



# Statutory Assessment for Special Educational Needs and the Warnock Report; the First 40 Years

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## OPEN ACCESS

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### Specialty section:

This article was submitted to  
Special Educational Needs,  
a section of the journal  
Frontiers in Education

**Received:** 14 February 2019

**Accepted:** 17 May 2019

**Published:** 22 October 2019

### Citation:

Lamb B (2019) Statutory Assessment  
for Special Educational Needs and the  
Warnock Report; the First 40 Years.  
*Front. Educ.* 4:51.  
doi: 10.3389/feduc.2019.00051

The Warnock report ‘Special Educational Needs’ (Warnock, 1978) provided the catalyst for an enduring framework of individual statutory assessment<sup>1</sup> in England for children and young people (CYP) with Special Educational Needs (SEN). Through its implementation in the Education Act (1981), enhanced in the Education Act (1993) and consolidated in the Education Act (1996), the report established the overall SEN framework in England for last 40 years; laying the foundation for statements of SEN and more recently Education, Health and Care Plans (EHCPs). The underlying legal structure has been reinforced with the introduction of the Children and Families Act (2014). However, by establishing the right to specified levels of resource for individual CYP, the Warnock framework has risked undermining adequate provision and parental confidence in the Special Educational Needs and Disability (SEND) framework; a central dilemma of the SEND system. This review considers the development of the statutory assessment system and the consequences of this specific model of securing provision for CYP with complex needs. It also explores the importance of securing parental confidence in the non-statutory offer. While additional legislation to strengthen the SEND framework is desirable the Government could begin to address concerns about the quality of the non-statutory offer through a more rigorous implementation of current legislation linked to reforms in funding, accountability and a renewed focus on rights based legislation in education. The conclusions are focused on the English system but the analysis is relevant to other jurisdiction’s assessment, funding, and accountability models.

**Keywords:** Warnock, statements of special educational needs, SEND reforms, education, health and care plans, Equality Act, SEND funding

## INTRODUCTION

### Warnock and Assessment

The Warnock Report envisaged assessments would be focused on those needing additional support as “children who require the provision of regular special help outside the ordinary school . . . call for greater resources and more complex organization of services.” The assessment was a means to secure these resources; “Unless these needs and the corresponding means of meeting them are explicitly recorded there will be real danger of insufficiency or default in their provision” (Warnock, 1978, sec 4.69). By creating protection for a defined level of provision Warnock intended to secure resources for children who had only recently had their entitlement to education

<sup>1</sup>Statutory assessment is used here to denote the process of assessment, agreeing a statutory plan or refusal to proceed to a statutory plan.

recognized (Warnock, 2010). Building on the Committee's recommendations statements of SEN were introduced in the Education Act (1981), with the first statements issued in 1983. Warnock assumed that local authorities (LAs) would be responsible for children with the most complex needs, thought to be 2% out of the 20%, which might meet the new designation of SEN that the Committee proposed (Warnock, 1978, sec 3.17). The number of statements stayed relatively stable during the 1980's in line with the stated intentions of the new system to secure provision for the most complex children (Williams and Maloney, 1998).

From its inception the framework was questioned as a means of organizing SEN provision with the House of Commons Education Committee (1987) concluding that the measures were good but had been poorly implemented. The Audit Commission review (1992) was more critical, finding that despite advances the new system had produced growing conflict with parents, a lack of clarity about who was covered, that resources were not being guaranteed and better outcomes had not been secured for many children. It also recommended that LAs should increase the capability of "ordinary schools to provide for pupils with special needs" (Audit Commission, 1992, par 160). A theme echoed in a House of Commons Education Committee Report the following year which recommended restricting statements to a "minority of pupils" (House of Commons Education Committee, 1993, par 32). Warnock went further suggesting "it seems to me time to get rid of what may be an obstacle to good and imaginative education" and concluded that "statementing should be abolished" (Warnock, 1993, p. xi, ix).

The Government responded to the criticisms by enhancing the statutory assessment framework through the Education Act (1993) and the subsequent SEN Code of Practice (DfEE, 1994), which was later consolidated into the Education Act (1996). This included measures to ensure compliance and enhanced protections, giving parents more opportunity to challenge local authority decisions by establishing the SEN Tribunal, improving choice over provision and speeding up the process of assessment. The role of statutory assessment was to secure a right to a specified and quantified level of educational support in a legally enforceable plan for a child with SEN. The protection statements provided, together with its role in allocating special school places, came to be seen by families as the "gold standard" for securing provision. In consequence reliance on statements grew in the early nineties and accelerated further following the 1993 Education Act reforms. Increasing from 168,000 in 1992 (Audit Commission, 1992) to 264,850 in 2002, exceeding demographic growth factors (Marsh, 2014). What started out as an exceptional means to ensure provision for children with complex needs was in danger of becoming a routine way of identifying and meeting wider SEN need. In the process undermining Warnock's intention that "The vast majority of children with special educational needs do not and should not have statements" (House of Lords 27th April 1993, Col 287). The impact of the focus on individual provision was raised in an Office for Standards in Education (Ofsted) and Audit Commission report which noted that LAs were "struggling to achieve strategic

coherence and budgetary control against a statutory framework that accords uncontested priority to individual needs" (Ofsted and the Audit Commission, 2001, p. 4).

