IPSEA comments on the SEN Code and Regulations as laid before Parliament
June 2014

IPSEA is a national charity advising and acting on behalf of parents of children and young people with special educational needs. We have followed the passage of the primary legislation, the Children & Families Act 2014, very closely, offering analysis and comment whenever possible.

Overall we do not think the Regulations of the Code are ready for final approval by Parliament for the reasons below.

The fundamental flaw in the SEN Regulations

Outcomes contained in an EHC plan are not challengeable by appeal

Under the Children & Families Act 2014 (C&FA) s37(2)(b), an Education, Health and Care (EHC) Plan must specify the outcomes that the local authority (LA) expect a child or young person to achieve as a result of the special educational, health and social care provision that will be put into place to support them. The Regulations require outcomes to be contained in section E of the EHC Plan.

However, by the Act or the Regulations as currently drafted there is no means of challenge or right of appeal about what these outcomes are or how they are worded if the parent or young person does not agree with them when the EHC Plan is finalised.

This is a real issue. The draft Code says at 9.68, "outcomes underpin and inform the detail of EHC Plans". If outcomes are so fundamental but the LA does not put relevant ones into the EHC Plan, or fail to word them adequately, or should revise them in the light of further evidence, they need to be appealable.

Where the ability to challenge outcomes is particularly vital is in relation to a decision to cease to maintain a Plan under C&FA s45(3) where a young person is over 18. Here a main factor in the decision to cease is whether the education and training outcomes specified in the plan have been achieved. If LAs were to write easy to achieve or already achieved outcomes in an EHC plan they will have a reason under the Act to cease to maintain the EHC Plan for a member of a very vulnerable group of young people. It would defeat one of the fundamental aims of ministers and Parliament in enacting this legislation. The First-tier Tribunal in making a decision on appeal against an LA doing this will have no power to amend the outcomes and will be limited therefore in how they can respond to a cease to maintain decision. The only way forward would be for parents or young people to bring a judicial review (a funding problem for many) against the LA. This would be extremely difficult for many parents and young people, and in terms of judicial proceedings would be a hammer to crack a nut.

The solution is to amend Regulation 12(e) concerning the form of an EHC plan to require the outcomes section of the plan to be split into two subsections, in one, education and training, and in the other, health and care outcomes. Regulation 43

Helping children with special educational needs get the right education
would then need to be amended so that the Tribunal could specifically consider the education and training ones on appeal. There is a power to do this under C&FA s51(4)(a). The Code would then also need amending to reflect this.

The SEN Code of Practice

‘The new Code will be significantly shorter, clearer and more concise.’
DfE Powerpoint presentation, December 2012.

The current (2001) Code is 142 pages long, with an additional 68 pages reproducing the SEN Regulations etc. and containing a comprehensive glossary and index.
The new (2014) Code as laid is 250 pages long, with an additional 27 pages containing annexes and a glossary. It does not have an index nor does it reproduce the associated Regulations.

As practical guidance on the law

In spite of its length, insufficient improvements have been made in the final draft to accurately reflect the underlying law on which this statutory guidance advises.

Legal Thresholds

Initial identification of SEN
6.15, “Making higher quality teaching normally available to the whole class is likely to mean that fewer pupils will require such support. Such improvements in whole-class provision tend to be more cost effective and sustainable.”

This may – and indeed is already – be read to imply that if schools retain their existing numbers of pupils with SEN, their teachers and their leadership are poor. This may provide a perverse incentive to remove the label and support from needy pupils.

6.37 “High quality teaching, differentiated for individual pupils, is the first step in responding to pupils who have or may have SEN. Additional intervention and support cannot compensate for a lack of good quality teaching.”

As above, but it is against the precautionary principle to make this always the first step. The precautionary principle would require a newly encountered difficulty to be responded to immediately by adopting appropriate strategies/resources; sometimes this will entail more than ‘high quality teaching’. This paragraph provides a perverse incentive to teachers to delay/avoid identification of SEN due to the implications for the quality of their teaching. It also conflicts with the anticipatory duty placed on schools by the Equality Act 2010.

