The Routledge Companion to Severe, Profound and Multiple Learning Difficulties

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Changing Special Educational Needs and Disability Legislation and Policy

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In this chapter, the following questions will be addressed:

• What was the rationale for introducing new special educational needs and disability legislation in England in September 2014?
• What is the definition of special educational needs?
• What are the implications for school placement and inclusion?
• What are the implications for policy of approaches to inclusive teaching (pedagogy)?
• What are the implications for the school curriculum?

Introduction

This chapter offers an overview of the special educational needs and disability (SEND) legislation in England introduced in September 2014. I reflect upon problematic issues related to the definition of special educational needs and learning difficulty, and implications both for school placements and for inclusive teaching and curricula. Different legislative frameworks are used in the other countries of the United Kingdom but it is hoped that the relevance of these reforms to a wider UK and international audience may be recognised.

Overview of special educational needs and disability legislation and policy – 2014

In Spring 2014 the Children and Families Act 2014 (United Kingdom Parliament 2014) was given Royal Assent. Part of this new Act – that came into force on 1 September 2014 – is concerned solely with provision in England for learners with SEND. The Act is supported with detailed regulations, and perhaps more importantly, a new Special Educational Needs and Disability Code of Practice: 0 to 25 years (Department for Education and Department of Health 2014). The
Code also came into force on 1 September 2014. It sets out statutory guidance for schools, early years settings and post-16 education and training providers and other service providers in England. Advice in the Code will shape developments in SEND provision and practice for at least a decade, and perhaps through further iterations, for many more years.

Although signalled as a radical overhaul of a special education needs system no longer fit for purpose (Department for Education 2011) the new framework is not perhaps as radical as claimed. This was acknowledged, albeit inadvertently, by the Department for Education in a PowerPoint presentation (Department for Education 2014) sent to school leaders to help them to prepare to ‘get ready’ to work with new legislation: ‘The SEND reforms build on the best practice over the past 13 years since the last Code of Practice was written.’ This reminds us that new SEND legislation and guidance is evolutionary rather than revolutionary. It also suggests that some concepts and policies associated with previous legislation have been retained.

Arguably, the most important change in legislation, and one that should be most beneficial to learners with SEND and their families, is the requirement that ‘joined up services’ are in place from birth to 25 years of age. Other changes are designed to address concerns raised time and again over the past 15 years (Audit Commission 2002; House of Commons Education and Skills Committee 2006; Lamb 2009; Ofsted 2010). These concerns included:

- parents and professionals experiencing frustration about the complexity of the SEND support system with too much emphasis on inputs rather than outcomes for learners;
- a lack of real engagement with parents and learners in decision-making that affects their lives;
- longstanding concerns about the system of statutory assessment, including the length of time involved and the lack of a connection between assessment procedures and the focus of educational support;
- too many instances of young people, particularly those with the most complex needs, ‘hurting into a void’ when they leave school and require support from adult services (Morris 1999; Department for Education 2011);
- systemic weaknesses in the quality of provision and support available to learners and their families;
- the over-identification of learning difficulties arising from the conflation of special educational needs with low attainment arising from teaching that did not set high expectations.

To improve matters radically, the government published a paper, Support and Aspiration: a new approach to special educational needs and disability (Department for Education 2011). This set out draft proposals for improving the SEND system. Following public consultation and significant redrafting, new legislation and new statutory guidance finally emerged in 2014, key features of which are:

- support across education, health and social care from birth to 25;
- requirements to ensure the participation of parents and learners in decision-making;
- early identification and intervention procedures and processes – to make sure support is in place as soon as it is required and can have optimal impact;
- the introduction of Education, Health and Care (EHC) plans – replacing Statements of special educational needs – with an emphasis on person-centred processes and outcomes;
- new duties to make sure that collaboration between education, health and social care is guaranteed and experienced as integrated support by parents and learners;
offering more choice and control over the support that learners and their families may want through the introduction of personal budgets;
• high quality provision to meet the needs of learners;
• a focus on inclusive practice and removing barriers to learning;
• successful preparation for adulthood, including independent living, employment and community participation.

Taken at face value, the features of the revised special educational needs system are positive and seem to be particularly well targeted with regard to improving provision and longer time opportunities and outcomes for learners with SEND. However, I want now to discuss four issues that I think are inadequately addressed in SEND legislation, each of which will be considered in relation to learners with SLD/PMLD. In doing this, I will refer directly to guidance in the *Special Educational Needs and Disability Code of Practice: 0 to 25 years* (Department for Education and Department of Health 2014).