When the seminal Audit Commission reports (2002a; 2002b) set out a critique of the statutory assessment system they were also crystalizing a number of concerns about its overall impact in the intervening period since its inception (Lunt and Evans, 1994; Coopers and Lybrand SEO CIPFA, 1996; Williams and Maloney, 1998). The Audit Commissions analysis centered on problems with the assessment process, resource allocation, and parental assurance and set the fault lines for debate on statutory assessment. On process it found that "Statutory assessment is a costly and bureaucratic process... which many parents find stressful and alienating" (Audit Commission, 2002a, p. 13; Pinney, 2002). Professionals also felt that they should be providing early support and intervention but were diverted from this by the process of making and maintaining assessments (Audit Commission, 2002a; Florian, 2002). The production of the statement had become an end in itself and was "hampering the design of an appropriate continuum of provision" (Audit Commission Ofsted, 2002, par 47). Further, LAs were routinely being held responsible for provision outside their control and assessments were not being joined up. The Commission concluded by recommending that unified children's services with a shared budget would create the potential for more planning across health and social care.

Statutory assessment was also "a poor way of allocating resources within the system," anticipating Warnock's later criticisms (Warnock, 2005, 2010) they concluded that "for pupils within mainstream an inefficient means of allocating funding" (Audit Commission Ofsted, 2002, par 47). Some LAs had been successful in reducing statements by delegating funding and the Commission proposed schools should hold most SEN resources in their own budgets. They argued this would lead to greater incentives to develop the skills and capacity to meet a wider range of pupil needs without seeking statutory assessment. Further, that focusing on what schools needed to manage CYP with SEN rather than what individual pupils needed would help stem the continued imbalance in resource allocation between statutory and non-statutory provision. These concerns were reinforced by Ofsted who noted that the statementing system was "an overly cumbersome and bureaucratic procedure in order to ascertain where a pupil should be taught or what resources should be allocated" (Ofsted, 2006, par 58). Though they did accept statements could function well in assessing initial needs.

It has often been the cost of statutory assessments and their inefficiency as a resource allocation mechanism that has dominated the debate on statutory assessment. What has been less focused on is the crucial role that the lack of parental confidence in the non-statutory offer has played in explaining the reliance on statutory assessment. The Audit Commission found that there; "is lack of confidence, particularly on the part of parents, that, without the protection it provides, the provision that is needed will be made. Where there is confidence, the statement is unnecessary," (Audit Commission Ofsted, 2002, par 47). They also noted that parents were poorly served by the statutory framework but "terrified" about losing the benefits it

bestowed (Pinney, 2002, p. 122). A crucial consideration as by 2005/6 over 3 per cent of the school population were reliant on statements, equating to ~77,000 additional pupils above the original 2% estimate of those who would need a statement (Audit Commission, 2007).

Parents “value the security of a statement and the confidence it gives them to challenge the authority if the provision agreed is not forthcoming” (Lamb, 2009a, p4; Lindsay et al., 2010). This helps explain the durability of the statutory assessment framework, despite continued criticism of both the processes and what they secure, as any change to the system has to retain parental confidence that current entitlements and future protections will not be reduced. Thus, while there have been consistent calls for a radical review of statutory assessment or its abolition (Audit Commission, 1992, 2002a; Warnock, 1993, 2005, 2010; Williams and Maloney, 1998; MacBeath et al., 2006; Ofsted, 2006) parent groups and advocacy organizations have tended to seek an improvement in the assessment process, tightening of requirements and more legislative entitlements to be able to hold the system to account as evidence to parliamentary inquires has illustrated (House of Commons Education and Skills Select Committee, 2006; House of Commons Education Select Committee, 2019).

## THE DEBATE ON WARNOCK’S STATUTORY ASSESSMENT FRAMEWORK

Securing parental confidence in provision without recourse to statutory assessment is a crucial element of the debate on, and the solutions proposed to, the Warnock framework. These issues are now explored within the context in which they developed in the public debate on the future of the system.

### Restrict Statutory Assessment to Special School or Mainstream Provision

In 1992/3 the Government responded to the Audit Commission criticisms of the statutory process by tightening statutory duties on LAs and schools however by the time of 2002 Audit Commission critique they had moved to reverse the emphasis on statements. The Department for Education and Employment (DfEE) had concluded in 1997 that “statements can act as barriers to full inclusion of pupils with SEN” (DfEE, 1997, p. 36) and had put in place measures to improve the non-statutory offer, embedding these in a revised SEN CoP and related guidance (DfES, 2001a,b). The revised code sought to enhance pupil and parent participation, improve provision of information to parents and promote early intervention. It also aimed to create a partnership approach between LAs, schools, services and parents. The focus on enhancing mainstream provision was also bolstered by the introduction of a rights based framework, the Special Educational Needs and Disability Act (2001). The Act created a greater presumption toward inclusion and introduced new rights to non-discrimination in education for disabled CYP, a group who overlapped but were not coterminous with those covered by the SEN definition. With three-quarters of disabled children also having SEN (Porter et al., 2008). These measures were also

reflected in the revised SEN CoP and guidance (DfES, 2001a,b), and together were referred to as the inclusion framework (Ofsted, 2004). However, a subsequent review by Ofsted found that many schools had not implemented the new access plans or reasonable adjustment duties contained in the new legislation and were “not reaching out to take pupils with more complex needs” (Ofsted, 2004, par 110).

