

Update: special educational needs and disability

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Introduction

This paper updates our previous briefing - *A new approach to special educational needs and disability: what this means for NHS commissioners for children and young people* - which was produced following the Government's Green Paper, [Support and aspiration: a new approach to special educational needs and disability](#), detailing the proposed wide reforms to the law in relation to children and young people with special educational needs (SEN) and disability.

Since the Green Paper was published, 20 pathfinders covering 31 local authorities and their PCT partners were appointed to trial the main proposals. Their findings will be key to shaping legislative change. The pathfinders are being independently evaluated and two quarterly reports for March and June 2012 have now been produced. A further interim report will be published by October 2012, with a final evaluation report expected in 2013.

The Government has now published [Progress and next steps](#) which responds to the Green Paper, sets out the progress made and the Government's next steps in taking forward the plans.

As before, this paper will focus on the progress of proposals impacting on NHS commissioners for children and young people.

The proposed changes to the current SEN statement

Readers will recall that the Government proposed that, by 2014, children and young people who currently have a SEN statement, or a learning difficulty assessment, will have a single assessment process and an Education, Health and Care Plan (EHCP) for their support from birth to age 25.

These proposals have been well received by those responding to the Green Paper but it was recognised that the success of a single assessment process and the EHCP will depend on agencies working together.

The pathfinders have been testing these proposals. Several pathfinders are actively moving towards formal working arrangements between local authorities and health services, including memoranda of understanding, shared governance and pooling or aligning of budgets to put in place the underlying structure. We understand that at least one pathfinder is planning to reorganise both their local authority and health corporate structures to improve joint working, simplify assessments and deliver services more effectively. Many are trialling approaches involving the bringing together of a set of assessments by different agencies (in relation to families who are already accessing services); or a single assessment episode supplemented by ad hoc specialist assessments (in relation to families who had not previously accessed services). Clearly, this approach requires further development for existing and new cases, post the pathfinder programme.

As discussed in our last paper, the role of the new Health and Wellbeing Boards, and the Joint Strategic Needs Assessments they will produce, will be vital to aid integrated working between the NHS and local government.

Work on the development of the EHCP will also be linked to the recommendations from [*The Munro review of child protection: a child centred system.*](#)

The Government has restated its intention that the EHCP will provide the same statutory protection to parents as the SEN statement and will include a commitment from all parties to provide their services, therefore being legally binding on the NHS. It has also reiterated that statutory protection will be extended to young people over 16 and up to 25 in further education.

Involvement of the voluntary and community sector

Work is ongoing to try and involve the voluntary and community sector to increase knowledge of how the current system works and make the most of local expertise to design the new single plan and assessment processes.

The Government has commissioned the BOND (Better Outcomes, New Delivery) consortium, led by Young Minds, to work with the voluntary and community sector to develop their capacity to offer early intervention mental health support, including to schools. It is intended that this will create additional capacity in targeted, early intervention mental health support services in line with the cross-Government mental health strategy, [*No health without mental health.*](#)

The Department of Health funded anti-stigma and discrimination campaign, [*Time to Change,*](#) led by Mind and Rethink, will also develop a new pilot programme that works specifically with children and young people.

Identification of SEN

The Government has started to work with experts in the education and health sectors to improve the way schools identify children with SEN, including those with behavioural, emotional and social difficulties so that children's needs are picked up and the right support is put in place.

Readers may be aware that the Government has funded the extension of the [*Improving Access to Psychological Therapies Programme*](#) to children and young people with the hope of driving improvements and transforming services for their mental health.

[*The Early Years Foundation Stage \("EYFS"\) framework*](#) will come into effect in September 2012 and will include a progress check at age two, involving all settings providing parents with a written summary of their child's development, focusing on communication and language; personal, social and emotional development; and physical development. The check will highlight what the child can do, any areas of concern and how the setting plans to tackle any emerging issues. It is hoped that the check will contribute to the single assessment process for the EHCP.

Work is also in progress to try to bring together the check with the current [*Healthy Child Programme*](#) health and development review to create a fully integrated early years and health review. This will, no doubt, be assisted by the [*Health Visitor Implementation Plan*](#) which involves the recruitment and training of an additional 4,200 health visitors by 2015 to deliver a full service and family offer, ranging from community and family support to additional services related to SEN or disability.

Personal budgets

The Government has set up trials to test direct payments to families for support with special educational needs (Parliament passed the [*Special Educational Needs \(Direct Payments\) \(Pilot Scheme\) Order 2012*](#) in January 2012 to allow this to happen), to complement those trials already run in relation to individual budgets for disabled children and the pilot scheme in place for personal health budgets. The final evaluation of this scheme is expected in October 2012 following a three-year trial period. The trial will assist with providing parents of children with an EHCP with the option of a personal budget by 2014. The Early Support Trust and National Children's Bureau have been commissioned to lead a programme of work to help develop key worker training, which will help to provide families with the support they need to take up the opportunity of a personal budget, should they wish to do so.

Local offer

Local authorities will be required to set out a local offer which, in every area, sets out information for parents, in a single place. It will be aimed at helping them to understand what services they and their family can expect from a range of local agencies – including their statutory entitlements. It will cover provision for birth to 25 and will also make clear what provision is normally available from early years settings, schools, colleges and other services, including health and social care services.

