

IPSEA

Independent Panel for Special Education Advice

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Mr John Harris
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Dear Mr Harris

Hertfordshire New Mainstream SEN Funding Framework

We have received an unprecedented number of complaints and concerns from parents and advice organisations about your New Mainstream SEN Funding Framework (which I will call “the SEN Funding Scheme”). I am therefore writing to you to request changes to this scheme which, for the reasons given below, we regard as both flawed and unlawful.

I am glad to hear from Steven Thornley that you are giving this matter renewed attention and will be inviting us to participate in a meeting to reconsider this Scheme. By way of overall comment, we understand your desire to respond to government guidance and to innovate to make inclusion happen on the ground though delegating both funding and responsibility to schools or “clusters” of schools. However you appear to have gone beyond government guidance and stepped outside the law in the formulation of your Scheme, which has effectively removed the legally prescribed safeguard of statutory assessment and statementing from your mainstream schools. We suggest that this is because of a fundamental misconception that delegated SEN schemes cannot co-exist with statutory assessment/statementing. We have scrutinised many schemes of this sort and are willing to help.

The remainder of this letter sets out our thinking on the detail of your policy and practice and we look forward to discussing it with you further.

IPSEA: defending children’s rights to special educational provision

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Issue 1: Failure to discharge your legal duties to identify, assess and statement children with SEN

Your policy on assessment and statementing is clearly stated as follows: “The new resourcing arrangements will not require statements in order to access support in mainstream.” (Page 8 in *New Mainstream SEN Funding Framework Questions and Answers*). You have effectively set up an SEN system which replaces assessment and statementing for children who would normally require it and are entitled to it. We suggest this works as follows:

- Statutory Assessment is replaced by “case discussions” at Cluster Meetings (Page 3ff *Guidance for Mainstream SEN Clusters*)
- Statementing replaced by District Panel decisions. Crucially this removes the critical parental right to express a preference for a School placement under Schedule 27 Education Act 1996 (see page 14 in *New Mainstream SEN Funding Framework Questions and Answers*). This is particularly detrimental to parents seeking a Special School placement.
- Annual reviews replaced by the still unclear “Review Arrangements” at Page 5 of *Guidance for Mainstream SEN Clusters*.

There will be no participation of parents or parental rights of appeal in these processes. Specifically the right to appeal to SENDIST and the right to Annual Review has been completely removed from parents whose children should be given a statement.

As regards the statements that will remain in your system, you will be aware of your Authority’s legal duty under s324(5)(a)(i) Education Act 1996 to ‘*arrange that the special education provision specified in the Statement is made*’. One of the most contentious aspects of the SEN Funding Scheme are your arrangements for delivering specified provision set out in statements set out in pages 8-9 of in *New Mainstream SEN Funding Framework Questions and Answers*). You state there that:

- As regards existing statements, funding of provision of more than 15 LSA hours (primary) or 20 hours (secondary) will have to be sought by schools from the cash limited “exceptional funding” pool.
- “Where there are new statements, the funding will either be within the school’s devolved predictable needs budget or accessed through the cluster/district decision-making process...There will not be a separate resourcing system for statements”.

There is no mention of the Authority’s residual duty to arrange for provision under statements if these routine funding mechanisms fail.

In all this the SEN Funding Scheme does not follow the Code of Practice (and therefore constitutes a breach of duty under s 313(2) to ‘have regard to’ the Code) or Government Guidance, which contemplates that any delegated scheme working in tandem rather than instead of the assessment/ statementing process. Please consider the following extracts from the Code:

“However resources are provided, schools and LEAs have specific duties in relation to children with special educational needs which funding for SEN

should support ... LEAs have a duty under Section 324 of the Education Act 1996 to arrange the special educational provision in a child's statement. LEAs may provide the facility in their funding arrangements to intervene where a pupil is not receiving the provision in their statement and make the arrangement themselves, charging the costs to the schools budget."
(paragraph 8:6)

"In the light of their statutory duties, LEAs and schools should work together to establish sound arrangements for monitoring and accountability to ensure that resources are used to raise the achievement of pupils with SEN. These arrangements ... should focus on the effectiveness of provision made for pupils with SEN and look to make sure that children make progress and achieve well, provision specified in statements is made, and the input of LEA and other support services is effective." (paragraph 8:7, our emphasis)

Page 44 of DfES Guidance *The Management of SEN Expenditure 2004* states that: "Where statements are maintained, LAs, in partnership with schools, must ensure that required provision can be delivered. Most resources may be distributed on a whole school basis but there must be arrangements in place to ensure that provision is made even where the relevant budget is delegated. These should be set out clearly for schools and parents."

