

There may be trouble ahead: local authority support to further education settings and new duties

Ben Amunwa, May 2016

1. When the Children and Families Act 2014 ('the 2014 Act') came into force and established a new legal framework for SEN in September 2014, the government made this observation about Further Education institutions:

“Currently, too many young people do not get the support they need and support does not focus sufficiently on helping them to achieve their goals, including paid employment and independent living.”¹
2. Accordingly, the new framework seeks to change this by creating four statutory duties that apply to FE institutions:
 - a. The duty to admit a young person if the institution is named in an EHC plan;
 - b. The duty to co-operate with the local authority on arrangements for children and young people with SEN;
 - c. The duty to have regard to the COP;
 - d. The duty to use their best endeavours to secure the special educational provision that the young person needs.²
3. By extension, these duties apply to and are relevant for Local Authorities. Further pre-existing duties under the Equality Act 2010 prohibit discrimination.
4. 'FE institutions' is broadly defined. It includes FE colleges, sixth form colleges, 16-19 academies and independent specialist colleges approved under section 41 of the 2014 Act.
5. What follows is a discussion of the new duties and their implications.

A) The duty to admit

¹ See Further education: guide to the 0 to 25 SEND code of practice (September 2014).

² See paragraph 7.3 of the 0-25 SEND Code of Practice ('COP') January 2015.

6. Under the old SEN framework, the Local Authority ceased to be responsible for young persons leaving school and going into FE institutions. Statements lapsed upon transfer.
7. Section 43 of the 2014 Act changes this. It extends the duty to admit children and young people with an EHCP from 0 to 25. It expands the range of institutions that young persons / parents may express a preference for.
8. Young persons now have the right to request an FE institutions is named in their EHCP.
9. Under section 39(4) of the 2014 Act, local authorities must name the FE institution unless, following consultation:
 - a. the FE institution requested is unsuitable for the age, ability, aptitude or SEN of the young person, or
 - b. the attendance of the child or young person at the requested FE institution would be incompatible with
 - i. the provision of efficient education for others, or
 - ii. the efficient use of resources.
10. Where an FE institution is named in an ECHP (Part I), the named institution must admit the young person.
11. For young persons with SEN but without a plan, section 34 states that they must be educated in a mainstream post-16 institution, subject to 5 exceptions.³

B) The duty to co-operate

12. Sections 28 and 29 of the 2014 Act require Local Authorities and their partners (including the governing body of FE institutions) to co-operate with each other in the exercise of the Local Authority's functions in cases where young people SEN matters.
13. This appears to be a re-statement of a common-sense principle.
14. In practice, it requires Colleges to participate in strategic planning of provision in the local area, as summarised in the 'Local offer', and also to assist in EHC needs assessments and the development and annual review of Plans.

³ Where the cost is not met by the local authority, or where the young person is admitted temporarily in various circumstances where there is agreement on the young person's admission (see section 34(3) and (5) to (9) of the 2014 Act).

15. Local Authorities can ask, but not require, Colleges to convene annual review meetings on their behalf, unless there is a contractual arrangement as part of the commissioning process in which this is agreed.
16. Breaches of this duty do not appear to give rise to a statutory right of redress under section 51 of the 2014 Act, however, they could result in:
 - a. Adverse findings against a Local Authority in a SENDIST appeal relating to other matters (such as Provision under Part F). For example, a young person may complain about the quality of a handover when they transfer from School to an FE institution and the lack of coordination between the Local Authority and its partners. Such a complaint could now be presented as a breach of the requirements in primary legislation;
 - b. Complaints to the Local Government Ombudsman where there are no other avenues of redress for the young person and/or parent.
 - c. Judicial review (in extreme cases of non-cooperation).

C) The duty to have regard to the COP

17. This is a new duty for FE institutions, although not for local authorities.
18. The new COP emphasises continuity between School and FE institutions and draws parallels between both settings.
19. So for example:
 - a. Colleges should be involved in transition planning (7.10, 8.22 – 8.28);
 - b. Colleges should bring together all the information from the School, the student and others (7.15);
 - c. Colleges should ensure appropriate expertise in the workforce, access to specialist skills and that there is a named person similar to SENCO in schools, who contributes to the operational management of the college (7.22);
 - d. Colleges should consider requesting an EHC needs assessment where despite relevant support a student is not making expected progress (7.23);
 - e. Colleges should ensure data is recorded accurately (7.26);

- f. Regular updates to the Local Authority about progress towards outcomes in the Plan (or where there is no Plan more general progress) (7.26).
20. Some Colleges may have a considerable amount of catching up to do in order to comply with the detailed requirements in the COP.
21. Local Authorities may also need to ensure some measure of uniformity across a very wide range of different FE institutions whose focus may be quite different to the approach in Schools.

D) The duty to use best endeavours to secure the special educational provision that the young person needs

22. This duty is imposed on Local Authorities and FE institutions by section 66 of the 2014 Act.
23. It replicates the duty in section 317 of the Education Act 1996 and extends it to cover FE institutions, (except independent specialist colleges or special schools).
24. There is no statutory definition of what 'best endeavours' requires.
25. It echoes the language of section 19 of the 2014 Act, (which requires Local Authorities to support the young person "*to achieve the best possible educational and other outcomes*").
26. Case law from outside the field of education law suggests the following guidelines:
- a. This is a relatively onerous obligation that could require local authorities to take all the steps in their power which are capable of producing the desired results;⁴
 - b. While onerous, it is not likely to be an absolute obligation;⁵
 - c. The steps expected to be taken should remain reasonable in the circumstances.⁶
27. The 2015 COP at 7.3 explains that:
- a. The purpose of this duty is to "ensure that providers give the right support to their students with SEN";

⁴ *IBM United Kingdom Limited v Rockware Glass Limited* [1980] FSR 335.

⁵ *Midland Land Reclamation Limited v Warren Energy* [1997] EWHC 375 (TCC).

⁶ *Malik Co. v Central European Trading Agency Limited* [1974] 2 Lloyd's Rep. 279.

- b. This duty applies to **all** students with SEN, whether or not they have a Plan. (It is worth keeping in mind that the new framework also extends the definition of special educational provision);
- c. It applies to students up to age 25, (due to the effect of section 46 of the 2014 Act);
- d. The duty covers a very wide spectrum of different programmes of study at all levels, but does not apply to Higher Education courses.

28. Like its predecessor provisions, if an institution is unable to discharge the duty in section 66 of the 2014 Act, section 64 provides that a Local Authority may be required to fill the gap by providing goods and services to that institution. Similarly worded provisions in the 1996 Act (sections 317 and 318) were considered in NC v Leicestershire County Council [2012] E.L.R. 365 at paragraph 38, where it was stated that:

“The primary duty is on the governing body of the school: the LA's duty is triggered only where the governing body is, in effect, no longer able to discharge its duty”

Conclusions

29. Unlike Schools, many Colleges are relatively new to SENDIST litigation. Colleges will have a steep learning curve, particularly if they are under-resourced and staff stretched already. The government's non-statutory policy document 'Implementing a new 0 to 25 special needs system' (attached) makes it clear that substantial changes are expected of FE institutions shifting to the new framework.
30. Local Authorities (in particular the special education teams within education departments) have a key role to play in ensuring that the new framework is complied with and that Colleges are able to cope efficiently with anticipated levels of litigation.

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