi agency working are also welcomed.

44. However, the SENTW has reservations about how ground breaking these provisions actually are and therefore how effective they will be in bringing about the sea change that is needed to deliver the fundamental improvements to collaboration and multi agency working that are going to be required if the new system of ALN is to function any better than the current SEN and LLD systems.

45. In the view of the SENTW the single biggest barrier to establishing effective inter agency working and support is the fact that education, health and social care services are each working to different and complex pieces of primary legislation and notwithstanding attempts that have been made to marry them together these pieces of legislation do not currently work well together to meet the holistic needs of children and young people with ALN.

46. The SENTW remains of the view that the most effective way of delivering an improvement in collaboration between education providers, education services, health services and social care services is to ensure that all services are placed under clear a statutory duty to engage in the process of assessing, identifying, making provision for and monitoring and reviewing ALN and just as importantly that all services work to the same criteria when doing so; criteria which place the needs of the child or young person first, irrespective of whether the need is education, health or care related.

47. It appears to the SENTW that there are a number of ways of seeking to achieve this (which are likely to have varying degrees of success):

48. The first is to make fundamental direct changes to the legislation that governs health services and social care as well as to education to make them fundamentally more compatible

49. The second is to make amendments to the definitions of ALN and ALNP in the Bill to include health and social care related needs and to provide that IDPs may include these needs and related provision and make this provision within an IDP legally enforceable in respect of health services and social care services

50. The third is to continue along the present path as currently set out in the Bill with some improvements being made to current proposed provisions to take account of the points that the SENTW outline in more detail below.

51. The SENTW would strongly urge the Committee to revisit in some detail the whole issue of how collaboration and multi agency working is best secured, taking the points made by the SENTW into account when doing so.

52. Having done so, if the Committee is minded to continue with the current approach in the Bill, the SENTW would ask the Committee to take into account the following points to try to improve on the provisions that are currently in the Bill.

53. In regard to the proposed new LHB obligations, set out at Sections 18 and 19 of the Bill, the SENTW is concerned that Section 18 (2) appears to mean that maintained schools cannot make a direct referral to LHBs under these Sections notwithstanding the fact that maintained schools will have a statutory responsibility to create IDPs and that they must channel any such request through the LA.

54. The SENTW is also concerned that the wording used in Sections 18 (4) and (6) relating to relevant "treatment or service" and "treatment or service that an NHS body would normally provide as part of the comprehensive health service in Wales," are not very clear and may allow LHBs to limit what is considered to be clinically necessary because of resource issues and

because the particular service does not work in a way that is compatible with the needs of the child or young person.

55. Most importantly the consent caveat at Section 19 (8) of the Bill appears top mean that LHBs will be able to refuse to deliver necessary provision as they can do under the current systems of SEN and LLD support. At best this significantly weakens the extent of the obligations being placed on LHBs and at worst it risks undermining faith in the fairness and efficacy of the provisions within the Bill designed to improve dispute resolution.

56. The SENTW would urge the Committee to consider ways to specifically include Social Care in the statutory provisions that are aimed at improving collaboration. Social Care Services have an important role to play in effective collaborative working and the delivery of multi agency support for children and young people. Whilst it is appreciated that Education Authorities and Social Care Services are both part of a Local Authority it is the experience of the SENTW that this generally does not make it easier for each Service to work together in a supportive and collaborative way,

57. The new statutory roles of DECLO and ALNCO, whilst very welcome, are not dissimilar to the none statutory roles envisaged for the SENCO and DMO within the current SEN Code of Practice. The key difference appears to lie with the statutory nature of the two new roles. The SENTW is somewhat sceptical about the degree to which this will impact on the ability of DECLOs and ALNCOs to contribute significantly to improving collaboration and multi agency working.

58. It is also noted that the current Code of Practice identifies the need for Social Care to have a designated officer for special educational needs to play a strategic and operational role in supporting Education Services. If the statutory roles of ALNCO and DECLO are

considered important in securing effective collaboration within the new system then it would seem logical to the SENTW for consideration to be given to the creation of a similar statutory role of Designated Officer for Social Care.

59. The duty to assist in Section 58 of the Bill is more clearly set out then the broadly similar duty to assist that is contained in Section 322 of the Education 1996. It also provides a helpful obligation to give written reasons for a refusal to assist, which is helpful. It remains, however, a relatively weak provision. It also appears to apply to local authorities alone and would not therefore appear to assist early years providers, schools or FEIs in securing cooperation from other services when they are trying to discharge their duties under the Bill. It may be helpful to consider whether this provision could be extended to address this important issue.