Furthermore this policy and practice is unlawful in that you are not performing adequately your duty to undertake identification, assessment, statementing and provision through statements where necessary under the Education Act 1996 for the following reasons:

1. As matter of general policy, expressly determining not to carry out these statutory procedures by stating: "The new resourcing arrangements will not require statements in order to access support in mainstream".
2. You are systematically declining to perform your duty under Section 321 Education Act 1996 to identify those actual children who may require statutory assessment. Instead you have told schools that the standard number of children who might normally be assessed for extraordinary provision will be 50-70 per district (page 5 in *New Mainstream SEN Funding Framework Questions and Answers*).
3. Schools and parents are being led to believe that they cannot apply for statutory assessment. One parent has told us "that in the past year, many people have been deterred from requesting a statutory assessment and have been told that there will be "no more statements from April";
4. You are failing to provide adequate specificity in part 3 of your new statements as a matter of policy as follows:
 - a. We understand that legal advice has been given to SEN Officers in your Authority that it is no longer necessary to specify provision within Part 3 of statements.
 - b. We have another report of a school being told by your Authority that it was no longer possible to specify physiotherapy or occupational therapy in Hertfordshire statements.

I refer to the established law set out in the attached letter from Ian Coates of DfES dated 15.11.05 in which Mr Coates states that “In our view, any local authority policy which prohibits, deters or even discourages its officers from specifying educational provision clearly and in detail and/or from quantifying educational provision for particular groups of children is likely to result in breaches of:-

- section 324(2) and (3) of the Education Act 1996...;
- regulation 16(b) of the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001...;
- section 313(2) of the Act...”.

You will also be aware of the clear statement in paragraph 8:37 of the Code of Practice that “LEAs must not, in any circumstances, have blanket policies not to quantify provision”.

5. Refusing to acknowledge your duties to arrange provision under statements under section 324 (5) (a) Education Act 1996 by stating that “no budget will be retained by the authority to provide further resources for SEN, except for the exceptional needs funding budget” (page 4 of in *New Mainstream SEN Funding Framework Questions and Answers*. You also warn schools that they will pay for any overspend as follows: “If the exceptional budget did overspend the authority would have no option other than to topslice the amount devolved to schools through the predictable needs formula...” (page 6 in *New Mainstream SEN Funding Framework Questions and Answers*). We already have one report of a child with 15 hours support on his statement having his hours cut to 5 by his school, presumably to juggle their budget having being told that your Authority will provide them with no extra money.

All that can result from this crude and unlawful approach is a steady flow of Tribunal appeals to ensure specificity in statements, and judicial review applications regarding your derogation of duty to arrange, wasting huge amounts of time and money in your Authority (the very resources you are seeking to save to benefit children with SEN).

An example of how this whole policy is backfiring is the case of X (whose parents have given permission for us to describe his difficulties). X’s parents asked for assessment in December 2006 and eventually received a statement in August with no adequate specification or quantification of provision in Part 3. They are now appealing to the Tribunal. Separately X’s school failed to act to get X funding under your new exceptional funding system in the Summer term because you had not obliged them to take sufficient training in that system. Consequently the earliest that a decision on X’s “exceptional” funding could be made would be November. This assumes that his case is put forward and gets through the two meetings (Cluster and Decision Panel) required to get this funding. If not, there is no parental right of appeal. Even if the money appears, there is no guarantee that it will be deployed in a timely and accurate fashion without the safeguard of a properly specified statement. If a properly drafted statement had been issued X would already have been receiving additional provision in June.