A new policy statement, Removing Barriers to Achievement and associated guidance, was also developed with the aim of promoting early intervention, improved teaching and greater access to specialist skills. It was hoped this would lead to a “reduced reliance on statements” and a reduction in special schools placements as mainstream skills and support increased (DfES, 2004, p. 18–19, 37). The overall strategy was successful to the extent that there was an 11% reduction in statements over the 10 years from 2003 to 2013 (Marsh, 2014). However, during this period, there remained significant variation in the number of statements between LAs and variation in provision (Penfold et al., 2009; Lewis et al., 2010; Marsh, 2014). Many parents groups remained critical of the statementing process and the provision it secured which fueled a continuing lack of parental confidence in the SEN system (House of Commons Education and Skills Select Committee, 2006; Lamb, 2009a; Lindsay et al., 2010).

While the DfES were still grappling with improving the non-statutory offer Warnock produced a revisionist paper (Warnock, 2005), criticizing how her original report had been implemented, building on her earlier critique (Warnock, 1993). Arguing that her Committee’s framework had been extended and misapplied the paper provoked radical questioning of the Government’s strategy. Warnock claimed that the placement of children with complex needs in mainstream schools had been a “disastrous legacy” of the original report. Her “recantation” was consistent with her earlier views that statements should be for children with the most complex needs which could not be met within mainstream provision (Warnock, 2005, 2010; Norwich, 2010). Her claim in part echoed the conclusions of the Audit Commission Ofsted review 2002 that statutory protection should not be needed for mainstream placements if provision could be improved.

Warnock’s critique provoked a new Select Committee inquiry into SEN which issued two reports critical of the statementing system (House of Commons Education and Skills Select Committee, 2006, 2007). The intervention was successful in focusing debates in the Education Select Committee on the functioning of statements and the concept of inclusion (House of Commons Education and Skills Select Committee, 2006, 2007). The evidence of many parents groups on the flaws in the statementing system gave purchase to Warnock’s criticisms of statutory assessment. However, her proposal to restrict statements to a passport for placement in special schools conflated complexity of need with one type of provision. In doing so it also ignored the more nuanced conceptualization of inclusion which focused on the process of inclusion not the place of education and also had less to say on how to improve non-statutory provision (DfES, 2005; Lindsay, 2007; Norwich, 2010).

Though not explored to the same extent there was also the option that the statutory system should only apply to pupils who have significant SEN placed in mainstream schools, the reverse of Warnock's revised proposal. It could be argued that those who go to special schools or resourced units do not need to have statutory protection as specialist provision is available to meet their needs. Statutory protections would then be reserved for mainstream provision where the adequacy of provision might be more insecure. However, this solution would still need a process for allocating special school places and assumes special school placements will always meet need. The most time consuming and often contested part of the statutory process would still have to remain in some form with a statutory right to appeal against decisions around placement. At best it is only a partial solution but does have the advantage of focusing attention on the quality of the mainstream offer.

### Separation of Assessment From Provision

The most routinely promoted solution to reforming statements that emerged from the Select Committee reports and subsequent debate was to separate statutory assessment into an independent assessment agency leaving LAs to organize provision (House of Commons Education and Skills Select Committee, 2006, 2007; Balchin, 2007; Hartley, 2010). This was supported by Warnock as an "obviously desirable reform" (Warnock, 2010, p. 118). The proposal sought to address concerns that LAs had a conflict of interest as both assessor of need and provider of services which resulted in Educational Psychologists (EPs) routinely fettering the content of statements to manage demand. The proposal also resonated with parents who had poor experiences of the assessment process (House of Commons Education and Skills Select Committee, 2006, 2007). However, if LAs had been restrained by this conflict of interest to both assess and provide it was difficult to account for the fact that the number of statements had grown so significantly during the previous period beyond demographic trends (Audit Commission, 2007). Further, there was a lack of systematic evidence to suggest collusion by EPs with the LA to fetter statements rather than a settled culture of assessing for what was known to be available in some LAs (Lamb, 2009a) and informal rationing through restricting the numbers assessed in the first place (House of Commons Education Select Committee, 2012a, Q 54f).

The Government responded that a radical separation of assessment from provision would "be a leap in the dark and would endanger the position of parents and children with special educational needs" (DfES, 2006, p. 5) by undermining current entitlements to provision. The requirement for a separate assessment agency, either nationally or embedded locally within other organizations, also required significant restructuring of LAs and the creation of independent assessment agencies. By the time the new Coalition Government came to consider the proposals in 2011 such agencies had been heavily criticized in respect of benefit assessments (House of Commons Work and Pensions Committee, 2011) and this made the Government reluctant to follow suit in such a highly sensitive area. While resource allocation would have been more transparent, without commitment to fund the potentially open ended budget this

solution required, it was difficult to see how separation would have been politically feasible. As an alternative the DfE proposed "introducing more independence into the assessments" (DfE, 2011, p. 6) through voluntary sector involvement. These proposals were quietly jettisoned once the risks and voluntary sector resistance to being co-opted were taken into account. However, the debate did emphasize the continuing fundamental role which statutory assessment played in securing resources and parental confidence.