### Defining special educational needs and disability

The 2014 Code of Practice (pp 15–16, paras xiii–xiv) uses a long-standing definition of special educational needs (SEN) – not a new one – but one that is confusing, and when considered alongside the Code’s advice on assessment and intervention, inappropriately negative. The salient wording is:

A child or young person has SEN if they have a learning difficulty which calls for special educational provision to be made for him or her.

A child of compulsory school age or a young person has a learning difficulty or disability if he or she:

• has a significantly greater difficulty in learning than the majority of others of the same age, or
• has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream-post 16 institutions.'

For parents, and some learners, confusion arises with regard to making a distinction between a greater difficulty in learning or a disability that prevents access to facilities. This confusion is exacerbated in the Code with its reference to the new duty placed on schools to support learners with medical conditions who also have special educational needs (p. 94, para. 6.11). A child or young person may therefore experience difficulties in learning that give rise to special educational needs. The same learner may also have a medical condition and be disabled.

To make matters worse, the Code of Practice notes (p. 16, para. xvi) that ‘Post-16 institutions often use the term learning difficulties and disabilities (LDD). The term SEN is used in this Code across the 0–25 age range but includes LDD.’

Evidently, the authors of the Code have tried to integrate definitions and draw together different legislation (e.g. the Equality Act 2010 and the Children and Families Act Part 3, 2014). The result is a terminological compromise with a resultant experience of perplexity for parents, learners, and the many professionals providing support who may not be familiar with the nuances of definitions. The Code’s compromise here is unlikely to address the concern referred to earlier in this chapter about the complexity of the ‘support system’ that families have to navigate.
The Code also provides less formal definitional guidance on ‘broad areas of need’, revising advice in the previous Code of Practice (Department for Education and Skills 2001b). Children and young people with learning difficulties are referred to under the ‘cognition and learning’ area of need:

Learning difficulties cover a wide range of needs, including moderate learning difficulties (MLD), severe learning difficulties (SLD), where children are likely to need support in all areas of the curriculum and associated difficulties with mobility and communication, through to profound and multiple learning difficulties (PMLD), where children are likely to have severe and complex learning difficulties as well as a physical disability or sensory impairment.

(pp. 97–98, para. 6.30)

This three-level description is familiar, but it is worth noting that children and young people with so-called moderate learning difficulties (MLD) were only included here after much debate. Earlier drafts of the 2014 Code of Practice preferred not to refer to MLD on the grounds that the needs of these learners were too easily conflated with low attainment arising from ineffective teaching. I welcome the acknowledgement that many children and young people do experience difficulties in learning that warrant the provision of additional support but am concerned that the Code (p. 97, para. 6.30) emphasises their slower place of learning when compared to that of their peers. Here, the Code slides into the discourse of deficit that is deeply problematic as we shall see in the discussion of teaching below. Before considering this, I want to examine the issue of inclusion as set out in the new Code.

Inclusive education provision

The Code of Practice clearly indicates that inclusive educational provision is back on the policy agenda (Robertson 2014a). It includes a section in the chapter on ‘principles’ titled *A focus on inclusive practice and removing barriers to learning* (pp. 25–28, paras 1.26–1.38). This reflects a decision to integrate previous statutory guidance on inclusive schooling (Department for Education and Skills 2001a) with other guidance on SEND. Positively, this section of the Code also refers to the UK government’s commitments under articles 7 and 24 of the United Nations Convention on the Rights of Persons with Disabilities (United Nations 2006) actively to develop inclusive education for children and young people and progressively removing the barriers to learning and participation in mainstream education.

However, for learners with SLD/PMLD, the imperative of inclusion is trumped, in my opinion, by the government’s view that parents of learners who have EHC plans have the right to express a preference for a mainstream or special school placement. This is in accord with its view – and that of the previous government (Department for Education and Skills 2004) – that special schools are an integral part of an inclusive education system and that learners can be ‘educated effectively in a range of mainstream or special settings’ (2014 Code of Practice, p. 28, para. 1.38). It is also consonant with the view of many special school based professionals (Department for Education and Skills 2003), the equivocal view of the national inspectorate (Ofsted 2006) and Warnock’s well-publicised revisionist view of integration and inclusion (Warnock 2005; Warnock and Norwich with Terzi 2010).

My concern here is that despite using the rhetoric of removing barriers to learning and participation, the current government has no real commitment to challenging the status quo of provision and educational placement for the majority of children and young people with
significant learning difficulties. This is reflected in the active encouragement being given to parents, professionals and organisations to open new special Academy and Free schools – premised on the idea of improvement through innovation and diversity – rather than through advice designed to enhance the quality of inclusive provision and practice in mainstream schools.