60. In addition the SENTW would ask that the Committee look again at powers of redress in relation to health services and social services provision, which are currently separate to powers of redress in respect of education provision and which the Bill appears to seek to perpetuate in large measure. This issue is addressed further below when considering matters relating to dispute resolution.

**Whether there is enough clarity about the process for developing and maintaining individual Development Plans (IDPs) and whose responsibility this will be.**

61. The SENTW considers that the Bill provides a clear structure to the process by which IDPs are developed and now that greater detail has been incorporated into the Bill around the processes of review, transfer and ceasing to maintain it also gives an overall clear structure to how IDPs will be maintained (Sections 9 – 12; Sections 21; Sections 29 – 31 and Section 33).

62. The processes that are now outlined in broad form in the Bill appear to the SENTW to be quite similar to the current assessment and referral processes that exist under the current SEN and LLD systems.

63. This would suggest that the success of the assessment processes outlined in the Bill will be as equally dependent as the current assessment arrangements are upon securing effective collaborative working and multi agency support whenever this is required and upon the capacity of the workforce to meet the demands of the system and the upon the availability of sufficient resources to deliver support that is deemed necessary. These are things which the SENTW address in other parts of the response and the concerns that the SENTW hold in regard to them are not repeated here.

64. What is currently less clear is how education providers and LAs will go about making the decision that a child or young person has ALN and so bring into play the processes for IDP creation and subsequent maintenance.

65. The Bill also provides limited detail regarding the issue of what constitutes ALN (Section 2). Since this is the trigger point for the creation of an IDP this is something that will be extremely important and the Committee might wish to consider whether it would be helpful to secure additional clarity over this issue.

66. Also the statutory definition of what constitutes an IDP set out at Section 8 of the Bill is extremely limited. So as to promote certainty and consistency the SENTW is firmly of the view that there needs to be a fixed IDP template that sets out the overall structure of an IDP and provides some additional mandatory content.

67. The new proposals envisage a process by which schools and FEIs may refer cases to the Local Authority for determination when it is felt that the needs of the

child or young person are in essence too severe and complex for the school or FEI to determine or make provision for. The proposals also make provision for the Local Authority to refer cases back to the schools if they see fit. In the view of the SENTW this fluidity creates the potential for children and young people to become lost in amongst arguments concerning who has responsibility for identifying ALN and providing for any ALNP as sometimes happens in the present system, with the result that provision of support is delayed and working relationships amongst all involved become strained.

68. Without greater clarity over when cases might be referred to local authorities and when local authorities ought to take over responsibility for an IDP there is a distinct risk that the new system will perpetuate inconsistencies in practice amongst schools and local authorities across Wales, with some schools tending to refer cases to local authorities more readily than other and some local authorities accepting referrals more readily.

69. The new assessment proposals also make local authorities responsible for reviewing school decisions that are challenged before these decisions can be appealed to the Education Tribunal (Sections 24 – 28 & Section 30). The SENTW asks the Committee to consider whether this is necessary and whether it would be preferable for schools to be responsible for their own decisions direct to the Education Tribunal in the way that they are responsible for their decisions in regard to disability discrimination.

70. Again the SENTW takes the view that there is a distinct prospect within this process for children and young people to become lost in amongst arguments about whether they have ALN and who should have responsibility for matters with the consequence that support is delayed and again working relationships become strained.

71. To guard against delay in these processes as much as possible the Committee may want to consider whether time limits should be set within the assessment processes and if so what those time limits might be.

72. The Bill itself does not make it clear as to who within a school or FEI should be responsible for making a determination concerning a child's or young person's ALN and ALNP and who should be responsible for drawing up and maintaining IDPs. It does however give a statutory standing to the role of ALNCO and it is assumed in so doing that it is the intention of the Bill to give primary responsibility in this area to the ALNCO. Precisely what that role will look like and what the levels of qualification and experience will need to be in respect of the role are as yet not clear. What seems very clear to the SENTW is that whatever this detail, such is the importance of this role that it needs to be a role which is clearly stated to be part of the strategic management structures of relevant education providers. Also, careful consideration needs to be given to the balance of none contact and contact time that ALNCOs will need to be able to deliver effectively on this very demanding role.

73. How early years providers, schools and FEIs and their ALNCO's will be able to access and engage with the advice and support from local authority support services, and from colleagues in Health and Social Care is not made very clear on the face of the Bill. This is a particularly important issue as in a significant proportion of cases ALNCO's, notwithstanding their own expertise and expertise within the education provider itself, will still need help and support from sources outside the education provider to make effective determinations concerning ALN and ALNP.