### Improving Confidence in the SEN Offer

How to improve the SEN offer was addressed in a number of related reviews commissioned in response to the Select Committee reports by the Government. The support of well-trained teachers with expertise in SEN, to strengthen provision for children was stressed in reviews of communication (Bercow, 2008), and dyslexia (Rose, 2009). Following these reports the Lamb Inquiry (Lamb, 2009a) examined how to secure greater parental confidence in the statutory assessment process. The Inquiry found that many parents lacked confidence in the assessment process including how needs were determined and reviewed. Parents wanted to be listened to and the system to be more ambitious for their children. They also valued the provision obtained through statutory assessment, even when there had been conflict securing it. The Inquiry responded to these concerns by seeking to improve accountability across the system including increased parental and CYPs engagement. It also recommended enhancing professional skills and a focus on ensuring better outcomes. The extension of the disability rights framework to auxiliary aids and services was also recommended as a means of extending statutory protections (Lamb, 2009a; Lindsay et al., 2010). It concluded that there should be no change in statute or policy which aimed to reduce the number of statements. If children were making good progress, supported by improved parental engagement this would increase parental confidence and, as a by-product, parents might then rely less on the statutory system. Providing additional resources before the statutory stage could also help ensure that a statutory assessment was not required to meet need (Lamb, 2009a).

The Inquiry provoked the issuing of new guidance on writing outcomes focused statements from National Strategies (DCSF, 2010) and strengthening parents' rights to appeal if statements were not reviewed. The Equality Act (2010) extended the right to auxiliary aids and services in schools and LAs to disabled pupils, while the focus on parental engagement and improved information was reflected in the strengthening of parental and CYPs rights to be involved in decision making in the Children and Families Act (2014).

Following from these reviews Ofsted's influential Special Educational Needs and Disability Review: A Statement is not Enough (Ofsted, 2010) also explicitly rejected increasing or tightening the statutory framework in favor of improving the identification of SEN, enhancing teaching and focusing on outcomes. It argued that poor teaching caused poor progression and was being confounded with SEN. This meant that SEN needs were being overstated and confusing identification of need, taking the focus and specialist provision away from CYP who

really did need the additional support. The review recommended that any changes to the statutory framework should be focused on simplification and ensuring better assessment which would lead to better outcomes. These recommendations were reflected in the focus on improved identification and teaching introduced by 2014 reforms.

### Remove or Restrict Statutory Assessment

Some commentators argued that the framework should be adjusted to remove the statutory stage or dismantled altogether and be replaced by a more generalist assessment for all children, with a much greater focus on early intervention and greater investment in the system overall to secure provision (Williams and Maloney, 1998; Sodha and Margo, 2010). However, without a fundamental improvement in non-statutory provision it is unlikely that removing statutory protection would be able to secure parental confidence for any change and this option secured little traction in the ensuing debate.

Another option was to maintain a multi-agency assessment outside of a specific statutory protection framework, giving parents the choice to be covered by statutory protection depending on their level of confidence in provision (Norwich, 2010). Where the provision is satisfactory then a simplified assessment could be used to establish what support children needed. To some extent this already took place when LAs used their discretion to supplement school funds and the parent then chose not to pursue statutory protection. The advantage was that it set a direction of travel and incentivized schools to make better provision. This option would require significant levels of delegation to schools for which they would need to be held accountable. Using delegation in this way was consistently recommended by the Audit Commission (1992, 2002a, 2007). This had the advantage of retaining confidence that statutory protection could be available if confidence declined and a simpler route to additional provision. The innovative pilots for the Lamb Inquiry tested parents relying less on statements in Oxford, Newham and Blackburn and Darwin. Parents interviewed welcomed the greater delegation of resources but were most interested in the provision this secured. However, they were also concerned about not having access to statutory protection especially at secondary school (Lindsay et al., 2010, p. 61). The proposal did not gain purchase in the ensuing debate given the concerns about how the system was working. However, the central insight of building confidence in provision to reduce dependence on the statutory framework could be part of a longer term solution if linked with other confidence building measures for parents.

## THE SEND REFORMS

### Widening the Scope of Statutory Assessment

The DfE had responded piecemeal to the individual reviews but the cumulative weight of their conclusions led to a complete review of the SEN system under the new Coalition Government starting in 2010. The primary focus of the review centered on reforming the process of assessment, and extending the age range

of the statutory assessment framework while less attention was given to the non-statutory system (DfE, 2011, 2012). The result of an extend period of pre-legislative scrutiny and consultation with parent groups was the new Children and Families Act (2014) and Code of Practice (DfE/DoH, 2015). This changed statements to become EHCPs and extended statutory protection to the 16–25 cohort, abolishing Learning Difficulty Assessments. The reforms were aimed at addressing the lack of cohesion around statutory assessment in respect of multi-agency assessment and reducing the number of individual assessments for services for those with complex needs (DfE, 2011). In doing so the reforms borrowed heavily from the personalization approach and also sought to strengthen existing joint commissioning and planning duties.

Educational need remained the trigger for the production of a statutory assessment while integrating complex health and social care needs into the assessment process where there was also an educational need. Securing parental confidence and support for the new system meant guaranteeing that current recipients of statements would be covered by the new plans and that the legal test to qualify for a statutory plan would remain the same (DfE, 2011). The legislation also introduced requirements to produce an outcomes focused plan, reduced the timescale for completing the plan from 26 to 20 weeks and harnessed this to a renewed emphasis on parental and CYPs engagement in the process of strategic planning through the Local Offer. This included parents and CYP being consulted on the appropriateness of the Local Offer and information on the services and support available in their area. There were also additional requirements for mediation before going to Tribunal and the introduction of personal budgets for educational provision.

