

CSN POLICY BRIEFING

Detained young persons: Special Education Needs and Disability provision – DfE consultation

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Summary

A revised draft [Special educational needs and disability code of practice: 0 to 25 years](#) under the Children and Families Act 2014 was published on 22 October 2014. Principally, the revised Code takes account of the new law on young people with special educational needs and disability who are detained. The new law will be introduced in April 2015. Accompanying the draft Code are the draft [Special Educational Needs and Disability \(Detained Persons\) Regulations 2015](#). The opportunity is also taken to correct a number of drafting issues with the July 2014 code, and make a few minor amendments. Responses are required by 19 November 2014.

This briefing focuses on the consultation document published at the same time as the draft regulations. It outlines changes in the guidance, and some of the main issues that might be reflected in consultation responses. It will be of interest to elected members and service leads in education, health, and social care.

Background

Part 3: Children and young people in England with special education needs or disabilities of the [Children and Families Act 2014](#):

- extends the responsibilities of councils for special educational provision up to the age of 25, and replaces statements of SEN with Education, Health and Care (EHC) Plans; promotes closer working between councils and NHS Trusts in the assessing and making provision.
- increases the voice of the parent or young person within the process, reduces the time taken to complete assessments and ensures an holistic plan to improve outcomes for those with assessed Special Educational Needs and Disabilities (SEND).
- requires independent advice, information, and if they want it, mediation, prior to parents going to a Special Needs and Disabilities Tribunal. Local Authorities are also required to put independent disagreement resolution procedures into place where parents disagree with the council or a provider.

A new [Special Educational Needs and Disability Code of Practice: 0 to 25 Years](#) was published in July 2014 and transition from the old system to the new started in September 2014. However the code stated specifically that “statutory requirements relating to children and young people detained in youth custody will be commenced from April 2015”. This consultation and the revisions made to the code (specifically Chapter 10 paragraphs 10.53 to 10.120) put that in place.

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Overarching Statutory Duties in relation to SEN

Councils have a responsibility to respond to requests for an assessment of a child's SEN from schools and parents. They must consider, and if agreed, complete the assessment within fixed timescales set out in the Code of Practice. Councils are not obliged to provide exactly what each parent requests, but they should be able to explain clearly why they consider a suggested provision meets the assessed needs of any individual child. They must also take steps to ensure that the views of the child or young person are properly recorded and considered when planning provision for them. The Special Educational Needs and Disability Tribunal provides a legal route to resolve differences about what is set out in a Statement of SEN or an EHC plan.

Councils must also provide support services (such as education psychologists or behavioural and sensory impairment support) to enable schools to provide for all children with SEN. They have an responsibility to work in partnership with other bodies, including the NHS and the voluntary sector in ensuring appropriate services are available. Schools and other providers have a duty to put in place the provision set out on a day to day basis. They also have a duty to identify and support all children with SEN appropriately. At the point at which a provider or parent requests an assessment of SEN the formal involvement of the council is triggered.

Briefing in full

The consultation page [SEN and disability: detained persons regulations and revised code](#) provides access to three documents and a response form:

- The [Draft Special Educational Needs and Disability \(Detained Persons\) Regulations 2015 and Draft Revised SEN and Disability Code of Practice: 0-25 years](#) is a consultation document covered in the section immediately below.
- The [Special Educational Needs and Disability \(Detained Persons\) Regulations 2015](#) provide access to the new draft statutory instrument
- [Special educational needs and disability code of practice: 0 to 25 years](#) provides the new 289 page draft statutory code for organisations which work with and support children and young people who have special educational needs or disabilities. Changes from the previous version of the code are outlined below.
- Responses can be completed online or through downloading a form accessible from the consultation page.

The draft regulations and guidance apply to children and young people aged 18 and under who have been sentenced or remanded by the Courts to relevant youth accommodation in England (meaning a Young Offender Institution, a Secure Training Centre or a Secure Children's Home). New regulations and guidance do not apply to children and young people subject to a detention order in the community, or those serving a sentence in the community. Nor do they apply to children and young people in secure mental health settings or subject to secure welfare orders.