6.21 “Persistent disruptive or withdrawn behaviours do not necessarily mean that a child or young person has SEN.”

This as the first sentence of 6.21 damages the impact of the rest of the paragraph, as it seems to require that problem behaviour is persistent before considering assessment for SEN. Any abrupt change in behaviour may be a reason to immediately screen for SEN and causes of SEN or other underlying problems which might call for support. This paragraph needs to allow for such situations.
6.22: “Where there are long lasting difficulties schools should consider whether the child might have SEN.”

That difficulties must be “long lasting” is not the trigger in law even for statutory assessment, let alone initial identification of SEN. We see this as part of an unhelpful pattern of emphasising delay before basic identification of SEN, let alone moving to involving external specialists or statutory assessment. As this paragraph uses the examples of bullying and bereavement, allowing effects to become “long-lasting” before considering screening is especially worrying. There is no advice in these two paragraphs on how schools or individual teachers should react to sudden changes in behaviour that may call for all three types of screening, SEN, health and social services (see ‘Omissions’ below on emergencies).

Contrast the precautionary principle at 5.29: “where there are concerns, there should be an assessment to determine whether there are any causal factors such as an underlying learning or communication difficulty.” Conflicting advice like these examples do not help schools to make potentially expensive decisions in order to meet children/young people’s needs.

There are many potential causes of changes in behaviour which need prompt response to prevent difficulties becoming persistent and long-lasting (as well as bullying and bereavement which are mentioned), e.g. onset of hearing or sight impairment, brain damage, mental health difficulties, epilepsy, diabetes, domestic violence, family breakup, eviction, etc. A better approach would be to advise comprehensive screening with external specialists’ involvement where necessary at the point of concern.

**Trigger for external help**

The early years chapter is contradictory. 5.36 stresses the paramount importance of no delay in making SEP, but 5.48 requires the child to fail to make progress in spite of the setting’s “evidence-based support and interventions”, before the setting can consider involving specialists. This is especially counter-productive advice where very young children are concerned.

**Statutory assessment for EHC Plan**

9.3 states that statutory assessment should not normally be the first step of responding to SEN/disabilities, and that only a ‘very small minority’ of cases would require that first step. We are not aware of any evidence the DfE is relying on here. In our experience the need for an immediate statutory assessment on first encountering the child or when a problem emerges suddenly is not that rare.

**Omissions**

**Exclusions and other emergencies**

What is open to LAs and providers in an emergency is referred to obliquely in Chapter 1 on principles at 1.29 (not where we would expect to find detailed guidance) but does not appear elsewhere. The ability to place a child or young person in a special school or as an emergency placement is vital for e.g. avoiding permanent exclusion or their being withdrawn from school. It is essential that guidance on what settings do in such situations appears in the relevant chapters on early years, schools and FE: exclusions are of course a major problem for children/young people with SEN/disabilities. Guidance should include moving to immediate statutory assessment and making provision immediately available, and link to exclusions guidance.

**LAs’ s22 duty to identify**

How LAs should carry out this duty with regard to children and young people with SEN is still not explained, and only referred to at 1.14–18. Health bodies and early years
settings are obliged and advised to inform the LA of their identification of a child with SEN, but there is no such advice that schools and FE do so. Indeed, their duty is stated to be on a par with that of parents: ‘parents, early years providers, schools and colleges have an important role’ in bringing a child or young person to the attention of a local authority (1.15). 10.30 states “Local authorities do not have a duty under section 22 of the Children and Families Act 2014 to assess every home educated child to see whether or not they have SEN”, so how do LAs identify those who do have SEN? So for children and young people whether in school or not there is a missing initial link in the chain of guidance from identification to further duties.

Then, what the LA does with its identifications is also unclear in the Code. Given that the law supplies a clear chain of duties, with an onerous one at the third link at s36(3), that must be clear:

“When … a local authority … becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.”

There must be guidance that an LA goes from identification under s22, therefore becoming responsible for the child/young person under s24, to making the decision as to whether a Plan may be necessary under s36(3).