74. The above points are particularly important given the intention that PCP methods are to be used to determine ALN and ALNP issues. Greater levels of engagement of children and their parents and young

people in IDP processes using PCP methodology are very much welcomed by the SENTW. However, if it is to be effective sufficient time needs to be allocated for it to be applied and ALNCOS will need to have the power to engage with necessary support services and health and social care colleagues to assist in decision making processes so that good quality decisions are made.

75. On the issue of engagement the SENTW would like to express some concerns and reservations about the way the Bill handles the inclusion of young people within the proposed new system. This is a very complex area as it brings into play issues of autonomy in respect of the 16 – 25 year old age group. The SENTW is not persuaded as yet, without further explanation of the thinking behind the current approach, that the Bill strikes the right balance between autonomy and support.

76. In this regard of particular concern to the SENTW are the provisions within the Bill which allow young people to veto IDP processes and thereby abrogate the responsibility of education providers and local authorities to address issues relating to ALN and ALNP in respect of the young people concerned.

77. The SENTW also has some concerns that are explained more fully later in this response about the fact that the Bill completely excludes parents of young people from consultation duties and from accessing rights of redress.

78. Linked to this the SENTW is also concerned that the Bill does not fully address the potentially complex interface between the rights of children and the rights of parents within the new system which, without significant clarification, either on the face of the Bill or through Regulation/the new Code, risks undermining the ability of organizations throughout the new system to make effective decisions. It is obviously hoped that in most cases the child and their parents will be in

agreement over issues concerning ALN and ALN provision but this is not always the case and the Bill needs to provide a basic framework for managing such disputes.

79. These are areas that the SENTW would ask the Committee to explore further during the current scrutiny process.

80. The SENTW would like to acknowledge the improvements made in the current Bill to the obligations on education providers and local authorities to make provision in Welsh. In the view of the SENTW, however, that the obligations are still relatively weak and this might be an area that the Committee may also wish to explore during the scrutiny process.

**Whether the Bill will establish a genuinely age 0 -25 system.**

81. The SENTW is very supportive of this aim. In the view of the SENTW the Bill does have the potential to create a unified ALN system for the age range 0 – 25.

82. The SENTW recognise the additional work that the Welsh Government has undertaken to include more detail in the Bill about how the new system will apply in an early years context and in the FEI context following feed back that the draft Bill was very focused on school based provision.

83. The SENTW would welcome even further detail in the Bill as to how the new system will apply in these areas in recognition of the fact that "one size does not fit all."

84. There may be some merit in restructuring the Bill so that the duties on early years providers, schools and FEIs are disaggregated in order to give greater clarity to the obligations of each and for greater ease of reference.

85. None inclusion of vocational training in the new ALN system is something that in the opinion of the SENTW needs to be acknowledged as it does impact on the ability of the Bill to fully deliver on support for all young people with ALN in the 16 – 25 age range.

86. On a practical level it needs to be recognised that delivery of provision up to the age of 25 will require significant system changes for all services, but particularly for Social Care and Health Services, as these Services are generally organised into separate children and adult teams.

**The capacity of the workforce to deliver the new arrangements.**

87. Clearly there will be significant training needs for all involved in the new system to ensure that the workforce has a clear understanding of how the new system will work.

88. As previously highlighted the SENTW believes that under the current system public services are already fully stretched and frequently struggle to meet the demands placed upon them. As an example of these difficulties, the SENTW would cite the long waiting lists for Health Service assessment of children and young people that the SENTW has encountered in a number of its cases, particularly in areas such as Speech and Language Therapy Services, Occupational Therapy Services, Physiotherapy Teams and Child and Adolescent Mental Health Services.

89. In many respects, and notwithstanding the reduction in disputes that are anticipated through use of person centred planning and the dispute resolution aspects of the Bill, the SENTW is of the view that this is likely to be a problem in the new system unless additional resources are made available.

90. In recognition of the likelihood that there will be considerable demands placed upon ALNCOs within the new system the SENTW broadly welcomes the power granted by Section 54 (2) of the Bill to appoint one or more ALNCO's and the indication given in the Explanatory Memorandum that this flexibility is aimed at ensuring that in larger schools and FEIs there are sufficient ALNCO's to address the needs of all learners and conversely that it would enable a small school to share the services of another school. However, in the view of the SENTW this flexibility should not frustrate the need for ALNCO's to be a central part of the strategic management structures of education providers and this is something that may need to be addressed as part of the power to make regulations in respect of the ALNCO. As will the need for the ALNCO to have sufficient non contact time to carry out many of the responsibilities that it is anticipated will fall to this role under the new system.