Consultation Questions

The consultation response period is limited to four weeks, as the substantive code has had two consultation periods prior to being formalised. Responses are required by the 19 November 2014. It is intended to publish the new Code in spring 2015. There are six questions on the response

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form. A summary of the main changes to guidance and regulations is provided below and should be referred to.

Question 1: Do the draft regulations set out clearly what local authorities, youth offending teams, persons in charge of relevant youth accommodation, custodial education providers and health commissioners are required to do regarding children and young people with special educational needs who are in youth custody?

Respondents may want to ask if the draft regulations are sufficiently clear in limiting their scope to young people aged 18 and under, and the need to retain an EHC plan if the young person is released before the age of 25. These retained rights link to responsibilities placed especially upon 'home' local authorities to continue to make and review provision for those with special educational needs and disabilities.

Question 2: Does the draft text on detained children and young people in chapter 10 (paragraphs 10.53 to 10.120 of the draft revised Code of Practice) clearly explain the duties set out in sections 70–75 of the Children and Families Act 2014 and the draft SEN and Disability (Detained Persons) Regulations 2015?

The question is asking if the guidance is clear enough.

Respondents may want to reflect if the definition of a 'home' local authority is adequate. For a child or young person with an existing EHC plan, the 'home LA' is the LA which maintained the child or young person's EHC plan when they were in the community. Where there is a new request for an assessment whilst in custody, the 'home' LA is the LA where the child is 'ordinarily resident'. For a looked after child who was placed out of area before going into custody, the request for an assessment should also be made to the LA where the child is 'ordinarily resident', however the LA who looks after the child will have financial responsibility for an EHC plan. There may be difficulties of definition here.

Question 3: Does the draft text on detained children and young people in chapter 10 make it clear what is required of local authorities, youth offending teams, persons in charge of relevant youth accommodation, custodial education providers and health commissioners in carrying out the statutory duties in relation to detained children and young people?

New duties are brought in for youth offending teams and providers of youth accommodation to have regard for the SEND code of practice and to cooperate with the home local authority. Clinical Commissioning groups and NHS England also have a duty to cooperate and NHS England have a duty to arrange health provision for young people in custody. Respondents may want to reflect on whether the new powers and duties are sufficiently robust.

Respondents may also have views on the impact of new powers and duties. The 'home' local authority has a duty to keep and review an EHC plan, to consider requests for an EHC needs assessment, to arrange SEND provision and to cooperate with youth custody providers. Home local authorities will only be able to meet these duties if they work very closely with youth offending teams, youth accommodation providers, education and health providers in custody. Does the new guidance provide a sufficient framework for this?

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Question 4: Are the links from the draft text on detained children and young people in chapter 10 to other parts of the Code of Practice clear?

The intention of the regulations and revisions to the code is to enable services and rights for children and young people detained with SEN and disability to mirror, as far as is possible, the position they would be in if not detained. Respondents may want to reflect if revisions to Chapter 10 actually do that.

Are those in secure mental health provision or subject to community detention orders properly excluded from the new Chapter 10 (detained persons) guidance and regulations? (but covered by Chapter 9 instead).

Question 5: Does the explanation of the assessment and planning duties in the draft text on detained children and young people in chapter 10 clearly set out the similarities and differences in the process for children and young people in custody compared to children and young people in the community (as set out in chapter 9)?

Are the arrangements envisaged in the guidance whereby EHC plans and assessment processes sit alongside those in the youth justice system coherent? Education provision in youth custody institutions is made through private providers commissioned through contracts. The assessment tools used when young people enter the youth justice system consider their education, health and care needs, but they also are part of a wider assessment of needs in custody. Will these two processes work well alongside each other?