A national banded funding framework

It was suggested in the Green Paper that one way to improve parents' experience of the assessment process and make funding decisions more transparent to them is through developing a national banded framework for funding high-cost provision for children and young people with SEN or who are disabled, in addition to what is normally available in schools. Responses to the Green Paper on this matter were mixed. Many felt that it was a good idea in

theory but it would be difficult putting it into practice. The proposals are currently being tested by a number of the pathfinders and further decisions regarding this are on hold until the findings of the pathfinders are known and have been considered.

Independent resolution of disputes

The Government is keen to ensure that mediation is available to young people aged up to 25 and their parents. Where mediation is not successful, young people and their parents should be able to seek redress, if possible, through the First-tier Tribunal (Special Educational Needs and Disability). This would be a significant change for those aged 16-25 in further education as, currently, the only right of redress is through the Local Government Ombudsman or Judicial Review.

There do not appear to be any plans at present to extend the option of mediation to the resolution of disputes regarding health or social care provision.

Transition from children's to adult health services

The transition from children's to adult health services was highlighted as a concern by the responses to the Green Paper.

The [Children and Young People's Health Outcomes Forum](#) published their [Report](#) on 26 July 2012. The issues considered by the Forum include the concerns regarding the transition from children's to adult health services and they have made recommendations to improve the system, including that:

- 1 The Department of Health includes a new outcome in the [NHS Outcomes Framework](#) to ensure that effective and healthy transitions take place between child-centred and adult-centred health care
- 2 The Royal College of Physicians works with the Royal College of Paediatrics and Child Health and other Colleges to develop a plan, by 2014, to ensure that health outcomes and the experience for transition are improved
- 3 NICE produce a Quality Standard for age and developmentally appropriate care of teenagers and young adults, including through transition
- 4 With immediate effect, all data about children and young people are presented in five-year age bands through childhood and the teenage years. This will allow relevant international comparisons of key outcomes as well as national or local comparisons of outcomes at significant transition points, such as joining secondary school and transition to adult life

The Government will consider the recommendations of the Forum, together with the early findings from the pathfinder programme, to inform legislative change.

It is envisaged that the development of the EHCP spanning birth to 25 will also assist with a smoother and more effective transition process.

Next steps

Subject to consultation, the Department of Health will consider how to use the Mandate to the NHS Commissioning Board to ensure that the NHS commissioning system, particularly Clinical Commissioning Groups (CCGs), are

focused on improving outcomes for disabled children and those with special educational needs. Subject to evaluation, this may include the use of personal budgets.

The Government intends to introduce legislation through a Children and Families Bill in this session of Parliament to implement the changes to the law required for the Green Paper reforms. This will be informed by the findings and outcome of the pathfinder programme. The Bill will build on the framework introduced in the Health and Social Care Act and ensure that services for disabled children and young people with SEN are planned and commissioned jointly between local authorities and CCGs. It is expected that the Bill will be introduced in early 2013 so we await this with interest.

The Department of Health also proposes to review the current *National Framework for Children and Young People's Continuing Care*, taking into account the experience and learning of the pathfinders on the single assessment process and the EHCP.

It is again stated by the Government that the *Special Educational Needs Code of Practice* will be revised to "give clear guidance on identifying children who have SEN and on the operation of a new single category of SEN". It is not clear to what extent, if any, the new Code of Practice will be expanded to include reference to health and social care provision.

Conclusions

The most significant reform for NHS commissioners of care for children and young people undoubtedly remains the single assessment process and EHCP. Clearly, integrated working between the NHS and local government is vital as these reforms are progressed: this builds on the framework set out by the Health and Social Care Act. As part of this, health and local authorities will look to pool or align their budgets and may wish to delegate commissioning responsibilities which can be achieved using the mechanism provided for by section 75 of the National Health Service Act 2006.

However, concerns raised in our earlier paper regarding the distinction between health, social care and special educational needs remain unaddressed. Each respective authority can only lawfully commit funds equivalent to the share of the provision they are legally responsible for funding. NHS organisations will need to differentiate health needs from social care and special educational needs to achieve this and ensure they are not acting ultra vires. Of course, given the lack of current definitive guidance in place regarding the definition of health and other needs, this could be a persistent stumbling block to a smooth joint working process. Even where budgets are not pooled or aligned, the distinction between the respective funding responsibilities is always going to pose a difficulty if further guidance is not produced.

We appreciate that the implementation of personal budgets is an important part of the commissioning landscape but, likewise, clarity will need to be maintained regarding which organisation is responsible for funding provision for each type of need and contribute accordingly to the personal budget.

The respective funding responsibilities for each organisation will also need to be agreed between the NHS and local authorities and clearly defined in order for local authorities to set out the proposed local offer to families.

Much of this theory will soon be put into practice as pathfinders finish putting the structures into place and recruit families to the programme. We hope that the Government takes this opportunity to provide clear guidance on what constitutes a health need, which we see as essential for fully integrated working to be successful (and lawful). We hope that this may be achieved by amendment of the *National Framework for Children and Young People's Continuing Care*.

Links

Our previous briefing *A new approach to special educational needs and disability: what this means for NHS commissioners for children and young people* is available on our [client extranet](#). Please email julia.simpson@mills-reeve.com to obtain log in details.

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