91. The SENTW is aware that Welsh Government anticipates that some of the capacity issues that are anticipated will be managed through the ongoing transformation programme. One particular issue of concern to the SENTW is the need to ensure that there is sufficient capacity across Wales for ALP to be delivered through the medium of Welsh.

**The proposed new arrangements for dispute resolution and avoidance.**

92. The SENTW broadly supports the majority of the proposed new arrangements in so far as they go but considers that there are key areas in the Bill that need further consideration and which may need amendment if the new system is to provide a fair and transparent system for resolving concerns and appeals.

<u>Capacity</u>

93. Section 63.3 provides an appeal right for a child or a child's parent to apply to the Education Tribunal

for a declaration of capacity. This could occur where another body has indicated that the child lacks capacity, and the child/parent disagrees and wish to appeal. Or it could in fact occur at any time, including a situation where the child wanted to bring an appeal but the parent questioned their capacity to do so.

94. Since the Special Educational Needs Tribunal for Wales Regulations 2012, SENTW has been able to make a finding that a child does not have sufficient understanding to participate or continue to participate in proceedings without a case friend. Such a finding is made where the question of the child's understanding is raised either by the party or on the initiative of the President or the tribunal panel. So, assessing capacity is not a completely new responsibility.

95. However (as indicated elsewhere in this response), so very few children have brought their own cases thus far that the situation hasn't arisen and is untested. The appeal right for a parent or a child to ask the Education Tribunal for such a declaration is new.

96. Whilst a lot of the practical issues in relation to this appeal right should be resolved through Regulations (elsewhere in this response the SENTW highlights the need for the provision to make Regulations on procedure at section 68), the SENTW is of the view that there are a range of issues which need careful consideration at this stage:

97. Section 75(2) indicates that if a governing body, LA or NHS body 'considers' that the child does not have capacity they do not need to comply with requirements as set out in section 75(1). If a child is considered to lack capacity, is that body required to inform the parent and child, and also inform them of the right to appeal this decision? The SENTW recommend that the Committee considers whether this should be clarified in the legislation.

98. If a child wants their capacity to be assessed, and makes the application (which could happen in various situations, including a contentious situation where the parent and child disagreed on this point), does that child have the right to legal representation? If so, who arranges it and pays for it? The Bill is helpful in outlining that a child should have access to independent advocacy, but independent advocacy is not the same as legal representation and – depending on the nature of the assessment (see below) – legal representation might be needed. Also, if supporting evidence were required to support the child's case (eg. professional reports on capacity), who would arrange and pay for them? The SENTW recommend that the Committee considers the implications for the child.

99. It is useful when considering the provisions on the face of the Bill to be aware of the complexity of underpinning issues which will need to be covered in the Regulations. The Committee may wish to take a view on some of these matters. They include, but are not restricted to the following:

- Would the Education Tribunal have the power to issue directions that evidence be provided? Would that power extend to schools (currently it only covers LAs)?

- Would the Education Tribunal have the power to remit the case back to the LA for reconsideration?

- Would the Education Tribunal make a paper-based decision, using evidence submitted by parties?

- Would the Education Tribunal – or someone appointed by the Tribunal – have to undertake the Tribunal's own assessment?

- Would a full oral hearing take place to determine capacity in the face of competing views?

- What supporting Regulations would be needed in relation to this appeal right alone?

Case friends

100. Under the current regime, once a finding has been made that a child lacks understanding, the SENTW directs the appellant to appoint a case friend. Certain information must be provided to the SENTW to indicate the suitability of the case friend appointed by the appellant.

101. Under the ALN Bill proposals, if a declaration has been made that a child lacks capacity, it is the Education Tribunal that appoints the case friend, which is a very different situation. It is also quite an unusual situation for an independent Tribunal to be in, appointing someone to support one party.

102. The Bill requires the Education Tribunal to be responsible for the appointment of a case friend who meets the criteria in section 76 (6). As far as the SENTW can see, there would be 3 ways of doing this, with varying degrees of rigorousness and varying implications for workload of and cost for the Tribunal.

