

IPSEA is a national charity which provides advice, support and information to the families of children and young people with special educational needs (“SEN”) about their legal entitlements to support. We are responding to this consultation after a number of parents in Hackney raised concerns with us about these proposals.

Having reviewed the consultation summary document (the “summary”), we have significant concerns that the proposals as stated would not comply with the requirements set out in the Children and Families Act (“CAFA”) 2014.

- *Policy cannot override law*

The summary and the accompanying FAQs document state that the Exceptional Funding Model will operate in the same manner as a statutory Education, Health and Care (EHC) Plan. The intention appears to be that this funding model will largely replace EHC plans within Hackney. Parents and young people have a legal entitlement to request an EHC needs assessment and, where necessary, to have an EHC plan maintained for the child or young person. A local authority (“LA”) policy cannot override this entitlement.

The summary continues: “A school, working with parents, can ask the local authority to consider making an EHC needs assessment if: 1. It can show that a pupil has SEN needs greater than Element 2 (£6,093) worth of special education provision; and 2. that the pupil has SEND needs greater than the level of additional funding model amounts would provide. This assessment may result in an Education, Health and Care Plan.”

The test for conducting an EHC needs assessment is set out in s. 36 CAFA 2014. The only legal test is whether (1) the pupil has or may have SEN and (2) they may require support through an EHC plan. The test described in the summary sets a higher bar for accessing an EHC needs assessment than is set out in law; it applies a stricter version of the test of whether to issue an EHC plan at the stage of considering whether to conduct an assessment. This is not lawful.

It should also be noted that, even at the stage of considering whether to issue an EHC plan, the relevant test is not whether the needs are “greater than the level of additional funding model amounts would provide” – it is whether the child’s needs can in fact be met through the resources available to the school. If the LA considers that a child’s needs could theoretically be met by the school but this is not in fact happening, that in itself could be a reason for the LA to conduct an EHC needs assessment and issue an EHC plan (MC v Somerset County Council (SEN) [2015] UKUT 0461 (AAC)).

The summary goes on to state that, following an EHC needs assessment, “where the local authority concludes that the child or young person’s needs can be met within Additional Funding levels the local authority may decide to provide an Additional Funding allocation through a SEND Support Plan”. This again applies a different test than required by law. Under s. 37(1) CAFA 2014, an LA must issue an EHC plan if, following an EHC needs assessment, it is necessary for provision to be made through an EHC plan. While the suggestion may be that the Additional Funding allocation would mean that an EHC plan was not necessary, it is questionable whether families would receive the same benefit. Funding through a “SEND Support Plan” would not carry with it the legal enforceability of support provided through an EHC plan, and nor would the parents or young person have the protection of a right of appeal against changes to that support in the future or a decision to cease the support altogether. If the LA were to decide, after an EHC needs assessment, to issue a “SEND Support Plan” rather than an EHC plan, it would need to be

made clear to the parent or young person that the LA was refusing to issue an EHC plan, and that they have the right to appeal that decision.

The summary states that, “If agreed, the Additional Funding and Exceptional Funding arrangements would be introduced for all pupils for whom a request for a statutory assessment is received from 1st April 2018 at the levels described below.” Again, this does not comply with the law. If a parent, young person or school makes a request for a statutory assessment under s. 36 CAFA 2014, the LA must decide whether or not they will conduct such an assessment. If they decide to instead provide Additional Funding, such decision would need to be accompanied by a notice that the LA is refusing to conduct an assessment with details of the parent or young person’s right of appeal.

Finally, the FAQs document states that where a child needs more than £15,000 “it is assumed that the child’s needs would be best met in a special school, which operate different funding models”. This statement does not reflect the fact that the starting point for a choice of school is that of the parent or the young person under s. 38(2)(b) CAFA 2014, and the right to mainstream under s. 33 CAFA 2014. A child cannot be excluded from mainstream school simply because of the financial cost of their needs.

- *Inaccuracies in description of law*

We are also concerned by inaccuracies in the description of the law within the summary.

