SPECIAL EDUCATIONAL NEEDS AND DISABILITY CODE OF PRACTICE AND REGULATIONS 2014: IPSEA COMMENTS TO SECONDARY LEGISLATION SCRUTINY COMMITTEE

Thank you for sending a copy of the comments you have received from the Independent Panel for Special Educational Advice about the draft Special Educational Needs and Disability Code of Practice and Regulations. The Department consulted widely on the Code of Practice, including with IPSEA. This note provides a response from the Department for Education to the points made in their submission.

**Regulations**

Outcomes contained in an Education, Health and Care (EHC) Plan are not challengeable by appeal

An EHC plan must set out a child or young person’s needs and specify provision to meet those needs, which should help them achieve the outcomes established as part of the assessment and plan process. The outcomes in the EHC plan are much broader than the objectives in the present special educational needs statement as they cover health and social care as well as education and training. Local authorities need to be able to take an integrated approach in describing outcomes in the EHC plan which reflect that a number of services may need to work together to deliver a particular outcome. Making the education and training outcomes appealable could prevent local authorities taking an integrated approach in describing outcomes.

The special educational provision in an EHC plan is appealable to the Tribunal. Chapter 11 of the draft Code clarifies that in making decisions about whether the special educational provision specified in the EHC plan is appropriate, the Tribunal should take into account the education and training outcomes specified in Section E of the EHC plan and whether the special educational provision will enable the child or young person to make progress towards their education and training outcomes.

A local authority may cease an EHC plan for a 19-25 year old if it decides that it is no longer necessary for it to be maintained because the special educational provision
specified is no longer needed. In deciding that such provision is no longer needed the local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved. If a local authority proposes to cease to maintain a plan the parent or young person has a right to appeal to the Tribunal. In considering an appeal the Tribunal must decide whether special educational provision through a plan is needed, not simply whether the outcomes have been achieved.

Chapter 9 makes clear that the outcomes specified in the EHC plan should reflect the need to be ambitious, showing how they will enable the young person to make progress towards their aspirations. These provisions will help to avoid any risk that outcomes could be set too low in order to cease a plan earlier than is appropriate for a 19-25 year old.

**Code of Practice**

**Legal thresholds**

**Initial identification of SEN**

Paragraph 6.15 reflects that changing what is normally provided is a key way of meeting the needs of individual children or young people. Within this paragraph the focus remains clearly on schools providing what an individual requires to meet their needs. The Department does not believe that it implies “that if schools retain their existing numbers of pupils with SEN, their teachers and their leadership are poor”. Nor does it provide “a perverse incentive to remove the label and support from needy pupils”.

More widely, Chapter 6, including paragraph 6.37, reflects that high quality teaching is fundamental to supporting all pupils, including those with SEN. It does not conflict with the anticipatory duties in the Equality Act 2010, which are explained earlier (in the introduction and Chapter 1 on principles and referenced in the chapters on early years, schools and colleges). The chapter also emphasises early intervention to prevent difficulties escalating, and an individual approach, closely monitoring the impact of teaching and interventions offered as part of a graduated approach to removing barriers to learning and putting effective special educational provision in place.

For example, paragraph 6.14 emphasises the importance of early identification and intervention and paragraph 6.19 says: "While informally gathering evidence...schools should not delay in putting in place extra teaching or other rigorous interventions designed to secure better progress, where required."

Paragraphs 6.21 and 6.22 do not establish thresholds. They are set in a section which emphasises the need for appropriate interventions based on knowledge of the individuals. The examples given illustrate things that should not automatically rule SEN in OR out. The first sentence of paragraph 6.21 serves to emphasise the importance of assessment to the identification of underlying SEN. It does not rule it out any point. The sentence picked out in paragraph 6.22 acts only to rule IN a consideration of SEN in this context. It does not rule out earlier action in any way.
Trigger for external help

Paragraph 5.36 emphasises the importance of early identification in a similar way to paragraph 6.14 in Chapter 6 (Schools) and paragraphs 5.39 to 5.48 set out a graduated approach for the early years with the same features as the approach for schools and colleges. The importance of involving specialists is referenced in paragraph 5.48 and in paragraph 6.59, which makes clear that schools may involve specialists at any point to advise on early identification of SEN and effective support and interventions and that a school should always involve a specialist where a pupil continues to make little or no progress or where they continue to work at levels substantially below those expected of pupils of a similar age despite evidence-based support delivered by appropriately trained staff.

Statutory assessment for EHC plan

Paragraph 9.3 recognises that an EHC assessment should not normally be the first step but follow on from earlier planning but also makes clear that this may not be possible where children or young people demonstrate such significant difficulties that a school or other provider may consider it impossible or inappropriate to carry out its chosen assessment procedure (an example is given but this is not intended to be exhaustive). Paragraph 1.29 of Chapter 1 (Principles) explains that emergency placements in special schools or specialist post-16 institutions can be made to facilitate an immediate EHC assessment.

Omissions

Exclusions and other emergencies

The guidance in paragraph 1.29 (referred to above) relates to exclusions and other emergencies. Chapter 11 includes a section on exclusions with a reference to the Department's guidance on exclusions, which contains advice relating to SEN.

