

Disability Rights UK Response to:
“Special Educational Needs and Disabilities (SEND) review:
right support, right place, right time”
Open Consultation 2022

Disability Rights UK is a national organisation led by Disabled people. Our vision is a world where Disabled people have equal rights, opportunities, and access to power. Our work is rooted in the lived experience of Disabled people. We are a membership organisation and work closely with organisations led by Disabled people, across the UK.

This response contains contributions from Disabled young people, including members of our Disabled Apprentice Network.

I. This green paper does not prioritise improving provision for support in education, its underpinned by limiting funding.

It is clear from the outset that the driving motivation behind these proposals is financial rather than a genuine attempt to deliver the right support, at right place, and the right time – for all Disabled pupils – as the review title suggests. The green paper describes the current system as “financially unsustainable” and “not delivering value for money”, citing some of the reasons for this as a growing number of children with an Education Health and Care Plan (EHCP) and costly placements in independent specialist schools.

The paper highlights how “despite unprecedented investment”, outcomes for Disabled children have not improved. This suggests that somehow, no matter the level of investment, outcomes for Disabled children will never improve. However, what the green paper fails to recognise is:

1. Where that investment has gone and
2. The consistent failure by local authorities to meet their legal obligations under both the Children and Families Act 2014 and the Equality Act 2010.

Research by Special Needs Jungle has found that councils have [spent over £253 million fighting parents at SEND tribunals](#) since EHCPs were introduced in 2014. The high number of tribunals highlights how frequently local authorities are acting unlawfully. Obligations under the Children and Families Act includes identifying the child’s needs, specifying and quantifying all necessary support to meet these needs within an EHCP, and implementing that plan in an education setting able to deliver that provision. Research in 2020 found that [95% of appeals ruled in parents favour](#), meaning that almost every tribunal ruled that local authorities had not complied with their legal duties.

If the priority of this green paper was not to limit funding, then it would focus on consistency in implementing current legislation, and accountability when authorities fail to do this – it would not attempt to introduce new policies, frameworks, or standards. The reason outcomes have not improved for Disabled young people is because the legislation that entitles them to support is not being followed, and funding is too often placed in areas that build additional barriers for students trying to access that support.

The National Education Union found that there's [a £2.1bn shortfall in SEND provision](#). At a time when [Disabled individuals are three times less likely to hold any qualifications](#) compared to their non-Disabled peers – consequently leaving them less likely to access employment, and more likely to live in poverty and be a victim of crime – reducing the topic of SEND provision to a financial burden fails to recognise that this is a human rights issue, and that we are currently failing all Disabled students in this country.

- ***Recommendation: The SEND system needs an increased level of funding that will deliver improved attainment and outcomes for all Disabled young people with and without EHCPs.***

II. Policy Concerns

The following section outlines our main policy concerns with the proposals set out within the Green Paper.

- **The current government direction is increasing segregation rather than enhancing inclusion within mainstream education.**

This green paper does not set out the much needed agenda on how mainstream settings can include SEND students in an accessible and inclusive way.

As accessing an inclusive education in mainstream settings is becoming more difficult, there is a clear trend towards Disabled students being pushed into segregated education. [The shadow UNCRPD report](#) found that, between 1999 and 2021, the number of Disabled children with EHCPs attending specialist segregated education settings rose from 35.4% to 49.6%. Last year there was also an additional 11,655 pupils without an ECHP educated in segregated settings. These figures strongly indicate that mainstream schooling is becoming less inclusive.

As underpinned by the UNCRPD, mainstream education settings should be an inclusive and safe environment for all Disabled students – no matter their needs. However, there is currently a clear trajectory towards segregated settings becoming the standard instead of the exception.

- ***Recommendation: Meaningful inclusive education in mainstream settings for all Disabled children should be the default position.***

- **Mandatory Mediation will only delay support.**

The green paper proposes to introduce “mandatory mediation” to “maintain and improve relationships between providers, local authorities and families”. This introduces an additional barrier before parents can access a tribunal which – as previously stated – is often the only step in the process that results in the delivery of support. It already takes up to 20 weeks to issue an EHCP – during which time any disputes should already be being managed, without the need for additional mediation. All the time this mediation delays, the pupil continues to be expected to attend an inaccessible – and often consequently unsafe – schooling environment.