The LA must then consult the parent or young person in making the decision and must inform them of appeal rights if they refuse to assess for a Plan.

9.11 does not mention this duty while explaining the LA’s duty to respond to requests for assessment, the first paragraph in the section entitled ‘Considering whether an EHC Needs assessment is necessary’.

Schools’ duties: special schools

Chapter 6 is entitled “Schools” but states it covers mainly mainstream schools (it does not offer a definition of “mainstream”, nor does the Glossary). However, it omits special schools’ duties to pupils with no Plans, important as some special academies will have the power to admit such pupils under the C&F Act. It also omits to explain the differences between mainstream and special schools’ duty in law to their pupils. Maintained special schools have no ‘best endeavours’ duty, for instance.

Chapter 6 should include in its legislation list of duties that are owed by special schools:

- to children with no plan (s34)
- duty to pupils with medical conditions (s100)
- and the duty to identify and respond to need via a graduated approach, with meetings with parents etc.

There is no guidance elsewhere on special schools’ duties to their pupils, or to the parents of those pupils.

Legal errors

Decision to issue a Plan

There is a serious error in the Code’s guidance on what the LA should take into account in making this decision, at 9.55:

“the local authority should take into account:

- whether the special educational provision required to meet the child or young person’s needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions…”
The problem here is that to be made lawfully, the decision must be made on the facts of the individual child or young person’s case, not on blanket provision or policies. The only relevant facts are what is actually available for the child or young person in the setting they are in or the intended setting. We believe that a confusion has arisen between the s21 definition of special educational provision (“provision that is additional to, or different from, that made generally for others of the same age in [mainstream]”, which of course is provision for children/young people with SEN whether or not they have Plans), and the decision on whether a Plan is necessary. That necessity must be judged on the facts in the child/young person’s case, not a national funding formula or local policy of resourcing.

**Schools’ duties v LAs’**

6.6’s reference to Local Offer requirements does not make clear that LAs are responsible in law for identifying pupils with SEN, not schools. Does assessment here mean statutory assessment?

**Schools – funding for SEN**

6.99 “The responsible local authority … should provide additional top-up funding where the cost of the special educational provision required to meet the needs of an individual pupil exceeds the nationally prescribed threshold”

This point gives a false interpretation of the absolute duty on an LA under C&FA s42(2) to secure the special educational provision for a child or young person. SEN funding policy will never be able to override this duty where a school has not got the actual budget to fund special educational provision. This is a dangerous and very misleading sentence.

**LA duties**

9.49 The bullet point about social care advice for an EHC needs assessment fails to be clear that an LA’s social care team must carry out an assessment, if appropriate, of a child or young person’s social care needs under the relevant social care legislation – CSDP Act 1970 or Care Act 2014 – and identify provision that they need. It refers instead only to LAs seeking advice and information. The C&FA at s36(2) states that an EHC needs assessment is of education, health and social care needs so this is a required duty.

9.77 “The local authority must send the draft EHC plan (including the appendices containing the advice and information gathered during the EHC needs assessment) to the child’s parents or young person and give them at least 15 calendar days to give views and make representations on the content.” Delete “at least”. The 15 days is a maximum not a minimum.

9.88: The title and paragraph reflect an incorrect duty. The duty to name a mainstream school or college in an EHC plan is there whether or not the parents/young people request a specific school or college. It is the default position for the LA, an overriding duty. Where a parent has requested a specific mainstream school or college and it is proved not to be suitable under s. 38(4) the LA must name an alternative mainstream setting.