The reforms failed to extend legal protections in plans beyond education provision to health and social care. EHCPs therefore strengthened requirements which were already in the original statementing process to take account of multi-agency assessments but without adding the binding legal protection of the SEND Tribunal (Norwich and Eaton, 2014). The proposals did not set targets for the number of EHCPs but in early discussions many LAs assumed this more complex process might be delayed while LAs increased their capabilities (House of Commons Education Select Committee, 2012a, Q 54–Q60f; House of Commons Education Select Committee, 2012b, par 20–21, 46). By making statutory assessment a gateway to coordinated assessment and extending the age range of the EHCP the reforms effectively enhanced the relevance, status and utility of statutory assessment for parents and CYP. In effect the EHCP has continued the parental assumption that this was the “golden ticket” to better provision and outcomes in many LAs if they believed non-statutory provision was not secure (Ofsted/CQC, 2017, par 30).

### Implementation

The DfE tested the reform proposals through a Pathfinder Programme with 6 of the 9 objectives focused primarily on statutory assessment (Hill et al., 2014). Additional funding for the new reforms included over £70 million allocated to help LAs prepare for their new statutory duties in 2014 and this was

followed by £153 million in “new burdens” funding with £23 million for strategic planning on high needs provision. Most of which seems to have been deployed on the additional costs of transition to the new statutory assessment system, though it is difficult to accurately track where this expenditure has been deployed. There has also been funding for parent carer forums to support engagement and information provision to parents and CYP (DfE, 2018a; Kerr, 2018). The Independent Support programme was also given £60 million to provide support to families going through the transition from Statements to EHC plans (DfE, 2018a). The additional resources devoted to enhancing mainstream teacher skills in SEND has been significantly less than investment in implementing EHCPs and the strategic focus on non-statutory support has come much later in the implementation process. Additional funding was deployed to develop resources and support across all aspects of the reforms to specific impairment groups such as sensory impairment, autism and speech, language and communication from 2014, but this funding is now winding down and was of a much smaller scale. The Whole School SEND Consortium has also been funded £3.4 million, following backing to pilot the approach, over the period 2018–20 to support the schools workforce focus on skills and planning around SEND (DfE, 2018b). The additional resource for transition to EHCPs was necessary to secure the changes in systems and enhanced capacity for LAs, while the support for parents in the transition process was crucial to support the transfer process for statements. However, the strategic and resource focus in the first 4 years of implementing the reforms were weighted towards the statutory system.

If there were expectations or fears that the more complex EHCPs would produce fewer statutory plans this has not been the case. The number of statutory plans under the new system has increased by just under 50%, from 237,111 statements in 2014 to 354,000 EHCPs as at January 2019 (DfE, 2019a, SEN 2 figures)<sup>2</sup>. The increase from January 2018 to January 2019 was 34,200 (11%) up from 319,800 CYP with an EHCP or statement to 354,000 with an EHCP (DfE, 2019a). This continues the upward trend of the previous 2 years where there were 12.1% (30,975) more CYP with statements or EHCPs in January 2017 compared to January 2016 (DfE, 2017), and 11.3% more (32,529) CYP with statements or EHCPs in January 2018 than the previous year (DfE, 2018c). There were 48,900 CYP with new EHCPs issued during 2018 an increase of 6,700 (16%) compared with 2017. The figures also show large variations between different LAs use of statutory assessment with around 30% of LAs seeing a reduction in new EHCPs (DfE, 2019a). If we look at the school population the percentage of pupils with an EHCP has risen to 3.1% (271,165) of the total pupil population from 2.9% (253,680) in 2018. Before this it had remained constant from 2007 to 2017 at 2.8% (DfE, 2018d, 2019b School Census figures). This means that around one-fifth of the school SEN population are covered by a statutory plan.

<sup>2</sup>SEN 2 figures are the most comprehensive analysis of all CYP with an EHCP. School Census figures also quoted here below refer only to school aged children and are collected through the school census.

A significant proportion of the growth in EHCPs has been driven by the opening up of statutory protection to the 16–25 cohort (replacing Learning Difficult Assessments for young people in further education and extending the age range). The proportion of the 16–19 age group moved from 10% of all statements in January 2014 to 22% of all EHCPs in January 2019, while the 20–25 age group represents 5% of all plans as at January 2019. This leaves just under three-quarters of EHCPs in the pre-16 age groups with the 11–15 years old group the largest at 36% of the total in January 2019. The increase in EHCPs is now across all age groups, with the largest percentage increases in the 0–5 age group (13%) and the 20–25 age group (32%) as at January 2019 from the previous year (DfE, 2019a). The number of initial requests for an EHCP has also risen to 72,400 during 2018, an increase of 12% since 2017. Of which 17,900 (25%) were refused (DfE, 2019a). This compares to 14,600 (23%) who were refused in 2017 (DfE, 2018c). LAs identify school exclusions, pressure on mainstream provision, and schools being less inclusive as important factors in the demand for additional EHCPs as well as rising levels of need and the extension of the statutory framework (Parish et al., 2018). LA leaders have also questioned the extent to which statutory assessment should be relied on if there is good provision in place (House of Commons Education Select Committee 8th May 2019, Written Evidence SCN0685).

Demographic trends are also driving demand with a growing incidence of complex needs (Pinney, 2017) which has also been observed by LAs (Parish et al., 2018). Pressures which will be added to by a growth in school age population, where “the latest DfE projections for Years 7–11 estimate that the state-funded secondary age (11–15) population will grow by 15% (427,000 pupils) between 2018 and 2027” which translates to roughly an additional 15,000 pupils with EHCPs compared to 2018 on current trends (Thompson, 2019), further increasing the strain on the statutory assessment system and LA budgets. The extension of EHCPs to the post 19 years age group is also being reflected in the figures with an estimated 15,000 additional EHCPs needed between 2014 and 2020 (Parish et al., 2018, p. 17).