Question 6: Any other comments on the changes listed in annex A of the 'Draft Special Educational Needs and Disability (Detained Persons) Regulations 2015 and Draft Revised Code of Practice' consultation document

Respondents may want to reflect if the arrangements under which this new legislation integrates with other statutory requirements to support children and young people in custody are clear enough. Other legislation, includes the Equality Act 2010 (which is mentioned in guidance – see below), the Crime and Disorder Act 1998, and the Health and Social Care Act 2012.

The Council for Disabled Children has published a factsheet entitled [The SEND Reforms: Young offenders with special educational needs](#) which covers these and other issues.

Changes to the Code specific to Children and Young People detained

Chapter 10 of the Code is on Children and Young People in Specific Circumstances. Paragraphs 10.53 to 10.120 are new and relate to children and young people detained in youth custody. The statutory basis is sections 70 to 75 of the Children and Families Act 2014, the new Special Education Needs (Detained Persons) Regulations 2015, and the National Health Service Act 2006 (as amended). It also draws on elements of the Children and Families Act that relate to the requirement to cooperate, and parents and young people lacking capacity.

In broad terms the statutory requirements are:

- Local authorities must not cease an EHC plan when a child or young person enters custody. They must keep it while the child or young person is detained and review it when the child or young person is released

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- If a detained person has an EHC plan before being detained (or if, unusually, one is completed while the detained person is in the secure accommodation), the home local authority must arrange appropriate special educational provision for the detained person while he or she is detained
- If the EHC plan for a detained person specifies health care provision, the health services commissioner (NHS England) for the custodial establishment must arrange appropriate health care provision for the purposes of the EHC plan

If the provision listed in the plan is not possible, the closest possible provision to that specified must be arranged, and if it is no longer appropriate, provision that is appropriate must be made. The key responsibility lies with the local authority where the young person has a home, but the duty to ensure health provision rests with the health care commissioner for the custodial establishment.

When a young person enters the youth justice system the assessment undertaken by youth offending teams must refer to a young person's EHC plan, if one exists, and the home local authority must provide this and any other relevant information. The home local authority "must promote the fulfilment of the detained person's learning potential while they are in custody and on their release" (paragraph 10.63).

Where no EHC plan exists, or an existing EHC plan has not been reviewed in the previous six months, parents or the young person can request an assessment from the home local authority of the detained person's post detention EHC needs. Any other partner can also request an assessment. Youth offending teams and those running detention establishments must cooperate with home local authorities in carrying out their duties. Where the home local authority is considering making an assessment, it must notify those required under the code. In addition the following must be notified: the person in charge of the relevant youth accommodation, the clinical commissioning group with responsibility before the person entered secure accommodation, NHS England which has responsibility for commissioning health services for detained persons, and the youth offending team responsible for the young person.

In any assessment, the local authority must take account of "evidence of the detained child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies including healthcare professionals in the secure accommodation". The views of the home clinical commissioning group must inform the plan as they will retain responsibility when a detained person is released. NHS England has to ensure it meets, or meets as closely as possible, any health requirements in an EHC plan, whilst the child or young person is detained.

The assessment process has to put the detained young person and their parents at the centre of decision-making. The principles and timescales mirror those for children and young people in the community as detailed in Chapter 9 of the code. Paragraph 10.80 points out that being in custody is not "in itself an exceptional personal circumstance justifying different timescales".

The custodial establishment must co-operate and support mediation and tribunal processes by providing local authorities with access to the detained person for these purposes. In some cases, the mediation sessions could take place in the custodial establishment and/or mediation or tribunals could be via a video link.

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Youth offending teams have to notify local authorities of an impending release, and local authorities at this point should review the EHC plan. Where a detained person is transferred to an adult custodial establishment, all relevant SEN information, including an EHC plan should be transferred so that the receiving establishment can take account of those needs. The SEND duties under the Children and Families Act no longer apply once a person is transferred to an adult institution. However, when a young person aged 18-25 is released from an adult custodial institutions who previously had an EHC plan, then the home local authority retains a duty to maintain and review the EHC plan.