Most crucially, human rights should never be mediated. Mediation is an inappropriate method to decide children’s needs. The reasonable adjustments and support provisions necessary to enable a child to access their education should never be a topic of compromise. Disabled children have the same right to education as their non-disabled peers, and education authorities have a legal obligation to make reasonable adjustments so that they can access that education. As the research has already made clear, what is discovered at a tribunal is the fact that Disabled children up until that point have been failed by unlawful decisions. This needs to be managed via a real system of accountability for both local authorities and education providers when their legal obligations are not fulfilled.

- ***Recommendation: Remove the introduction of mandatory mediations and improve access to the tribunal system.***

- **A Local Authority provided list of schools removes parental choice.**

The proposal to introduce a “tailored list of settings” for parents and students is not child and parent centred and restricts parental choice. It should be the responsibility of parents to decide what is best for their child, not local authorities.

It is also not clear in the green paper what issue this is attempting to resolve, or how it will support parents – therefore there is concern that it will be used to gatekeep settings that are deemed too expensive.

It is essential that who creates these lists, and how the schools on there are decided, is a completely transparent process. There must also be a route for parents to challenge the list, should they believe there is a more appropriate setting which is not included. Much like mandatory mediation, however, this process will cause additional delays to accessing support.

- ***Recommendation: Keep the current system and do not restrict parental/student choice of schools.***

- **The potential legal implications of national standards.**

The green paper suggests introducing “clear national standards” to create greater consistency across the country. Although greater consistency would be welcomed, the current cause of inconsistency is the failure to implement legislation, not the legislation or policy itself. The duties within legislation are clear and consistent, it is the extent to which these duties are delivered that’s too often inconsistent.

What’s more concerning is the proposal to enshrine these standards in legislation. Some examples of what these standards would be, include: how needs are identified and assessed, what is appropriate provision, and standardised processes to access and review support. [As IPSEA highlights](#), enshrining any of these new standards in legislation would mean changing the current legal framework and this puts Disabled children’s current legal protections at risk. Especially in the context of a green paper that wishes to “create a system that is financially sustainable” – it is vital that the current SEND legal framework is not adjusted to shrink the boundaries of eligibility for support even further.

Even if new standards were introduced in legislation, there is no proposals on how this legislation would be more likely to be enforced than the current law. Rather than creating new standards, the government must ensure current legislation is consistently and effectively implemented nationally.

- ***Recommendation: Uphold current legislation, rather than introducing national standards. Ensure that current legislation is effectively implemented to achieve consistency across local authorities.***

- **The EHCP’s inability to transition across education pathways.**

Although the green paper includes a section on supporting Disabled young people in their transition to further education and preparing them for adulthood – there are no meaningful proposals to improve support across post-16 options, or how the EHCP will better transition across different settings up till the student turns 25. Provision for support in Higher Education is missing, as is a solution for the fact that in practice support often disappears once the young person turns 18.

Outside of support via EHCPs, a consistent concern shared by our Disabled Apprentice Network is that careers advice and information available on all post-16 options was not readily available to them at school and any advice they could access was often limited to options based on presumed ability.

- ***Recommendation: Improve support for Disabled young people as they transition through different stages in their education – both through ensuring that the EHCP is effectively implemented up till 25, but also in improving post-16 options support in schools, including training careers advisors and teachers not to limit the options suggested to SEND students based on bias and low expectations.***

III. The silences in the SEND Green Paper.

The following section will outline what issues were missing from the green paper, and why those omissions are concerning.

- **The children who don't qualify for support.**

Something missing from this green paper is the young people who do not currently qualify for an EHCP and too often go without any support. Although there are 1.4 million students identified as having SEND, only 51,800 have been awarded an EHCP. That's less than 4%. Although EHCPs have always been awarded to students with the 'most severe' needs, it is essential to recognise that all Disabled students have needs – and all have a right to reasonable adjustments under the Equality Act, whether a local authority grants them an EHCP or not. Any Disabled student who is being refused reasonable adjustments is being treated unlawfully and this is unacceptable.

Accessing an EHCP is reserved for those who are deemed to have the most 'severe' needs, yet there have been no proposals on how to ensure children who fall outside of this category can still access an accessible education and reach their full potential.

This SEND review response is lacking in any real mention or analysis of education providers' duties under the Equality Act. The legal obligation to provide reasonable adjustments to every Disabled child does not form the basis for any of these SEND policy proposals, yet these legal obligations exist and are (for the majority of cases) not upheld.