Minsters have stated that there was a deliberate relaxation in part of the criteria for assessments where “may have SEN” was introduced into the definition which triggers an assessment. This has potentially widened the number of CYP who could be covered by the definition (House of Commons Education Select Committee, 2019 Q814–816). It could therefore be argued that some of the significant growth in EHCPs can be understood as the system meeting additionally identified needs and the growth is therefore welcome. If this is the intended objective of the policy then the Government needs to fully fund the capacity of LAs to respond. However, it is not clear why some of the needs currently addressed by the statutory process could not be met earlier through enhanced provision outside of the statutory framework. Thus, using some of the transactional costs incurred in producing the EHCP on early intervention and support as required by the CoP (DfE/DoH, 2015, p. 79) and potentially reducing the need for more intervention later.

The challenge of introducing the new EHCPs, while simultaneously converting all the existing statements, has

absorbed the capacity of LAs and diverted special educational needs coordinator's (SENCOs) and schools from focusing on the new SEN support category. LAs are struggling to complete plans within the new timescales with only 60.1% being completed within the 20 week deadline in 2018, lower than the previous year (64.9%) and the starting point in 2014 which stood at 64.3% (DfE, 2019a). With 50% of teachers in one survey saying that they had taken on additional work to complete plans for the LA (NASWUT, 2018). The greater personalization and complexity of assessments suggests that the investment of staff time and costs in completing the process will also have increased compared to statements though this is dependent on how they are implemented by LAs (Craston et al., 2014).

A majority of parents and CYP have valued the more personalized and outcomes focused assessment process. A large scale survey of 13,643 new EHCPs in 2015 found that around two-thirds of parents were happy with the overall process and around the same proportion were confident about the outcomes being achieved as part of the new process (Adams et al., 2017). However there were continuing concerns about some aspects of the new process with less than half (46%) saying their plan had helped them and their family to have the life they want to lead (Adams et al., 2017). While an in-depth analysis also showed wide variation in parental satisfaction with some elements of the process (Adams et al., 2018). There is also continued evidence from statutory bodies of variability in the quality, consistency and delivery of EHCPs (Local Government and Care Ombudsman, 2017; Ofsted/CQC, 2017). In addition there has been continuing dissatisfaction from parent groups including those representing CYP with dyslexia and autism (Driver Trust, 2015; Moore, 2016).

The quality of the transfer process from statements to EHCPs has been questioned with 52% of respondents, to a survey of 430 organizations and professionals directly involved in the transfer process, saying that children being transferred from statements rarely or never received their legal entitlement to a full EHCP needs assessment (Special Educational Consortium, 2018). While a large scale survey of 349 SEN professionals found that 32.14% did not think that EHCPs convey a better picture of the needs of CYP than statements (Palikara et al., 2019, p. 90). There are also continuing complaints about provision being constrained even when statutory assessment is secured (House of Commons Education Select Committee, 2019). Failure to integrate health and social care into the EHCP assessment is also undermining one of the key objectives of the new assessment process. Ofsted's annual review noted that out of 68 reviews undertaken of LAs implementation of the reforms 30 LAs had required a written statement of action with continuing concerns about the integration of health and social services advice, and planning for EHCPs often cited in individual reports (Ofsted/CQC, 2017; Ofsted, 2018, p. 53). Nevertheless, greater personalization and increasing parental and CYPs voice within EHCPs has been welcomed even where LAs capacity to implement this has been questioned (Adams et al., 2017; Lamb, 2018).

Which CYP are placed in special schools is not simply a function of SEND need but what support can be accessed outside of the special school setting. Choosing to seek a special school placement often happens only after parents lose confidence in

the mainstream offer as most pupils in special school start in the mainstream (Bryant and Swords, 2018). The increase in the number of statutory plans has also coincided with an increasing trend toward placement in special schools of pupils with EHCPs and statements with an increase from 38.2% to 43.8% in state funded special schools and from 4.2% to 6.1% in independent special schools since 2010. Less than half of all pupils with EHCPs (47.9%) attended mainstream schools in 2018 (DfE, 2019b). This increase in part predates the change in policy away from the presumption toward inclusion brought in by the Coalition Government (DfE, 2011, p. 5, 17, 51).

Only part of the trend toward additional special school placement can be explained by demographic growth (Black, 2017) and suggests a continuing weakness in the mainstream offer, for both statutory and non statutory provision, could be a factor along with funding incentives for schools to move children out of mainstream provision explored below. For example a review of provision for those with statutory provision in mainstream schools concluded that "the overhaul to the SEND system does not yet appear to have had a profound effect on secondary school leaders' thinking and approach to provision for pupils with SEND." Also that there was "an absence of strong leadership in primary and secondary schools with respect to SEND" (Webster and Blatchford, 2017 p. 6, 95).

