

## **Consultation on Draft 0-25 Special Educational Needs Code of Practice, Draft Regulations and Transitional Arrangements.**

### **Response from the Office of the Children's Commissioner.**

#### **About the Office of the Children's Commissioner.**

The Office of the Children's Commissioner (OCC) is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. The United Nations Convention on the Rights of the Child (UNCRC) underpins and frames all of our work, and the Children Act 2004 sets out a number of powers that the Commissioner and her Office can use in undertaking her work.

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives. Following an independent review of the Office the Secretary of State accepted that the remit of the Office would be amended to that of 'protecting and promoting children's rights,' and should operate in the spirit of its future remit following the Children's Minister setting out the Government's intentions for the Office in November 2010.

#### **Response to the report**

We welcome the opportunity to respond to this consultation.

This response is informed by the need for all statutory guidance to be in compliance with the UNCRC. In this case, the most relevant articles of the convention are:

Article 2: All rights apply to all children regardless of their personal circumstances and regardless of what they have done.

Article 3: The best interests of the child must be a primary consideration in all actions concerning children.

Article 12: Every child has the right to say what they think in all matters affecting them, and to have their views taken seriously.

Article 23: Children with a disability have a right to special care and support.

Article 28: Every child has the right to an education [...]. Discipline in schools must respect children's human dignity.

Article 29: Children's education must develop each child's personality, talents and abilities to the fullest.

Our response is also informed by our Child Rights Impact Assessment on the Children and Families' Bill<sup>1</sup>. Many of the issues raised in this consultation response reflect concerns raised in this earlier assessment.

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<sup>1</sup> A Child's Rights Assessment of Parts 1-3 of the Children and Families Bill.  
[http://www.childrenscommissioner.gov.uk/content/publications/content\\_651](http://www.childrenscommissioner.gov.uk/content/publications/content_651)

It has also been informed by the two year Inquiry conducted by OCC into school exclusions. In particular, this Inquiry found that children with SEN were many times more likely to be excluded than those without, and that in many cases schools excluded such children without having due regard to their duties under equality legislation<sup>2</sup>.

### **General Issues.**

We welcome the general principles underpinning the move towards replacing statements of Special Educational Need with Education Health and Care Plans. In particular we welcome the commitment set out in the draft Code of Practice to placing the views of children and families at the centre of the decision making process, and to “joining up” commissioning of services across education, health and social care.

However, we consider that there is a gap in these principles which, unless it is addressed, will lead the Code of Practice to be in breach of Article 3 of the UNCRC. This Article states that the best interests of the child must be a primary consideration in all actions concerning children. This may be implicit in the requirement for the views of the child to be taken in at each stage of the process. However, we recommend that it should be explicitly stated throughout the Code of Practice in order to emphasise that this is a binding requirement on all parties involved.

### **Response to specific issues raised in the Code of Practice.**

#### ***Chapter 3: A Family Centred System.***

The Office of the Children’s Commissioner strongly supports the primacy of the views of young people in expressing their views regarding the provision which is right for them, as set out on page 19 of the Code of Practice. We agree that, in the large majority of cases, the views of parents will be in line with those of young people. However, in the small minority of cases where the two are in conflict, we agree that the views of the young person should be given priority.

In addition to the establishment and expansion of these forums, as set out on page 24, we recommend that the Code of Practice should encourage the establishment and expansion of similar forums for children and young people to share their views in discussions and decisions about the support available locally. Such forums already exist in some areas – for example the CETAN Panel in Sunderland. The Code of Practice represents an opportunity to share this work and to encourage its being adopted elsewhere.

#### ***Chapter 4: Working together across education, health and care.***

##### *Integration of services and joint commissioning.*

On page 29, the Code of Practice states that the NHS mandate requires health bodies to “promote integration of services”. However, this is not the same as a requirement to work on joint commissioning – the requirement to promote integration could be fulfilled through other means than those envisaged for EHC Plans. We recommend that this section be expanded to make clear that there is a requirement

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<sup>2</sup> The Reports of the Children’s Commissioner’s Inquiry into School Exclusions are available at: <http://www.childrenscommissioner.gov.uk/info/schoolexclusions>

for health bodies to co-operate on joint commissioning of services. As currently drafted, this section risks leaving Local Authorities with a responsibility to ensure joint commissioning but no power to make this happen.

In a similar vein, the draft Code of Practice should clearly set out the duty of all bodies across education, health and care to co-operate with the Local Authority in the commissioning and delivery of services for children with Special Educational Needs. We understand from conversations with bodies involved in commissioning that this duty to cooperate is not fully understood or complied with by a number of bodies delivering statutory services, particularly those which are new to such delivery. The Code of Practice represents an opportunity to reiterate Government's commitment to ensuring that cooperation between service providers is ensured.

### ***Chapter 5: The Local Offer.***

We consider that the description set out in the draft Code of Practice concerning the types of provision to be covered by the Local Offer is broadly sufficient. However, we would recommend that it be extended to include access to and specific provision of emotional health, wellbeing, psychology and mental health services for children and young people. This will provide important linkage to the whole age mental health strategy and to the aims of early intervention and prevention through Public Health England.

However, our concerns remain regarding the lack of a national minimum standard for the contents of the local offer. Equally, we are concerned that there is no obligation on providers to actually deliver what is in the local offer on the basis of need. While those children and young people with EHC plans will have their provision specified, and have an enforceable right to receive it, this is not the case for those without these plans. We have concerns that, in a time of extreme financial pressure for providers, young people will find it impossible to gain access to provision which is theoretically in the local offer. Equally, due to the same financial pressure, in the absence of a "backstop" national minimum standard, providers may limit the local offer to a "bare bones" service.