103. The Education Tribunal could appoint a panel of professional case friends who were recruited on the basis of the appropriate skillset and appropriate vetting. A case friend in whose abilities the Tribunal was fully confident would be appointed for a child; the child would not know the case friend, which might not be helpful, but their appropriateness in other respects could not be questioned. There would be cost implications for the Tribunal.

104. The Education Tribunal could invite the child or parents or other interested parties to nominate a case friend for the Tribunal to assess suitability. It is unclear how the Tribunal should assess this suitability (since the Tribunal would not have the appropriate knowledge without conducting investigations), but if it

were to be done rigorously then there would be cost implications for the Tribunal. The Tribunal would also need to get DBS checks (which is currently the responsibility and at the cost of the case friend).

105. The Education Tribunal could invite the child or parents or other interested parties to nominate a case friend, asking them to submit a form such as the one in use under the current system. This form requires the prospective case friend to sign to say that they will act in accordance with requirements much as those set out in 76.6. This form is then sent to all parties to the proceedings and the child's parent to see if anyone has any objections to the suitability of the case friend. This provides an element of checking, but isn't fool proof if the other parties are not familiar with the proposed case friend. The Tribunal could then appoint purely on this basis. This has the advantage of appointing a case friend that the child knows, and a lack of lengthy investigation procedures (which could delay the case and thus meeting the needs of the child, if the Tribunal were to find in favour of the child), but as the Tribunal would be relying on the declarations and non-objections of others, it is questionable as to whether the Tribunal would genuinely have sufficient knowledge to 'appoint' the case friend with confidence. It is presumed that the DBS responsibility and cost would come to the Education Tribunal, rather than sit with the prospective case friend as at present.

106. None of these methods is ideal and some could have significant resourcing implications for the Education Tribunal. The Tribunal could also be criticised if a party was not happy with the choice of case friend as the case progressed.

107. The SENTW suggest that the Committee considers whether it would be appropriate to amend the Bill to reflect the current system, whereby the Tribunal directs the appellant to appoint a case friend. If not, the SENTW would welcome the Committee's views on how the Education Tribunal should deliver a

responsibility to appoint case friends, having regard to both practical and financial implications for the Tribunal, as well as ensuring best outcomes for the child.

Capacity of young people

108. Section 63(3) of the Bill says that a child or a child's parent can apply to the Education Tribunal for a declaration of capacity. There are further provisions for the support of a case friend for a child that lacks capacity. This does not appear to apply to a young person or a parent of a young person.

109. Section 74 of the Bill sets out arrangements for young people who lack capacity (who are treated in the same way as parents who lack capacity).

110. The SENTW is not convinced that it is helpful to exclude young people from the capacity and case friend provisions, and start treating them as adults who might have a deputy or power of attorney in place to represent their interests.

111. It seems to SENTW unlikely that, for example, a 17 year old who remains living at home with parents and in full time education (but who would be deemed to be a young person as defined in the Bill and thus not be covered by section 63(3) and associated provisions for case friends) would have these provisions in place.

112. Unless there are compelling reasons otherwise, it would seem to provide better and more seamless access to administrative justice for young people to have access to declarations of capacity and the support of a case friend if wishing to bring a case to the Tribunal. We ask the Committee to consider whether amending the Bill to this effect would be helpful.

113. In the view of the SENTW this is of particular importance if the reforms do not give any rights to the parents of young people (as discussed below).

Removal of rights of parents of pupils aged 16 – 19 at school and a lack of rights for the parents of young people

114. The Bill builds on and strengthens existing arrangements for children and young people to bring their own appeals.

115. At the same time the Bill makes a clear distinction between the parents of children and the parents of young people within the new ALN system, such that the parents of children will automatically have the right to have their views taken into account and they will have direct rights of appeal to the Education Tribunal but parents of all young people will not.

116. In so doing the Bill takes away the rights that parents of 16 -19 year old young pupils with a statement identifying school provision currently have to be actively engaged in all decisions relating to the ALN and ALNP of their children in their own right.

117. Whilst the Tribunal is highly supportive of empowering young people to bring their own cases, and the provision of support structures to enable that, the SENTW is uneasy about the approach being adopted.

118. Firstly, the rationale behind this approach and its impact is not touched on in the Explanatory Memorandum. Secondly the SENTW feels that the proposed approach does not reflect the reality that many parents of necessity remain actively involved in the care and education of their children into adolescence and beyond. Thirdly the removal of this right is inconsistent with the statement in the Justice Impact Assessment section of the Explanatory Memorandum and Regulatory Impact Assessment

where it states (section 8.596) that "the Bill replaces existing rights of appeal under the current SEN Framework with new rights of appeal."

