Consultation questions on the Revised Code of Practice – National Deaf Children's Society response (6 April 2014)

Changes made during the passage of Children and Families Bill

1. **Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to include disabled children and young people in the provisions on identifying children and young people, integrating education, health and care provision, joint commissioning, the local offer and providing information and advice? (Chapters 1, 2, 3 and 4)**

   No.

   We are pleased to see that the duties to support disabled children imposed by the Equality Act are more strongly reflected in the Code.

   Chapters 5, 6 and 7 each helpfully include a section on the Equality Act and its application in early years, schools and further education. We believe these sections could be clearer if they emphasise the anticipatory duty to make reasonable adjustments. This will be a key point for practitioners to grasp – that support should be in place immediately to ensure children and young people are not placed at a substantial disadvantage and that local authorities and practitioners should not 'wait' for the child to 'fall behind' before acting.

   We believe that the inclusion of disabled children who are aged 0 to 2 is still too weak and not given sufficient prominence. Greater clarity and emphasis on the crucial role of the local authority in securing provision for deaf children aged 0 to 2 is needed to ensure that they are clear on their duties to support families with children with disability and/or SEN. This includes support from Teachers of the Deaf to promote communication and language development. This is a critical age period for this group of disabled children.

   We believe that a number of changes across the Code are necessary to ensure that local authorities are clear on the importance of these 0 to 2 services for this group of disabled children in their SEN commissioning decisions. These include:

   - Referencing sensory support services for children aged 0 to 2 within the home prior to paragraph 4.37.
   - Expanding the section "From birth to two – early identification" in paragraphs 5.13 to 5.17 to give some of the above issues more prominence and provide more detail on the expected role of these services. The text currently underplays the role of these vital services. For examples, Teachers of the Deaf do more than *"discussing communication and clarifying needs"* and instead have a direct teaching and support role here that helps ensure deaf children develop age appropriate language and communication skills.
   - Before paragraph 5.33 "SEN support in the early years", making it clear that SEN support can also be provided within the home and not just within an early years setting – and amending the following paragraphs to reflect this.
   - It is not explicit in chapter 4 on the local offer whether local authorities should also include information on provision for families with children with special educational needs and/or disabilities aged 0 to 2.

   We are also concerned that the drafting of the Code in some areas undermines some of the key messages promoted elsewhere on early intervention. For example:

   - Paragraph 5.43 states that *"where, despite purposeful action by the setting, a child continues to make little or no progress over a sustained period, practitioners should consider involving appropriate specialists..."* The use of the term 'sustained period' is

imprecise and vague and could lead to wide variations. It would not, in our view, encourage a more urgent response in keeping with the need for early targeted intervention. We are also concerned that settings should only 'consider' involving specialists.

- Paragraph 5.34 seems to be underplaying the possible need for an Education, Health and Care Plan by suggesting that "meeting needs through the local offer" may be more valuable to parents. We would be concerned that this would encourage local authorities to avoid assessing for a Plan in the early years. The validity of this statement would also seem to depend on the needs of the individual child. Again, this potentially undermines some of the other messages around early intervention and identification.

On a related note, NDCS suggests that paragraph 5.16 be amended to reflect that from September 2014 disabled children in receipt of Disability Living Allowance will be entitled to free early years provision. The current draft implies early years education with an early years provider starts at the age of 3 years.

2. Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to include children and young people in the local authority duties to provide information and advice? (Chapter 2)

Not sure.

3. Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to provide for local authorities to set out what action they intend to take in response to comments from children, young people and parents on the local offer? (Chapter 4)

Not sure.

It is unclear what means of redress families would have if they felt that local authorities were ignoring feedback from parents or indeed if the local authority was failing to meet its duties more widely on the local offer.

4. Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to clarify when health and social care is to be treated as special educational provision? (Chapters 4 and 9)

No.