The use of out of authority placements has also been a growing trend within the rise in special schools placement. The cost of Independent Non Maintained Special Schools (INMSS) is consistently higher than in authority provision and is often required because of the additional non-educational support elements or behavior management issues. Thus, while only 6% of CYP with EHCPs are in INMSS placements they account, on average, for 14% of LAs expenditure (Parish et al., 2018, p. 21). With the full cost of complex residential placements falling on the High Needs Block (HNB), even if the originating need for the placement is not educational need (Parish et al., 2018). Gaps in specialist services such as speech and language therapy, specialist teachers, mental health services and behavior support also drives demand for more costly specialist residential placements and diverts funds from developing sustainable local services (Lenehan and Geraghty, 2017).

The DfE's response to the growing crisis in provision has been to announce funding which would secure 39 new special free schools and AP provision offering an extra 3,459 extra places for pupils (DfE, 2019c) but this clearly falls short of the potential total number needed on current placement trends and increasing demand.

Creating gateways to accessing specialist provision means it is inevitable that there will be disputes at the edge of that boundary with so much at stake (Meijer, 1999). As the numbers covered by the statutory system grow so does the boundary edge at which disputes will take place. The total number of registered claims for the First-tier Tribunal (Special Educational Needs Tribunal-SENDIST) has increased from 3,557 in 2012 to 5,679 in August 2018 with an increase of 20% in 2018 from the previous year (Ministry of Justice, 2018). The LA loses almost 9 in 10 cases heard questioning the quality of LAs decision making on SENDIST cases. The introduction

of a statutory right to mediation was aimed at reducing the number of appeals going to SENDIST by introducing a requirement to consider mediation before progressing to a hearing. An analysis of the early mediation cases from a survey of LAs showed a 14% reduction of appeals going to SENDIST (Cullen et al., 2017). While the figures for 2018 show that of the 3,200 mediation cases held during 2018, 800 (26%) were followed by appeals to SENDIST suggesting that the mediation process has been successful at reducing the number of cases that might otherwise go to SENDIST (DfE, 2019a). This needs treating with some caution as analysis from a large mediation provider covering 19 LAs shows that of 1,972 enquiries dealt with in a 10 month period in 2017–18, 1,221 were requests for Part 1 certificates, with the parent or CYP not proceeding further with the mediation process (Global Mediation, 2019). These figures suggest that a significant number of parents undertaking the mediation process do so to bolster their case in then moving to an EHCP. There are very different rates of appeal across different LAs (Ministry of Justice, 2018). This reflects the size of the LA and assessment policies but also indicates significant variations across LAs in parental confidence in the statutory assessment process, with 30% of appeals against a refusal to secure an EHCP and 56% disputing the content of EHCPs (Ministry of Justice, 2018). The overall proportion of SENDIST cases are only 1.5% of appealable decisions but the proportion is rising (Ministry of Justice, 2018) and they are an important indication of continuing levels of conflict in obtaining a statutory plan and the contents of that plan.

## SEN Support and Statutory Assessment

An important strand of the DfE's strategy to improve the SEN offer in schools has been to enhance teacher skills on SEN. The Making Good Progress initiative 2007–2009 (PricewaterhouseCoopers LLP, 2010) explored improving teacher skills to support improved attainment. This was further developed in a pilot with a focus on parental engagement, wider outcomes and school leadership through Achievement for All (Afa) 2009–2011 which was developed from the Lamb Inquiry (Lamb, 2009a). A positive evaluation of the Afa pilot (Humphrey and Squires, 2011) was reflected in the reform proposals (DfE, 2011) and influenced the schools chapter of the SEND Code of Practice (DfE/DoH, 2015 p. 276). The Afa programme was converted into a charity to promote the approach in early years, schools and colleges on a traded basis (Blandford and Knowles, 2013).

The focus on the quality of teaching rather than hours of support led to more attention on classroom teachers taking more responsibility for children with SEND in the revised CoP (Blatchford et al., 2009; Ofsted, 2010; Webster and Blatchford, 2014; DfE/DoH, 2015). The DfE has also enhanced the focus in initial teacher training on SEN and supported an expanded role for SENCOs within the CoP (CoP, DfE/DoH, 2015, Chp 6). However, the DfE's continued drive to have a more market led approach to continuing professional development (CPD) in schools has limited its capacity to intervene, which has contributed to significant

gaps in some aspects of school based CPD for SEND (Wall et al., 2019). It also means that the main strategic tool for the DfE in influencing school capability on SEND is the provision of small scale contracts to support workforce awareness, training and development through the voluntary sector with resources mainly aimed at SENCOs and other front line staff (DfE, 2018b).

The 2014 reforms made limited alterations to schools obligations on SEN. The most significant change was to abolish the categories of School Action and School Action Plus in favor of introducing a single SEN support category for non-statutory provision which was implemented through the CoP (DfE/DoH, 2015). This was intended in part to stop the too easy conflation of SEN with CYP who had simply fallen behind through poor teaching, an issue identified by Ofsted in its 2010 report, and improve identification of SEN (DfE, 2011, p. 10; Ofsted, 2010). The numbers of children identified as SEN has dropped significantly from a peak of 21.1% of all pupils in 2010 to 14.9% in 2019 (DfE, 2019b). However, there was a significant fall in numbers before the abolition of School Action and School Action Plus categories, suggesting that Ofsted's (2010) focus on accurate identification of SEN had already achieved a change in practice with a downward pressure on numbers. Creating a single category of SEN has created a binary division between SEN support and a statutory assessment. This can make it more difficult to demonstrate to parents where additional resources are being deployed as part of the graduated approach introduced in the CoP before statutory assessment (DfE/DoH, 2015). It may be that the revised framework has helped to drive additional demand for statutory assessment as parents think securing statutory protection is the main route to additional provision.