On page 53, the draft Code of Practice sets out a duty to consult children and young people on the local offer. In order for this to be compliant with Article 12 of the UNCRC, there should be an accompanying duty for Local Authorities to have due regard to what young people say in response.

### ***Chapter 6: Early Years, schools, colleges and other education and training providers***

#### *Use of school budgets*

We consider that the draft Code of Practice should give greater clarity to expectations on how schools should use their core funding to support children with SEN, but who do not qualify for an EHC plan. Evidence submitted to OCC suggests that there is confusion among some schools regarding these expectations. Evidence was also presented that in some schools, not accommodating the child or meeting her/his needs was the default option unless considerable additional resources were available. The children with SEN but no recourse to an EHC could continue to be ill-served, unless the Code is very clear about schools' duties,

Funding for SEN has been subsumed within the Dedicated Schools Grant (DSG) rather than standing alone in schools' budgets. However, we understand that some

schools have taken this to mean that they no longer receive any funding to support SEN, and that they are therefore unable to offer any support. This message is being given to parents. We strongly recommend that this misapprehension is corrected through this Code of Practice. This will provide clarity for both schools and parents, and will ensure that children receive the support to which they are entitled.

Similarly, the value “Nationally prescribed threshold” beyond which additional funding is available should be specified, again to provide clarity for schools and parents.

#### *Involving parents and children in the planning and review process.*

The current draft of the document states that the views of the child “should” be included. This should be changed to “must” be included, and also that these views must be given due weight in decision making.

### **Chapter 7 – Assessments and Education, Health and Care plans**

#### *Requesting an assessment*

As currently drafted, only young people over the age of 16 can request an assessment on their own behalf. This right should be extended to all children and young people. This would bring it in line with current law regarding appeals against SEN decisions and other areas of education law (for example on admissions).

#### *Content of EHC Plans*

We strongly support the principle that the content of EHC plans should separate the agreement of desired outcomes for the child, and the provision needed to achieve these outcomes. We also agree that reviews of these plans should focus on the continuing relevance of these objectives and whether they have been met, with any changes in provision resulting from this assessment.

#### *School admissions*

On this issue we continue to have the concerns we raised in our Children’s Rights Impact Assessment<sup>3</sup>. The reasons which a school can give as an objection to admitting a pupil are unnecessarily vague, and could be applied to practically any individual. We recommend that greater exemplification be given to demonstrate circumstances where it is and is not reasonable for schools to object to admitting a child. Throughout, we consider that there should be a stated presumption that the school will admit the child unless there is an overwhelming, and proven, reason for the school not to do so.

Linked to this, we have serious concerns regarding the content of the draft Code of Practice on transport costs for young people with EHC plans (page 139). As drafted, this appears to suggest that a Local Authority can overrule parents’ wishes if the school they express a preference for is not the nearest suitable school to their home address. If this is the case, it is contrary to the principles of a family-centred system which run through the Code of Practice, and therefore it should be changed. If our reading of the text as it currently stands is mistaken and our assumption is incorrect, the draft code should be amended to remove the ambiguity which has led us to our interpretation and the Code should be made clearer.

#### *Personal Budgets*

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<sup>3</sup> A Child’s Rights Assessment of Parts 1-3 of the Children and Families Bill.  
[http://www.childrenscommissioner.gov.uk/content/publications/content\\_651](http://www.childrenscommissioner.gov.uk/content/publications/content_651)

We consider that more thought needs to be given to ensure that direct cash payments are spent for the purposes intended and the expenditure can be seen, and proven, to be in the best interests of the child. As the text is currently set out, there is a risk that a minority of parents may spend direct payments for purposes other than those intended, to the detriment of their child. There is currently no safeguard against this happening. Such safeguards need to be introduced.

#### *Reviews of EHC plans.*

OCC recommends that, in addition to the circumstances set out in the draft Code of Practice, a review should be triggered in the case of a permanent exclusion where the school is named on the EHC plan. Rather than being to act unilaterally, the school should be required to trigger a full review of the plan, with a recommendation that the named provision be changed. However the decision to exclude would be taken as part of a review process, rather than solely by the school.

### **Chapter 8 – Children and Young People in Specific Circumstances**

#### *Looked After Children*

It is not at present sufficiently clear how the responsibility for, content or process of writing the new EHC plans will dovetail with the overall care plan for looked after children, which already encompasses health and education planning. This will be particularly important when a child is placed out of their 'home area' (the local authority with statutory responsibility). Guidance should be included for social workers and independent reviewing officers (IROs) responsible for the child to ensure that these processes are closely linked and the overall care plan takes account of the EHC.

We support the plan to tie in review of an EHC with the review of the overall care plan for looked after children. We recommend that ensuring this happens should be the responsibility of the IRO.

Greater clarity is needed concerning the potential role of foster carers in taking responsibility for personal budgets. Such responsibility will need to be managed in line with policies on the overall management of delegated responsibilities. It should be made clear that Local Authorities will need to provide training and support for foster carers on this and that the delegation process needs to take account of the guidance currently being prepared on planning for permanence.

#### *Children in Custody.*

It is unclear exactly which children and young people are covered by the Code of Practice under the heading of "Young Offenders in Custody" (p149). We assume that this also covers those on remand (who have not been convicted of an offence and are therefore not "young offenders") but as drafted this is unclear.

Similarly, the draft Code of Practice refers (page 149) to young people in Young Offenders' Institutions (YOIs), but not to those in other secure settings such as Secure Children's Homes and Secure Training Centres. Clarity should be given as to whether these young people are covered by the Code of Practice and, if not, what the arrangements for them are.

On the issue of health care in custody, the draft Code of Practice refers to the Intercollegiate Standards and says secure establishments are 'expected to consider' them. This is insufficiently robust and should be amended to state that establishments must abide by these standards.