NDCS believes it would be helpful if the Code made it clear that access to health and social care services that may be regarded as SEN provision is not necessarily dependent on having an EHC Plan. Many disabled children may not reach the education trigger point for the EHC Plan but still require access to health and social care services that support the child's learning and development. It would be helpful to make the point that health and social care are expected to continue to provide and fund such services, not least to meet their duties under the Equality Act.

We welcome the section in chapter 4 about treating speech and language therapy as special educational provision. However, the Code should also make clear where speech and language therapy provision sits in regards to sections of the EHC Plan set out in paragraphs 9.49 to 9.67, as it could be assumed that it is covered by Section G (health provision) rather than section F (education) as described in 9.60.

We believe that the section on personal budgets is unclear about what it means by integrated personal budgets and how this could be secured. Paragraph 9.108 talks of a 'single integrated fund' and a 'single integrated budget'. The following paragraphs could be clearer on whether this means a single *SEN* personal budget – i.e. the drawing together of funding from education, health

and social care for the purpose of addressing a special educational need. Or if it is being suggested that local authorities should go beyond and pool together funding for other needs for a wider 'super' personal budget. If the policy intention is the latter, then this section would benefit from more discussion of the practical implications of this and how this would be set out in section J of the Plan.

5. **Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to require local authorities to include the social care services they must deliver under the Chronically Sick and Disabled person's Act 1970 in Educational Health and Care (EHC) plans? (Chapter 9)**

No.

Paragraph 11.99 does not seem to make clear that families have the separate right to request a social care assessment and that they can also complain about a refusal to carry out an assessment. This could also be made clear within the section on the local offer.

Consultation Questions

6. **Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to clarify the duties on local authorities in respect of young people over 18 with SEN. These are to consider whether a young person requires additional time, in comparison to the majority of others of the same age who do not have SEN, to complete his or her education or training, and to have regard to whether educational or training outcomes specified in an EHC plan have been achieved when considering whether or not to cease to maintain the plan? (Chapters 8 and 9)**

No.

We do not believe that the Code provides adequate clarity in this area and are concerned that the Code may undermine the amendments made to the Children and Families Bill removing the duty to 'have regard to age' previously placed on local authorities. In particular we are concerned by paragraph 9.148 of the Code which states that:

''There is no entitlement to continued support or an expectation that those with an EHC plan at age 18 must be allowed to remain in education or training from age 19 to 25.''

We believe that there is a conditional right for young people to keep an education health and care plan beyond their 19th birthday. This right is conditional on a number of factors which are clearly set out in the code, including whether or not the young person wishes to remain in education and training and whether the local authority deems it appropriate for them to do so in order to meet the education and training outcomes set out in the plan. We recognise the need for the Code to emphasise that not every young person who has had an education health and care plan will stay in education beyond 19. However, the above wording is not clear and will create confusion for local authorities. In addition it does not reflect the spirit of the Act.

Furthermore, we believe that the language used to describe the conditions in which plans should be finished post-19 remain unhelpfully imprecise. In particular we firmly believe that the Code does not adequately explain what it means to *"complete or consolidate…learning"* (9.148). Or how a local authority could, with any consistency, decide whether a young person requires *"additional time, in comparison to the majority of others of the same age who do not have SEN, to complete his or her training"* (9.152).

There is no set standard of education or training achieved by all young people by the end of their time in compulsory education and training. This will differ widely from young person to young

person even in the case of young people without SEN. Therefore it is very difficult to see what, in practice, the 'completion' or 'consolidation' of learning means. We are very concerned that the ambiguity of this wording will lead to wide variations within and between local authorities. We believe that whether a young person wishes to stay on in education and training, and whether the education and training outcomes set out in the plan have been achieved, and whether remaining in education and training will allow these outcomes to be achieved should be the only tests of whether a plan will continue. This will then allow local authorities, with appropriate best practice guidance in time, to set sensible and appropriate educational and training outcomes for young people who are preparing for adulthood which do not presume that they will stay in education indefinitely.