119. In the view of the SENTW to remove a right of appeal from a group of people, without a very clear and very compelling rationale, risks restricting access to administrative justice and – in this case – makes it potentially less easy to access appropriate educational support in disputed cases. This is particularly the case given the high levels of support needs for some of the young people concerned.

120. SENTW usage statistics show the following:

121. In spite of SENTW providing targeted guidance and a dedicated helpline for young people (children's booklets are sent out automatically with every request for appeal/claim forms), the Tribunal has only received 1 claim and 1 appeal directly from children since the right was introduced in 2012. The Tribunal has had a couple of other appeals where the child has been instrumental in the appeal, but the appeal was brought by a case friend. The majority of the (very small number of) children/young people bringing their own cases have been looked after children.

122. In contrast, during the equivalent period (academic years 2012-2016), 21 cases have been brought by parents on behalf of those in the 16+ age group.

123. The SENTW considers that it would be helpful if the position of Welsh Government on this issue is made clear and fully explained.

124. In the absence of a very clear and compelling case to remove these rights the SENTW is of the view that the Bill should be amended to retain them and indeed extend them to include parents of young people with ALN in the FEI sector. This would mean that the views of all parents are heard and the option

for parents of young people to bring an appeal would run alongside but in no way preclude the right of young people to bring their own appeal.

Disagreements between parents and children

125. The structure of the current legislation, where under section 9 of the Education Act 1996, it is stated that a child is to be educated in accordance with the wishes of their parents insofar as that is compatible with the efficient education of others and the avoidance of unreasonable public expenditure, means that within the statutory decision making framework, the child's preference is automatically secondary to the parents'.

126. The position reflects UK society's perception, when the provision was first included in the 1944 Education Act, that a child was the property of their parents, with all decisions being made for them by their parents. If children are now to have a right of appeal, it must have at least equal standing in the eyes of the law to that of their parents, and where there is a disagreement, and the child doesn't agree with their parents' proposed placement, then it would benefit the parents to obtain a declaration of incapacity so as to undermine the impact of the child's own evidence.

127. At present, there is no mechanism for the decision maker to apply equal weight to the child and the parents' preferences in the way in which provision is delivered or the school placement and this is an important issue for resolution before the Measure is enacted.

128. Where a right of appeal exists for both child and parent in respect of the decision, presumably, the intention is that both appeals will have equal standing before the Tribunal and will be considered on their merits. That is not the current situation, and the parents' wishes have precedence over both the wishes and the welfare of the child. Education legislation

does not contain any reference to the child's welfare being paramount as does the Children Act 1989 and this raises a real danger of potentially compromising the emotional welfare of the child through the decision making and appeals process and driving a wedge between them and their parents. The situation may be particularly acute where there is limited provision in rural areas and parents and local authorities must consider residential placements purely because of the distances involved, and the child may vehemently oppose such a proposal.

129. The advantage to the parents in obtaining a declaration of incapacity in those circumstances would be that it could be used to undermine the child's evidence in the expectation that that would give greater strength to their argument that the provision they seek is the appropriate provision.

130. For instance, a high functioning ASD pupil may present challenging behaviours in a mainstream school because they cannot cope with the sensory overload of being in a busy school environment. Parents may recognise the problem, and seek a specialist placement in ASD specific provision. A child may not have insight into the difficulties and oppose the move because they prefer to stay in a familiar environment with their friends, whilst not recognising that the placement is not meeting their special educational needs. Both the LA and the Tribunal must listen to the child's views and take them into consideration in reaching the decision.

131. For comparison purposes, a similar situation can arise where estranged parents, who each have a right of appeal against the LA's decision, apply to the Tribunal for different school placements. The situation is particularly acute where one parent seeks a special school placement and the other a mainstream. There is under the Education Act 1996 a statutory presumption in favour of mainstream, unless the parents consent to special school – thereby again

providing one parent with a stronger hand than the other. In those situations, the Tribunal have deferred the decision to the Family Court on the basis that issues of principle regarding the type of education to be offered to a child ie mainstream or special, should be decided under the Children Act 1989 where consideration of the child's welfare is paramount, with decisions about the specific placement ie school named within the type of provision, is the remit of the expert tribunal.

132. On a practical level, are parent and child appeals to be heard by the Tribunal together as a three handed appeal – with the potential that it will have to consider and decide between three different proposals for provision and placement? Such a process will involve greater formality and longer hearings. Are appeals to be heard consecutively by the same panel? That too will lead to longer hearings. Or should appeals be heard separately by different panels, so that each is taken on its merits? That could lead to different panels reaching different conclusions.