There is also newly emerging evidence that the number of learners attending special schools in England is beginning to increase (by 8,475 between 2007 and 2013) (Times Education Supplement 2014). This increase is small but could be significant because it reverses a slow long-term trend towards reduced special school placements, and is not simply explained by changing demographic patterns (e.g. increased survival rate of premature babies). More plausible explanations are likely to include one or more of the following:

- the perceived political ambivalence of the current government – in 2011 it clearly expressed the view that it intended to ‘remove the bias towards’ inclusion (Department for Education 2011);
- lobbying by some parents and organisations to increase the availability of specialist provision;
- increasing special school places in some local authorities due to demand from parents and mainstream schools;
- some mainstream schools seeking special school placements for learners because of perceived or real difficulties in being able to make appropriate curriculum provision (particularly in secondary schools);
- positive marketing of specialist provision by special school sector professionals.

Notwithstanding positive developments in special school-led inclusive practice initiatives (e.g. through collaborative activities with mainstream schools and a wide range of community-based activities) these are far from systemic in the way that Norwich (2008) argued for, and they are potentially fragile if, for example, a change of headteacher or a new Academy leadership team decides to downplay the value of inclusive provision.

I had hoped that new SEND legislation and guidance would be radical with regard to ensuring that more and more learners with a range of special educational needs, including learning difficulties, would be placed in mainstream schools as of right. The revised SEND framework does not, I think, open any new doors in this regard. The 2014 Code of Practice is at best cautious in its advice on educational placement and, although it refers to the concept of equality and the importance of countering discriminatory practice in education by adhering to provisions in the Equality Act 2010, it backs away from addressing arguments about the intrinsically discriminatory nature of specialist provision. In failing to do this, the Code only encourages mainstream schools and settings to develop inclusive provision without providing an imperative to do so. It also struggles to address the perennial problem of regular schooling that has at its core the need to marginalise and exclude some learners because of demands to focus on academic standards and the standardisation of provision to meet these (Cigman 2007; Slee 2011).

### Inclusive teaching and learning

Having argued that the concept of inclusive education is poorly served by the 2014 Code of Practice, and that this has a particularly negative impact on children and young people with learning difficulties, I now want to consider the guidance the Code provides on teaching this group of learners.
The key vehicle for identifying, assessing and teaching learners with SEND is set out in Chapter six of the Code. It is referred to as the graduated approach and involves use of a four-part assess-plan-do-review cycle (pp. 100–102, paras. 6.44–6.56). The approach is a common sense one and can be applied through successive cycles to support different levels of teaching intervention according to the needs of learners. So far, so good, and the approach clearly lends itself to adaptation for learners with MLD, SLD and PMLD who may require teaching interventions of greater intensity by teaching staff with specialist knowledge (see chapters by Fletcher-Campbell, Porter, and Ware respectively in Lewis and Norwich, 2005 for detailed discussion of specialist teaching).

The difficulty in applying the graduated approach arises from the way that the new Code conceptualises the needs of learners who are making less than expected progress (Robertson 2014b). It refers to this as progress which:

- is significantly slower than that of the learner’s peers starting from the same baseline;
- fails to match or better the learner’s previous rate of progress;
- fails to close the gap between the learner and peers;
- widens the attainment gap. (p. 95, para. 6.17)

Without being stated explicitly, learners’ difficulties are constructed in deficit terms and the ‘real message’ is that schools and teachers could do more to ensure progress is in line with age-related expectations of performance in core subject areas.

Reference is also made to ‘progress in areas other than attainment – for instance where a pupil needs to make additional progress with wider development or social needs in order to make a successful transition into adult life’ (p. 95, para. 6.18). This is welcome advice congruent with research recommendations (Douglas et al. 2012), but it does not have the same force as the persistent normative attainment narrative in the Code, government rhetoric more generally, and national inspectorate exhortations (Ofsted 2010, 2014).

Guidance in the Code on improving outcomes for learners with EHC plans is more neutral in tone, but is obviously linked to a narrowly conceived view of learning and progress. It refers, for example, to specific, measurable, achievable, realistic and time-bound (SMART) shorter-term outcomes or objectives (pp. 162–169, paras. 9.64–9.69), and in so doing, reflects a rather dated behavioural objectives approach to teaching and learning. What is missing here is a recognition that teaching approaches today can be richer, more responsive to the needs of learners, and be successful without being limited by SMART targets that can constrain learning. Examples of richer and more meaningful pedagogical approaches can be found in the social constructivist tradition (Watson 2000), the inclusive education tradition (Corbett 2001; Hart 1996; Hart et al. 2004; Loreman, Deppeler and Harvey 2010; Swann et al. 2012), and through the application of neurologically informed evidence (Claxton 1997).