The Additional Funding Model is purportedly to ‘plug the hole’ in circumstances where pupils’ needs are not being met by the notional budget funding (£6,093) and yet they do not meet the criteria for an EHC plan.

We refer again to the tests set out above. If a child has needs which cannot be met out of the school’s existing resources, it is therefore necessary for an EHC plan to be maintained for that child. It is not accurate to say that children whose needs exceed the notional budget funding would not meet the criteria for an EHC plan.

- *Comments on EHC needs assessments*

The summary states, “With a potential turn-around time of just 6 weeks, this support can be provided much quicker than through the standard EHC assessment process of 20 weeks”. The FAQs document continues on this theme, describing the EHC needs assessment process as “red tape”, and stating that the proposals provide “a quicker way of accessing funding targeted to meet specific needs of your child to help them achieve their outcomes. This early help approach means school will not have to wait 20 weeks for an assessment and decision to provide an Education, Health and Care Plan (EHC Plan) and funding.”

This indicates a fundamental misunderstanding of the purpose of an EHC needs assessment. Parliament legislated for a certain assessment process to be followed so that, where there are concerns that a pupil with SEN is in need of additional support, a detailed analysis of that pupil’s needs is conducted. This enables professionals and schools to obtain a clearer picture of the challenges faced by the pupil and the support required.

Even where an EHC needs assessment does not result in an EHC plan (and given the “provisional and predictive” nature of an EHC needs assessment, as described in *Cambridgeshire CC v FL-J* [2016] UKUT 225 (AAC), this should not be entirely

uncommon), it is still a worthwhile exercise to better understand the support that child or young person needs. To describe it as 'red tape' disregards the importance of obtaining a full picture of the child's needs and implementing evidence-based support to meet those needs, as emphasised throughout the Code of Practice.

Furthermore, the implication that the LA is currently unable to implement an "early help approach" because of the EHC needs assessment process is disingenuous. The Code of Practice positively encourages early intervention alongside the EHC plan system set out in the CAFA 2014.

- *Concerns for children and young people with existing EHC plans*

The summary contains some worrying statements about the impact these proposals would have on children or young people with existing EHC plans. Most strikingly, the table on p. 5 indicates that, at all levels, funding would be reduced. For example, what Hackney currently describes as Levels 1, 2 and 3 cover additional funding ranging from £4,985 to £6,842. The proposal is that this is replaced by the Additional Funding Model, which will provide up to £4,000. No explanation is given as to how those children currently on Levels 1, 2 and 3 will continue to have their needs met despite losing up to £2,842 in funding.

Hackney's decision to arrange its funding in 'Levels', as it is currently done, is not mandated by law. The legal requirement on LAs is to prepare EHC plans which set out all of a child or young person's SEN, and the provision required to meet each of those SEN. Regardless of which 'level' or 'funding model' Hackney considers a pupil falls under, they are required to ensure all of the provision set out in the EHC plan is delivered.

Secondly, the summary appears to indicate that Hackney intends to cease to maintain EHC plans for reasons outside those set out in the CAFA 2014. The summary states after the implementation of the proposed funding models, annual reviews of EHC plans could result in the child or young person 'transitioning' to Additional Funding or Exceptional Funding through an SEND Support Plan instead. The only lawful reasons for a LA to cease an EHC plan is if it is no longer responsible for that child or young person, or the EHC plan is no longer necessary (s. 45 CAFA 2014). If a child or young person has needs above that which can be met by the notional SEND budget, then the continued provision of that support through an EHC plan is likely to be necessary. As described above, a SEND Support Plan would not carry with it the same legal rights and guarantees as an EHC plan, and so any challenge to the SEND Tribunal of the LA's decision to cease an EHC plan in this scenario would be likely to be determined in favour of the parent or young person.

- *Conclusion*

If the funding model were to be implemented in the form set out in the summary, there is a high risk that it would amount to an unlawful policy. This could leave Hackney open to legal challenge, and may also result in a higher number of appeals to the SEND Tribunal.

We strongly recommend that these proposals are re-thought, with input from the LA's legal department, and that the current plan is not put into practice in the form proposed.