133. Should issues of principle be referred for resolution to the Family Court first, e.g. mainstream/special; residential/day placements? What is the mechanism for doing this? The advantage of such a referral would be that the court must consider the child's welfare as paramount and are not constrained to comply with the parental preference if it conflicts with the paramountcy of the child's welfare.

134. There is no doubt that the involvement of multiple fora for making the decision would inevitably lead to delay, and careful consideration should be given to the mechanisms created establishing the decision making process, for both local authorities and appeals.

<u>LA/LHB responsibility for delivery of Tribunal decisions</u>

135. The focus of the Tribunal is on access to education. A wide range of professionals may be involved in supporting a child or young person in accessing education, and this will often include some health professionals.

136. Most commonly, this will include speech and language therapists (SALTs), occupational therapists (OTs), physiotherapists and children and adolescent mental health services. Whilst these professionals will be highly experienced in giving clinical judgments as to a child's needs, in order to meet the educational needs of the child, and crucially on the basis of the evidence before it, the Tribunal sometimes finds that there is a need for increased support from health professionals. The Bill makes it clear that the Tribunal will continue to be able to make such decisions (Section 19(7)).

137. In such cases, as things stand at present, the SENTW hears cases, and makes a decision which the local authority is responsible for delivering. If the Tribunal has determined that additional support is required for educational purposes, then the LA must ask the LHB to deliver. If the LHB refuse to deliver then either the LA must seek private provision (which can cause delay in the provision being made, is costly and difficult to regulate) or the needs of the child remain unmet, which is inequitable and damaging to their education. In such circumstances, SENTW has no power to enforce. Parents must complain to the Welsh Government.

138. SENTW regards this as a fundamental weakness in the current system.

139. Unfortunately it is a weakness that it appears is likely to reoccur in the new ALN system as a result of Section 19 (8) of the Bill which states that:

> "If the Education Tribunal for Wales orders the revision of an individual development plan in

relation to additional learning provision specified under this section as provision an NHS body is to secure, an NHS body is not required to secure the revised additional learning provision unless it agrees to do so."

140. This clause effectively means that, in spite of the Tribunal's power to make an order as set out in Section 19(7) of the Bill, an LHB is in a position to over-ride the determination of the independent specialist Education Tribunal (and it is assumed, based on experience to date, that LHBs will do this).

141. If the Tribunal has formed a decision (a legal judgment made, by those appropriately skilled to do so, on the basis of the expert evidence before it), and the LHB which should deliver that service can simply say that it does not consent then it undermines the whole purpose of having a Tribunal and is likely to result in the needs of the child/young person not being met.

142. SENTW does acknowledge and welcomes the effort that the Welsh Government are making to improve the capacity of LHBs to work effectively with LAs to deliver the ALN provision for children.

143. The SENTW acknowledges that this may reduce the number of cases where the health provision is contentious, nevertheless where such cases do arise it is essential in the educational interests of the child that the order of the tribunal is complied with. The wording in the Bill at present makes this doubtful.

144. The SENTW is of the view that the most effective remedy for this weakness would be for LHBs to be under a duty to comply with the determination of the Tribunal, just as LAs are. Indeed it seems irregular and inequitable that the duty should be placed on one kind of public body (LAs) and yet not on another (LHBs).

145. If, however, the current situation is maintained, with LHBs able to ignore the findings of the Tribunal, then there must be complete clarity in the Bill as amended that the LA must deliver the order of the Tribunal and further clarity on how they will achieve that and the funding implications for any such provision.

146. The SENTW considers that for a family to have to go to Judicial Review to achieve delivery of a tribunal order to be entirely inappropriate resulting in additional expense and distress for the family as well as further delay in meeting the established ALN of the child.

147. There must be an effective form of enforcement and redress if the LA fails to do so.

148. It is also contended that it would be sensible to consider ways in which LAs could be given a greater degree of control in this situation.

<u>Enforcement procedures</u>

149. Currently, where the SENTW has made a decision that a child should receive increased support, and that support is not forthcoming, parents often contact the SENTW seeking redress but the Tribunal is currently powerless to act and must simply advise the family to contact the Welsh Government.

150. It is strongly recommended that – as a minimum – the new system requires complaints about non-compliance to be routed via the Education Tribunal (who are familiar with the case and could quickly verify whether the complaint is legitimate) before transferring to the Welsh Government for enforcement action. This would facilitate the handling of such cases, as well as enable the Tribunal to monitor numbers.