One of the contributions we received from a Disabled young person with a speech impediment highlights the impacts that not upholding these duties has on a child's education, future options, and wellbeing:

"I felt there was no support offered in school for this and no reasonable adjustment for lessons where speaking out in front of a class full of students was part of the session. All my support came from family, friends and a speech and language specialist who my mum and dad paid for when I was a child and then a teenager again... Due to my speech impediment, I was unfortunately bullied which knocked my confidence hugely and meant that I struggled throughout school with communicating in all classes which subsequently had a knock-on effect and meant I did not achieve the grades I needed to get into college."

The Equality Act is an anticipatory duty, meaning that schools should be taking proactive interventions to make sure that their setting is inclusive to all students. Some of these adjustments won't require funding or support plans, they require a change in culture and the raising of awareness amongst staff and students regarding inclusive practice.

- **Recommendation: Ensure that schools are evidencing how they provide sufficient and relevant reasonable adjustments and additional learning support for all Disabled students who require them, and that there is**

accountability in place for when this legal duty is not upheld – including a transparent process for parents to challenge decisions when needed.

- **The failure to identify and diagnose SEND students.**

Alongside those children currently not deemed ‘severe’ enough to access support in school, there are also too many young people currently unable to access a diagnosis.

[The Guardian reported in April 2022](#) that the longest wait times for Autism and ADHD assessments in children were up to 5 years, with the average appointment times coming in after 88 weeks. This green paper posits that an inclusive system must be “built on early and accurate identification of needs”, yet it provides no meaningful proposals on how to reduce current wait times for assessments, or increased training for teachers to identify a student’s needs earlier.

Of all the young people we heard from, every one of those who had a late diagnosis said that had they been diagnosed earlier their education experience would have been very different.

- ***Recommendation: Improve teacher training to identify traits and behaviours earlier, so that Disabled young people can access support sooner rather than later.***

- **Exclusions and the ‘management’ of behaviour.**

Despite only making up [15% of the school population](#), Disabled students make up [nearly half of all exclusions](#). Any support provision in school becomes futile when Disabled children are consistently denied access to attending. Current frameworks and guidance on behaviour and exclusions fails to recognise that behaviour is communication, and that disruptive behaviours are most often a sign that the child requires an adjustment or additional support. We acknowledge that the government have held a separate consultation on revising the behaviour and exclusions guidance – which we have responded to in detail – however, this cannot be treated as a separate issue to SEND policy as the two must work together. All the while behavioural ‘management’ and SEND provision don’t provide joined up support, Disabled children will continue to be disproportionately excluded and unjustly punished for being distressed in an inaccessible environment.

- ***Recommendation: Ensure that the revised Behaviour and Exclusions Guidance works in collaboration with SEND policy, and that both policies introduce effective ways to support Disabled young people with their behaviour instead of perpetuating an unhelpful cycle of punishment (more details on this recommendation can be found in our response to the behaviour and exclusions consultation).***

- **Disproportionate levels of abuse.**

It is essential that the government implements an approach to tackle the disproportionate levels of abuse that Disabled children face in school. Despite SEND students facing [double the rate of bullying](#), and being [three times more likely to experience sexual abuse](#) - there were zero proposals to tackle this in the SEND green paper, and almost no mention of the issue overall.

There was also no mention of the abuse found to take place in specialist segregated settings, including [the use of physical restraint and seclusion rooms](#) – despite [previous inquiries](#) calling for tougher inspection and oversight in residential ‘special’ schools.

- ***Recommendation: Create and implement meaningful proposals to tackle the disproportionate levels of hate and abuse that Disabled children face in education settings.***

- **No system of accountability for local authorities and schools has been introduced.**

As has been highlighted many times in this response, the current issues and barriers to effective support is not policy or legislation – it is policies not being implemented and legislation not being upheld. The SEND green paper considers accountability in the context of who holds what responsibility, but it fails to explain what happens when institutions don’t deliver on that responsibility.

The statistics on tribunals show us that currently the only way parents and students are implementing accountability is through the appeals and tribunals process. Yet, the proposals in this green paper are putting additional barriers in place, making it harder to access tribunals.

The green paper proposes that every local authority publish a “local inclusion plan”, which will set out how they will meet the national standards – but no plans are provided on what happens when local authorities fail to meet those standards, or don’t effectively implement their plan.