Evidence from all these approaches highlights the limited value of prescribing outcomes and the benefits of co-constructing learning opportunities that can lead to the achievement of unintended but more powerful outcomes. Intriguingly, these approaches resonate with the following advice in the Code:

> When agreeing outcomes, it is important to consider what is important to the child or young person – what they themselves want to be able to achieve – and what is important for them as judged by others with the child’s or young person’s best interests at heart.

(p. 163, para. 9.67)
The danger of course is that best interests are determined by those ‘who know best’ and in relation to demands of an assessment framework that may not be considered important to the learner, parents or possibly a teacher.

The Code’s guidance on identification, assessment and intervention – or teaching – children and young people with learning difficulties is narrowly conceived and driven by particular assessment requirements. This is also a matter of concern with regard to teacher education, and the Code has little to say about this. We know, for example, that there is an outstanding need for teachers working with learners with SEND to enhance their own knowledge, skills and understanding (MacBeath et al. 2006; Hartley 2010; Ellis, Tod and Graham-Matheson 2011; Department for Education 2012).

Curriculum provision

The 2014 Code of Practice (p. 94, para. 6.12) briefly notes that ‘all pupils should have access to a broad and balanced curriculum’. It then refers to the National Curriculum and the Inclusion Statement (Department for Education 2013), included in the National Curriculum framework introduced in England in September 2014. The statement has two dimensions. It places a strong emphasis on setting suitable challenges for learners and stresses the importance of responding to learners’ needs and overcoming potential barriers to access and participation for individuals or groups of learners. With regard to suitable challenges for learners it says that teachers should:

- set high expectations for every learner;
- plan stretching work for learners whose attainment is significantly above the expected standard;
- recognise that they have an even greater obligation to plan lessons for learners who have low levels of prior attainment or come from disadvantaged backgrounds;
- use appropriate assessment to set targets that are deliberately ambitious.

This guidance is at best perfunctory, does little to acknowledge development work undertaken over many years to enhance access to the National Curriculum for children (aged 5 to 16) with learning difficulties (see Chapter 5 in this book), and yet again we see learners viewed from a deficit perspective.

With regard to overcoming barriers to access and participation, the Inclusion Statement reminds teachers of their responsibilities under the Equality Act 2010, and the importance of making reasonable adjustments in curriculum provision for learners with a wide range of needs (Robertson 2014c). The advice here is sound, but weakened because of the lack of more detailed guidance on National Curriculum access and participation, and the complete lack of guidance on what a broad and balanced curriculum might look like for children with significant learning difficulties.

Guidance in the Code on the curriculum for children in early years settings and young people in further education is minimal. This brevity might be regarded as positive if it affords teachers freedom to innovate, but there is a danger that, without more detailed advice, this might too easily be interpreted as ‘just implement the graduated approach’ in ways that I have cautioned against above. In the post-16 sector there is an additional concern that, following a national review of vocational education (Wolf 2011), a focus on core course provision in future will narrow opportunities for the learning opportunities for young people with learning difficulties that they want to help them fulfil their longer-term aspirations.
Summary

In this chapter I have provided a brief overview of SEND legislation implemented in England in 2014. I have argued that claims about its radical nature have been overstated and that, in many respects, it represents a cautious approach that focuses on making gradual improvements and refinements to the SEND system that is perhaps more fit for purpose than we might think (Lewis, Parsons and Robertson 2007).

It would be unfair to assess policy impact at the current time, given that it can take up to ten years to ascertain deeper level effects of key changes. However, I have presented a critical discussion of policy as set out in the 2014 Code of Practice. The weaknesses, as I view them, represent at best a missed opportunity in relation to the development of better provision for all children and young people with special educational needs. Furthermore, this missed opportunity will have a disproportionately negative impact on learners with SLD/PMLD. However, I do not want to conclude this chapter on a negative note. I take the view that teachers, parents and hopefully learners will find ways to navigate the new SEND system, making the most of its good features, and circumventing its weaknesses with imagination and resilience. Yet again though, they will do this in spite of rather than because of legislation or policy guidance.

Questions for readers

- Does the Code of Practice provide clear and accurate enough guidance for the people in your setting who have to implement it?
- What guidance and training has your local authority provided about the creation and delivery of EHC plans?
- Has your local authority published the ‘local offer’ about services available for learners with SEND?
- Does your local authority and/or your own setting have any statements about inclusive teaching and learning?
- If you do not live and work in England, what comparable frameworks and systems exist in your country?

References


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