151. The number of complaints which arise will be reduced if the issues of LHB responsibility for compliance with decisions of the Education Tribunal as set out above are addressed, since many of the complaints the SENTW receives from parents arise from situations where the LHB has refused to deliver provision and the LA has not made/ has been unable to make alternative provision.

152. The SENTW have recommended above that Section 68(2) of the Bill is amended to allow provision for Regulations to cover monitoring and enforcement of compliance with Tribunal orders.

Retention of complex systems of redress

153. The current processes for dispute resolution and redress within the SEN and Learning Difficulties and Disabilities (LLD) are diverse, fragmented, complex, time consuming for all involved, and they do not work together.

154. Unfortunately, rather than integrating these processes so that there is a single mechanism for resolving disputes and securing redress the Bill seems to envisage that the current processes will continue in much the same way as presently.

155. In the view of the SENTW this position needs to be reconsidered.

156. If the current redress systems are not to be integrated then in the view the SENTW, at the very least, further work needs to done to identify how these processes relate to each other and can be made to work together more effectively.

Need to learn from cases

157. The 2012 Consultation proposed that there should be a requirement for the parties to tribunal proceedings to hold post outcome reviews so that

practices can be improved where possible. The Tribunal continues to support this proposal and considers that it is something that should be included in the Bill or in the mandatory provisions of the new ALN Code of Practice.

**Any amendments to the Bill to improve any aspects of the Bill that are identified as inadequate.**

158. Possible amendments to improve specific aspects of the Bill have been outlined above.

159. In addition, less substantial, but nonetheless, useful amendments that the SENTW believe should be considered are as follows:

<u>Specific Statutory Definition of Parent/s</u>

160. Inclusion of a clear statutory definition of the term "parent/s" within s. 68 of the Bill would, in the view of the SENTW, be extremely helpful to all involved in the new system.

161. The Tribunal takes the view that it will be helpful to recognize that the definition of parent is a broad one, which in addition to natural parents encompasses all those with parental responsibility for a child and also those who may have care of a child or young person. It may also be helpful to make it clear that parents are entitled to act jointly or independently of each other in relation to education matters.

<u>Power to Appoint Deputy Presidents to the Education Tribunal</u>

162. In the context of the administration of Tribunal functions it would assist the SENTW to have a statutory power to appoint a Deputy/Deputies to the President of the Tribunal to ensure that all the functions of the Tribunal can continue to be exercised in the event that the President were to become incapacitated for whatever reason.

163. The current Tribunal Regulations provide for a number of the powers of the Tribunal President to be delegated on an ad hoc basis to a Chair/Chairs of the Tribunal, which is extremely helpful, but does not provide the full benefits of appointing a deputy that has been seen in other Welsh devolved tribunals.

164. Sadly, in another Tribunal the recent highly unexpected death of the President has very much highlighted the need for deputation to ensure the continuation of the effective running and administration of the Tribunal.

Change of the term "lay panel" to "education panel"

165. Sections 79 – 81 deal with the constitution and the proposed new Education Tribunal and within these sections use of the term "lay panel" is used. This is based the same wording that is used in Part 1V of the Education Act 1996 when making provision for the constitution of the SENTW.

166. So as to better reflect the fact that the "lay panel" of the SENTW is made up of members with considerable expertise in education, SEN and disability related issues when the SENTW Regulations of 2012 were created the term "lay panel" was changed to "education panel."

167. In the interests of consistency therefore and so as to better reflect the nature of the panel the SENTW would ask that references to "lay panel' within the Bill are amended to "education panel."

Inclusion of a power to the Tribunal to cease to maintain an IDP under Section 64

168. Under Section 63 of the Bill there is a right of appeal concerning the issue of whether or not an IDP should be ceased. The concomitant power to make an order regarding an issue concerning a cease to

maintain appeal allows the Education Tribunal to order the continuance of the IDP with or without revision but it does not include the power to order that the IDP ceases. Whilst it is arguable that this is achievable through the power of the Tribunal to dismiss an appeal for the sake of clarity and for the avoidance of any doubt it is preferable for the Bill to specifically grant the Tribunal this power. The SENTW currently has this specific power in respect of SEN appeals.

## Concluding Remark

169. The SENTW would like to thank the Committee for taking the time to consider this response and it hopes that the Committee finds it useful in carrying out its scrutiny of the ALNET Bill.