7. **Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to include young offenders in assessment and planning duties that are broadly similar to those for other children and young people? (Chapter 10)**

No response

8. **Does the Code clearly reflect the changes made to the consultation draft to take account of the amendments to the Children and Families Bill to extend disagreement resolution arrangements and mediation to health and social care as well as education? (Chapter 11)**

No. We find the text on mediation to be difficult to follow. Paragraphs 11.13, 11.14 and 11.19 are particularly confusing and are overly long. We believe the Code would be clearer if it focused first on the mediation arrangements for education before outlining separately the issues around health and social care. Currently, these are conflated together and so the paragraphs do not flow well.

The diagram on page 212 and 213 is also unclear – the 'flow' of the decisions and how different scenarios would apply here is not apparent.

Clarity, layout and accessibility of the Code

Background:

The consultation asked respondents whether the draft Code of Practice was clearly written and easy to understand and whether it was clear from the structure where to find information needed. While there was considerable support for the format and layout, there was also significant comment as follows:

- **a need for easier navigation, with paragraph numbers and key information highlighted**
- **a call for more illustrative examples of professional best practice and case studies**
- **a need for greater accessibility for children, young people and parents**
- **a clear demand for guidance materials tailored to specific audiences**
- **a need to explain the statutory duties more clearly.**

The Code has been revised as follows:

- **each chapter starts with a summary of what it covers and sets out the relevant legislation**
- **the key principles which apply across the Code, such as involving children, young people and parents and references to Equality legislation have been moved to an early chapter which focuses on principles**

- **content for early years, schools and further education has been moved into separate chapters, with an additional chapter focused on preparing for adulthood**
- **supplementary guides will also be produced for young people and also for parents setting out what the Code means for them and other web-based guides will highlight the key parts of the Code, relevant to different groups of professionals who need to have regard to it**
- **sources of good practice will also be referenced for practitioners.**

9. Do changes to the Code, and the plans to produce supplementary materials, address the responses to the main consultation on clarity, layout and accessibility?

No.

The current draft is a significant improvement. However, we believe there are still significant issues around clarity.

We believe that parents will find it easier to navigate the introductory chapter if numbers are used rather than roman numerals in the introduction.

We also believe that the Code would be clearer if there was greater cross-referencing to the legal duties imposed by the Children and Families Act.

Finally, we believe that in a number of other areas, further changes may be needed to the Code to ensure there is full clarity over what is required and expected, as set out below:

Early years

As set out in our response to question 1, we believe the Code should be more explicit about the needs of disabled children aged 0 to 2 and their need for support to be in place as soon as possible.

Key workers

Whilst the role of the key worker is clearer, the difference between this role and an independent supporter and an advocate still remain unclear. In particular, it is unclear if the roles are mutually complementary – for example, could an independent supporter act as a key worker? We are concerned that this lack of clarity will leave parents and young people confused on what support is available to help them.

Personal budgets

In response to question 4, we highlighted the lack of clarity over what 'integrated personal budgets' mean in practice. Further to this:

a) the reference to 'eligibility criteria' when talking about personal budgets is extremely confusing. Given that personal budgets flow from EHC Plans, any provision that could be purchased by a personal budget is provision that the local authority, in any event, must secure. Therefore, it is not clear why any eligibility criteria would apply here. This section needs urgent clarification.
b) Local authorities are required to set out their 'policy' on personal budgets. NDCS's understanding is that a local authority would have to consider each individual request for a personal budget on its own merits. Therefore, a local authority could not apply a blanket policy. This section would therefore benefit from an explanation that any such policies should be treated as indicative only.