Local authorities’ section 22 duty to identify

The duty on local authorities under section 22 of the Children and Families Act 2014 is to exercise its functions with a view to securing that they identify all the children and young people in their area with special educational needs and disabilities. Those functions, which include duties to keep educational, training and social care provision under review; the joint commissioning duties; the preparation and review of the local offer; provide opportunities for local authorities to gather information to help them fulfil this duty. The chapters on early years, schools and colleges make clear that children and young people can be brought to a local authority’s attention as having SEN and by way of specific requests for EHC needs assessments. Health bodies have a specific duty to notify a local authority of a child under compulsory school age who they think has or probably has a disability or special educational needs, enabling the local authority to consider what support may be needed.

The reference in paragraph 10.30 to local authorities not having a duty to assess every home educated child to see whether or not they have SEN is consistent with
the general duty under section 22. The guidance in this paragraph makes clear that local authorities should work in partnership with, and support, parents to ensure that the SEN of these children are met where the local authority already knows the child has SEN or the parents have drawn the children's SEN to its attention.

**Schools’ duties: special schools**

The opening paragraph of Chapter 6 seeks to make clear how the guidance applies to mainstream and special schools. The graduated approach set out in Chapter 6 relates to the duty on mainstream schools under section 66 of the Children and Families Act, which does not apply to special schools.

**Legal errors**

**Decision to issue a Plan**

The legal test of whether a local authority should issue an EHC plan following an EHC needs assessment is stated in paragraph 9.53 - that is, where it is necessary for special educational provision to be made in accordance with such a plan the local authority should prepare one.

Paragraph 9.55 relates to when, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, and makes clear that the local authority should consider whether provision to meet the child’s needs could be met from resources normally available or whether it may be necessary for it to secure special educational provision in accordance with an EHC plan. The guidance is about making decisions on an individual, case by case basis not on blanket provision or policies.

**Schools’ duties v local authorities’ duties**

The reference to identifying and assessing needs in paragraph 6.6 relates to schools’ duties to use their best endeavours to make sure that children with SEN get the provision their needs call for – not to statutory EHC needs assessments.

**Schools – funding for SEN**

Paragraph 6.99 makes clear that a local authority should provide additional top up funding where the cost of the special educational provision required to meet the needs of an individual child exceeds the nationally prescribed threshold. Providing additional funding above the nationally prescribed threshold is not dependent upon an EHC needs assessment or plan. Where a local authority has carried out an EHC needs assessment and issued an EHC plan, section 42(2) places a duty on it to secure the special educational provision in the plan and this is made clear in Chapter 9.

**Local authority duties**
Paragraph 9.49 in Chapter 9 (EHC needs assessments and plans) simply lists the advice and information the local authority should seek for an EHC needs assessment. Seeking such advice and information could trigger a social care assessment if appropriate and the child or young person is not previously known. Or if they are known and it is appropriate under the relevant social care legislation such an assessment may have already been carried out and this will be information contributing to the EHC assessment. Paragraph 9.137 explains the duties on social care teams.

Paragraph 9.77 is correct in stating that 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. This is explicitly provided for in Regulation 13(1) (a) of the Special Educational Needs and Disability Regulations 2014.

Paragraph 9.88 clearly signals that it applies where no preference is expressed or one has been expressed and not been met and makes clear that the local authority has a duty to name mainstream provision in those circumstances subject to this not being against the parent or young person’s wishes or incompatible with the efficient education of others (where no reasonable steps can be taken to prevent that incompatibility). Paragraph 9.89 also makes clear that where a request for a specific mainstream school or post-16 institution has not been met it becomes a candidate for consideration under the conditions mentioned above.

Paragraph 9.127 – Personal budgets can cover transport costs.

**Children and young people without statements/plans**

It is asserted that “high quality teaching is meant to reduce SEN numbers”. This is not an objective of the Government’s policy nor is it stated in the guidance in the draft Code of Practice. Paragraph 6.37 notes: “High quality teaching, differentiated for individual pupils, is the first step in responding to pupils who have or may have SEN.”

Paragraph 6.38 goes on to describe the information and formative assessment the school should consider in deciding whether to make special educational provision and makes clear that “For higher levels of need, schools should have arrangements in place to draw on more specialised assessments from external agencies and professionals.”

The guidance on the graduated approach (SEN support) does not require or suggest “a potentially eternal cycle of trial and error termed “assess, plan, do, review” nor does it provide disincentives to identify SEN or call in specialist help, or seek an EHC needs assessment:

- Paragraph 6.59 - “Schools may involve specialists at any point…”
- Paragraph 6.60 - “Where assessment [in school] indicates that support from specialist services is required, it is important that children and young people receive it as quickly as possible.”
Paragraph 6.62 – “Where, despite the school having taken relevant and purposeful action to identify, assess and meet the SEN of the child or young person, the child or young person has not made expected progress the school or parents should consider requesting a EHC needs assessment.”

Children will lose protections against being placed inappropriately in special schools

The Secretary of State has the power to consider proposals from individual Special Academies and Special Free Schools to admit some pupils without EHC plans. The draft Code of Practice describes the approach the Secretary of State will take to guard against inappropriate placements, which reiterates commitments given in the House. The requirements would be set out in individual funding agreements.

Inclusion and equality

The Department believes that the draft Code of Practice sets out the Children and Families Act provisions relating to mainstream education; draws on the guidance in Inclusive Schooling, including examples of reasonable steps that can be taken to prevent the inclusion of a child with SEN in mainstream being incompatible with the efficient education of others; and includes the statutory provisions in respect of children and young people with and without EHC plans. The draft also includes information on duties under the Equality Act 2010 and links to relevant guidance. The chapters on joint commissioning and the local offer refer to the need to comply with the Equality Act (paragraphs 3.8 and 4.5).

Department for Education