Please therefore provide us with:

1. Clarification as to how you are discharging your statutory duties regarding assessment and statementing, particularly the duty to identify and assess children who probably require your Authority's determination of the SEP under 321-324 Education Act 1996.
2. Please confirm that your SEN officers are not implementing and will not be implementing a policy not to specify provision in Part 3 of statements.
3. Confirmation that you will replace the contentious wording set out above in your relevant policy and guidance documents with text which confirms that: the Authority
 - a. will continue to identify individual children that require assessment;
 - b. carry out its statutory duties to assess and statement when necessary;
 - c. honour its obligations to arrange the provision in statements.

Issue 2: Unlawful failure to provide sufficient information regarding statutory assessment and statementing under the Special Educational Needs (Provision of Information by Local Educational Authorities) (England) Regulations 2001

You will be aware that you have a duty under The Special Educational Needs (Provision of Information by Local Education Authorities) (England) Regulations 2001 ("the Information Regulations") Regulation 2, paragraph 3 to publish:

"3. The general arrangements made by the local education authority, including any plans, objectives and timescales, for...
(c) organising the assessment of children's educational needs pursuant to section 323 of the Education Act 1996 in the local education authority's area including any local protocols for so doing;
(d) organising the making and maintaining of statements in their area including any local protocols for so doing;"

From a parental point of view, this information is an important entitlement. However both the location and the content of relevant documents on your website obstruct parental access to this information. As regards location, it is difficult to find information about SEN at all, it being located under "Curriculum" on the front page. Once one gets to the main SEN page there is no visible reference to assessments. The obvious place to look is under "SEN/Inclusion Strategy" which makes no mention of assessment. In fact your documents relating to assessment are under "Publications and guidance".

Once found, the information for parents on statutory assessment is commendably detailed and largely accurate. However it has no cross reference to the guidance on the delegated funding scheme. Indeed it refers to "Earmarked Pupil Funding" which no longer exists. If a parents looks separately at the documentation on the SEN Funding Scheme delegated funding scheme, it fails to explain in any detail how it interrelates with statutory assessment and statements except to say that statements are no longer necessary under the SEN Funding Scheme.

From a parent's perspective, this information taken together (if a parent can find it at all) is inadequate because it is contradictory and confusing. It appears to us that the reason for this is that you are deliberately attempting to restrict access to assessment and statementing in your mainstream schools. We therefore request the necessary changes to your published information to explain the inter-relationship between the right to request an assessment (1) and the operation of the SEN Funding Scheme (2) in terms which make it clear that the latter does not exclude the operation of the former in your mainstream schools.

Other concerns

You appear to have given considerable thought to the issue of proxy indicators (page 3ff in *New Mainstream SEN Funding Framework Questions and Answers*). However monitoring and moderating the effects of using this method for the distribution of funding appears to be less robust in your scheme, largely because (as is common in many local authorities) adequate accounting methods for SEN expenditure are not yet in place at schools level: as you candidly acknowledge "Currently there is limited awareness in Hertfordshire about the amount of SEN funding in school budgets" (page 10 in *New Mainstream SEN Funding Framework Questions and Answers*).

We suggest you concentrate in particular on monitoring the effectiveness of your distribution system and the expenditure of SEN funding by schools once it is received. We note that local schools are already experiencing severe shortfalls in funding, and parents are extremely concerned about this issue. It has to be resolved if any delegated scheme is to achieve credibility with schools and parents.

Conclusion

We are writing to you because of the unusual amount of profound concern that has been expressed to us by your citizens. We suggest that the solution is to recognise your legal obligation to operate the statutory assessment/statementing regime alongside your delegated scheme in your mainstream schools. Statutory assessment/statementing is an important safeguard and entitlement for your most needy children. It is, however, only a safeguard and we agree with you that the need for statements will reduce if and when your Scheme succeeds. In the interim the two processes for assisting children need to remain in operation side by side.

I look forward to meeting with you. It would be useful to have a response to the points raised in this letter before then. Could you also supply me with a copy of the parent leaflet or booklet that I understand you are preparing (see page 11 in *New Mainstream SEN Funding Framework Questions and Answers*).

Yours sincerely,

Roger Inman
Chief Executive.

Cc Justin Donovan, Debbie Horton and Steve Thornley