Other (minor) changes in the new draft code

The Government has taken the opportunity to publish a range of other minor revisions.

In the Introduction, paragraph xix on the equalities duties on schools, early years providers, post-16 institutions, local authorities and others includes an additional bullet point saying “they must not discriminate for a reason arising in consequence of a child or young person’s disability”. An additional sentence clarifying the extent of the public equality duty: “the general duty also applies to bodies that are not public bodies but that carry out public functions. Such bodies include providers of relevant early years education, non-maintained special schools, independent specialist providers and others making provision that is funded from the public purse”.

Chapter 3 “Working together across education, health and care for joint outcomes” has a table at paragraph 3.70 outlining the roles and functions of various bodies in joint commissioning. NHS England’s local joint role in relation to detained young people is clarified by removing “children and young people in the secure estate or secure colleges” and inserting “provision for detained children and young people in relevant youth accommodation”.

In chapter 5 “Early Years Providers” paragraph 5.7 is amended to make it clearer that the full range of pre-school and early years providers must not only ensure they have policies in place and aim to meet the special educational needs of children, but they must also cooperate with the local authority in ensuring information is provided to parents. Changes in para 5.22 clarify the end of the foundation stage is at the “end of reception” rather than “when the child turns 5”.

In chapter 6 “Schools”, paragraph 6.1 describes “Improving outcomes: high aspirations and expectations for children and young people with SEN”. The reference to what children and young people are “entitled to” is replaced by “should expect” as legally there is no entitlement.

Chapter 8 “Preparing for Adulthood from the earliest years” amends the first bullet 1 in paragraph 8.5 to make it clear that local authorities should “support and involve the child and his or her parent, or the young person, and to have regard to their views, wishes and feelings” when carrying out their functions. Paragraph 8.58 refers to using the published service specification for the transition from Child and Adolescent Mental Health Services (CAMHS) to adult mental health services. Individual provision should build on person-centred services. Previously, it read “best measurable” person-centred services. Paragraph 8.69 now takes a more outcomes focused view saying a local authority must continue an EHC plan until such time as it has “reached a conclusion about their need for support from adult services” rather than until they have completed “relevant steps” found in the previous Code.

Chapter 9 refers to Education, Health and Care needs assessments and plans. Paragraph 9.106 refers to personal budgets and the circumstances where a local authority cannot identify a sum of money. Currently “the LA might agree that the provision is needed but may be unable, at that point

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in time, to disaggregate funding that is currently supporting provision of services to a number of children and young people” is changed to refer to “unless the sum is part of a larger amount and disaggregation of the funds for the Personal Budget (a) would have an adverse impact on services provided or arranged by the local authority for other EHC plan holders, or (b) where it should not be an efficient use of the local authority’s resources”. Paragraph 9.215 when discussing the requirement for a local authority to publish its transport policy has corrected the statutory reference to the Education Act 1996 rather than Education Act 2006.

External links

[Children and Families Act 2014](#)

DfE and DH [Special Educational Needs and Disability Code of Practice: 0 to 25 Years](#) (June 2014)

DfE [SEN and disability: detained persons regulations and revised code](#) (22 October 2014)

Council for Disabled Children: [The SEND Reforms: Young offenders with special educational needs](#) (20 October 2014)

Related briefings

[SEN and Disability transitional arrangements – draft DfE guidance](#) (June 2014)

[SEN and Disability Reform: readiness – DfE research](#) (May 2014)

[Children and Families Act 2014 \(No.2\)](#) (April 2014)

[Special Educational Needs: preparing for the future – LGO report](#) (April 2014)

[Impact Evaluation of the SEND Pathfinder Programme – DfE research](#) (May 2014)

For further information, please visit www.lgiu.org.uk or email john.fowler@lgiu.org.uk