9.217 “Transport costs may be provided as part of a Personal Budget where one is agreed and included in the EHC plan as part of the special educational provision.” Transport is not special educational provision in law, cannot go into that section in Plan or be part of a special educational provision personal budget.
Children/young people without statements/Plans

The majority of children with SEN may be worse off

The Code’s “system” has no distinct formal steps or triggers for next steps within its so-called “graduated approach”. Currently parents can understand and participate in the clear framework of the two stages of School Action and School Action Plus, with accompanying clarity on documentation via standard individual education plans and reviews, and clarity also on what to do if these stages are not appropriate or ineffective. The replacement of this by a single category with no formality around any stages within it will not improve accountability to children and young people, to parents, and to public funds. The “graduated approach” essentially sets up a potentially eternal cycle of trial and error termed “assess, plan, do, review”. There is no clear sign-posting of an exit by which pupils and staff can escape the loop to access additional help, or of how to immediately access additional resources when necessary. Good schools will manage, but the guidance is for all schools.

Additionally, the disincentives to identify SEN, to call in outside help and to request assessment for an EHC Plan for these children and young people will give rise to many potential points for confusion, delay, and conflict about the support they need. This is against the spirit of the Green Paper and the declared intentions of the Government in introducing the Children and Family Act. Schools and teachers may be unfairly criticised when they do identify SEN as “high quality teaching” is meant to reduce SEN numbers.

Children will also lose protections against being placed inappropriately in special schools

In the final draft there is one paragraph of guidance (1.29) on this new power. It appears in the chapter on principles (not where we would expect to find it, we think it should appear in the “Schools” chapter). There is no guidance on:

- how children will be assessed to match their needs with the provision the school can make,
- how they will be supported and funded,
- how their placement might affect the support and funding of the other children for whom the school is intended, and
- how their interests might be safeguarded in this anomalous position,

Therefore this paragraph is inadequate. Are these pupils funded as mainstream pupils? In which case what is the advantage of such a placement to the pupil or the academy? Are there still duties to “assess, plan, do, review” for these pupils, and a duty to request assessment where needed?

Inclusion and equality

Much of the current statutory guidance on the right to inclusive schooling is not in the final Code.

There are improvements from the previous drafts, but not enough.

The draft reduces the “reasonable steps” guidance to schools, all of which we have found to be necessary and useful, and has it in the wrong place (see below). Separate paragraphs dropped in here and there on Equality Act duties are not yet sufficient.

The detailed advice within the Principles chapter at 1.27 to 1.30 needs to be moved to or repeated in appropriate places within the chapters on early years, schools and FE so that settings are clear on their duties, especially on admissions. The importance
of schools’ clarity on this was re-emphasised by the April 2014 report by the Children’s Commissioner for England, "It might be best if you looked elsewhere".

Confusion may arise from 1.27 which correctly advises mainstream schools that they may not refuse admission of children and young people without Plans because schools do not feel able to meet needs, versus the same schools’ ‘offer’ of what support they can provide, implying limits on what needs they can cater for.

Further, 1.27 does not advise on admission of children and young people with Plans: the operation of parent/young person’s right to mainstream regardless of need, with the expectation that LAs will supply any extra help via the Plan (case law). This latter case is not dealt with elsewhere. This section needs to link to paras 9.78 to 87 (once corrected, see below) and this advice should be located in the Schools chapter so that schools can be clear about their duties to admit children with SEN, with and without plans.

In the section (paragraphs 9.78 to 87) on requests by parents/young people for particular schools etc. to be named in Plans, there is no mention of their right to a mainstream place, with the evidential requirements on LAs if those LAs wish to deny mainstream. The Code treats that aspect of law as one only pertaining to cases where no request for a school has been made (paragraphs 9.88 to 9.94), whereas the law applies to both request and no request.

The ‘no request’ guidance is the only place where what remains of the reasonable steps guidance from the current inclusive schooling guidance is to be found. The limitation of reasonable steps guidance to cases where no request for a placement has been made is wrong and misleading. It should be placed in the schools chapter along with guidance on admissions generally.

The chapters on joint commissioning and local offer should also advise on how all bodies involved perform their Public Sector Equality Duty within these new functions, with the requirement for progressive development by all partners prominent in them. One paragraph appears on this in Chapter 3 (3.8), but in the local offer chapter the PSED appears only with reference to early years at 4.37. It should be a purpose in 4.2, given that part of the duty as stated in 3.8 is that public authorities publish information demonstrating compliance.