- ***Recommendation: A meaningful system of accountability needs to be put in place to ensure local authorities and schools are meeting their legal obligations and implementing sufficient support. The responsibility should not be falling on parents to go through a tribunal process, to provide the only form of accountability in a system that is found to be unlawful in practice in the majority of cases.***

IV. Wider education policy concerns.

This section includes our concerns regarding current wider education policy issues that also need highlighting as they cause implications for the SEND green paper.

- **The Schools Bill.**

The focus on stricter attendance regulations in the Schools Bill and the impact this will have on Disabled young people is deeply concerning. We were disappointed to see that the points we raised in the [attendance consultation](#) were not heard, and largely misrepresented by this statement in the government's response: "*charities, unions, and representative bodies were more likely to agree with the proposals, especially around school attendance policies. Respondents in this group also suggested that there needs to be a greater focus on preventing school absence (especially around disability and mental health).*"

Parents should not be criminalised for choosing to remove their children from an unsafe environment when schools and local authorities fail to uphold their legal duties. [The criminalisation of parents of Disabled young people](#) is a growing issue, and the schools bill will only exacerbate this. For more details on this, we urge you to refer to our attendance consultation response.

- **Inaccessible Assessments.**

There are many issues with the way we assess, including that our system is too standardised. The exams process in the UK needs a complete overhaul when it comes to improving accessibility, and students must be made aware of their right to access reasonable adjustments in assessments.

An additional concern that has recently been highlighted by the Disabled young people that we work with is the issue of inaccessible and discriminatory competency standards in GCSE and A-Level qualifications. One of these competency standards, for example, is memory. Assessing a student's ability to memorise information does not effectively demonstrate their understanding of a topic, nor their skills in a subject. For students whose disability or health condition impacts their memory – for example, trauma to the brain as a consequence of assault, cancer treatment, or a tumour – the competency standard of memory leaves them unable to sit their exams, even if (with relevant reasonable adjustments, like open book provisions) they could achieve outstanding results.

The inaccessibility of exams becomes even more of an issue when placed in the context of [proposed SFE reforms](#), whereby students funding for Higher Education may be restricted if they don't pass their GCSEs. Although policies like this should not exist - as they create unnecessary additional barriers for Disabled students - if they are going to exist, then it is essential that the way in which we assess and the competency standards that we're assessing are reconsidered and reformed so that they don't discriminate against Disabled young people.

- **Barriers to welfare support as a student.**

The barring of students from receiving Universal Credit is putting barriers in the way of Disabled students accessing further and higher education. This matter needs to be resolved by DFE and DWP.

- **Challenges with Disabled Students Allowance (DSA)**

While students are already being refused access to universal credit, many students are also unable to access support via DSA. For those that don't qualify, there is then a lack of policies in HE settings that exist to support Disabled students. For those students that do qualify for the policy, they often experience delays – which can lead to them choosing to withdraw their application to the detriment of their studies and wellbeing.

V. This Green Paper lacks the transformational proposals needed to fix the currently failing SEND system.

Processes, frameworks, and standards do not automatically change practice – especially if there is no system of accountability that will ensure those standards are delivered. If this is the government's transformative package for enabling Disabled young people to reach their full potential, then we will not see improved outcomes for Disabled young people in the coming years.

The DFE highlighted three key challenges in this green paper:

1. Outcomes for children and young people with SEN or in alternative provision are poor.
2. Navigating the SEND system and alternative provision is not a positive experience for children, young people, and their families.
3. The system is not delivering value for money for children, young people, and families.

The proposals outlined in the government's SEND review are going to make each of these challenges worse. With little investment in fixing the issues, and the majority of investment going towards building more barriers to accessing support, we are deeply disappointed in the government's approach.

The ministerial foreword acknowledged that “we know that, too often, children and young people with SEND ... feel unsupported, and their outcomes fall behind those of their peers.” This green paper failed to recognise that Disabled students don't “feel” unsupported, they are unsupported, and consistently failed by under-resourced education providers and unlawful decisions and practices. The minister also failed to recognise that the reason Disabled students' outcomes “fall behind those of their peers” is because of the failure to uphold their rights.

The disability strategy failed to provide the transformative reforms needed to tackle the unacceptable – and growing – levels of disability inequality in this country. Now the much anticipated SEND Green Paper has done the same. Failing all Disabled young people with a complete absence of support, too often in the wrong setting, and always much too late.

Response to be sent to: SENDreview.consultation@education.gov.uk