Outcomes and school-based support

Although outcomes within the EHC plan are now described in some detail, they are not described within the school based stage. There are frequent references to outcomes in chapter 6 but it is not

clear what is meant by outcomes. For example, the following paras make reference to outcomes without them being defined / described:

- Paragraph 6.37*("Consideration whether special education is required should start with desired outcomes..."),*
- 6.39 *("...the parent, pupil and teaching staff should each be clear about how they will help the pupil reach the expected outcomes...")*
- 6.45 *("All teachers and support staff... should be made aware... of the outcomes sought...")*
- 6.46 *(… "support and intervention to meet the outcomes…")*
- 6.50 *(…"deciding on any changes to the support and outcomes...")*
- 6.60 *(…'talk to parents regularly to set clear outcomes…'')*
- 6.67 *(..."Ofsted will expect to see a focus on outcomes…")*

We believe that the Code could be clearer on:

- What is meant by outcomes at the school based stage (for example, how long term should they be? How detailed? Are they the same as the outcomes described in the Ofsted framework for inspection schools and supplementary information issued by Ofsted?)
- Where in the process should outcomes be generated? It would be reasonable to assume that they would be set after the assessment in the Assess-plan -do-review cycle. However, paragraph 6.37 suggests they might predate this.

We therefore recommend that:

- There is more clarity about the nature of the outcome at this stage
- Outcomes added to paragraph 6.44
- An insertion regarding the need for individual teaching targets to support the outcomes is made, as is now the case for outcomes in the EHCP (paragraph 9.60 section E)

Separately, paragraph 9.66 states that "*outcomes will usually set out what needs to be achieved by the end of a phase or stage in education in order to help the child or young person progress successfully to the next phase or stage.*" In terms of educational attainment, NDCS assumes that this would seem to be prescribed by the requirements of the attainment targets as stated in the document *National Curriculum in England: Framework document* (July 2013). However, no link is made in the SEN Code of Practice to the national curriculum requirement. For many children with an EHC plan, such an attainment target may be unrealistic, but if they do not strive for it they will experience difficultly in navigating the next phase / stage successfully.

The example given in the draft SEN Code is of a secondary pupil requiring specific results to access a specified course. This is a good example as at secondary level there are naturally occurring differentiated outcomes such as education, training, employment etc. However, at the earlier stages and phases, there is only the National Curriculum for the educational aspects.

Expected progress

There are references to expected progress in paragraphs 7.20, 6.58 and 6.52 but it is only defined in paragraph 6.14. Readers of these later paragraphs may not remember the significance of 6.14 and so we suggest that the reference to 6.14 is given in these other paragraphs.

Moderating panels

The Code suggests the need for moderating panels at paragraph 9.58 – "it is helpful to set up moderating groups to support transparency in decision making". It would be helpful to clarify whether the moderating panels are to decide whether or not to carry out an EHC assessment or not to issue an EHC plan or allocate resources or do both.

Paragraph 9.37 (page 138) states that *"parents might be happy to agree changes to an EHC plan.....while at the review meeting."* However this may not be appropriate as changes to resourcing often has to be agreed by a moderating panel to ensure equity. Thus this could lead to confrontation between parents and local authority if parents agreed a change at the meeting that was not then upheld by a moderating panel.

EHC plans and parents

In paragraph 9.75, NDCS recommends the removal of the words "at *least"* as parents have only 15 days in which to respond. This is a maximum amount of time not a minimum.

Specialist peripatetic teachers

Paragraph 9.141 is confusing when it states that local authorities *should consider* commissioning peripatetic services for children with hearing or visual impairment. Elsewhere in the Code it states that, where an EHC Plan is being considered, deaf children must be assessed by a qualified Teacher of the Deaf. This cannot happen unless the service employing these Teachers has been commissioned. We believe this should read as ***must*** *commission.*

Specialist resource provisions

Chapter 6 and indeed the Code more widely, makes no specific reference to the role and status of resource bases or units within mainstream schools. Many deaf children are educated in specialist resource provisions or resource bases. These play a crucial role in meeting the needs of deaf and other children with SEN and disabilities. There are concerns that academies are in some cases reluctant to maintain these resource bases after changing from maintained status and this is a concern not addressed in the Code.

Reporting and data

We do not believe that the Code is clear on how local authorities, schools and other providers how should report on information for their pupils with SEN and disabilities. Will reporting through the school census continue to be around the current categories of SEND? This has significant implications for how we capture prevalence and measure progress of deaf children with different types of impairment.