The number of children identified with SEN annually may not be representative of the total number over time within a particular cohort of children as they progress through school. Analysis has shown that because children move in and out of being categorized as having SEN, due to the relativity inherent in the definition, the overall number of children over the course of a cohort going through the schools system can be much higher than the overall figure in the annual statistics. Thus, one analysis suggests 39% of children were recorded with SEN at some point between Reception (age five) and Year 11 (age sixteen) (Hutchinson, 2017) while a different analysis put the figure at 44% identified over a similar period (Thompson, 2018). The period measured cuts across the change in SEN categories. However, this still suggests that the headline figure underestimates the overall level of SEN identified across a period of time with potential consequences for how provision is being resourced at SEN support.

There have been many examples of good practice for children in the SEN support category (Bryant and Swords, 2018; Lamb, 2018) but the relative lack of focus on the non-statutory offer has meant poor provision and outcomes in some LAs. A summary of the first 30 local area inspections by Ofsted found that "Children and young people identified as needing SEN support had not benefited from the implementation of the Code of Practice well enough" (Ofsted/CQC, 2017; p. 27), and that "A large proportion



of parents in the local areas inspected lacked confidence in the ability of mainstream schools to meet their child's needs" (Ofsted/CQC, 2017, p. 6). While many parents of children with SEN are not confident that schools understand their children's needs with 32% not feeling that schools are putting in place the right level of support for their child, or engaging them in their child's education (DfE, 2018e). In a survey of Parent Carer forums 57% were not confident that schools provide good SEND support that enabled children to achieve good outcomes with only 2% very confident (Contact et al., 2017).

The SENCo role is fundamentally important in supporting better provision for SEN in school, yet SENCos think their role is undervalued. A large scale study of 1,940 SENCos experiences of the reforms found that only 27% felt their role was understood by colleagues and less than half (46%) thought their role was understood by senior management. Additionally 74% of SENCos stated that they do not have enough time to ensure that pupils on SEN support are able to access the provision that they need (Curran et al., 2018). Further, pupils with SEN make less progress in all subjects compared with pupils with no identified SEN with an attainment gap of 52% in reading, writing and maths (DfE, 2018f). While Ofsted concluded that "the gap in outcomes for children with SEND continues to widen. Identification of SEND is weak and those who do not quite meet the threshold for an EHC plan have poor outcomes" (Ofsted, 2018, p. 13). Poor outcomes erode parental confidence in provision and are another factor in encouraging them to seek statutory protection (Lamb, 2009a; Ofsted, 2018).

Provision for the SEN support category is also being undermined by a lack of resources. Funding per pupil has fallen by 8% in real terms since 2010 (Institute of Fiscal Studies, 2018) which means it is not surprising that 94% of school leaders, in one survey, said that they are finding it harder than 2 years ago to fund support for pupils with SEN. With 73% of respondents saying it was harder to resource support for pupils with SEN due to lack of mainstream funding where cuts to TAs and pastoral staff have had a major impact (NAHT, 2018). Another survey of teachers, including specialist teachers of SEN, found that almost two-thirds of respondents (62%) reported a decrease in the level of support to CYP with SEN they provided (NASWUT, 2018). Lack of support to mainstream provision is being compounded by EPs being restricted to statutory assessment work rather than focusing on early intervention (National Association of Principal Educational Psychologists (NAPEP), 2018 par 25–31). This is further impacted by a national shortage of EPs (National Association of Principal Educational Psychologists (NAPEP), 2018). The number of mainstream schools with additional provision for children with SEN has also dropped by almost 10% between 2017 and 2018 from 3,489 in January 2017 to 3,157 in January 2018 (DfE, 2018d, Table 11) and dropped further by 6% in January 2019 to 2,946. Overall moving from 10% of schools with resourced provision in 2015 to 8.3% of schools in 2019 while SEN units in schools dropped from 7.1% to 6.2% in the same period (DfE, 2019b, Table 11). While these resource bases will normally require CYP to have a statutory assessment they also help to support the mainstream offer.

Failure to support schools' capacity to manage SEN is also reflected in the higher proportion of exclusions of children with SEN than any other category of pupil. Pupils with SEN accounted for 46.7% of all permanent exclusions and 44.9% of all fixed period exclusions (DfE, 2018g). Pupils with EHCPs or with a statement had the highest fixed period exclusion rate at 15.93%—over five times higher than pupils with no SEN. Pupils at SEN support had the highest permanent exclusion rate at 0.35% which was six times higher than the rate for pupils with no SEN (DfE, 2018g). Permanent exclusion rates for those with EHCPs are about half the rate of those on SEN support reflecting that schools are required to avoid permanent exclusions of those with EHCPs (Timpson, 2019). The differential rates of exclusions cannot be explained simply by issues inherent to the type of SEN alone (Timpson, 2019, p. 38). Ofsted have also consistently raised concerns about the rate of exclusions and off-rolling (Ofsted, 2018), while there is evidence that exclusions are being used to save money, ensure better exam results and speed up referrals to AP and special schools (House of Commons Education Select Committee, 2018; Ofsted, 2019a). A survey of school leaders and teachers also found that 64% thought they need more support with SEN to prevent off-rolling (Ofsted, 2019a). Further, 22% of the children withdrawn from school to be home-educated in 2017/18 were identified as having SEN (Children's Commissioner for England, 2019a). Home education may be a positive decision but many parents stated that they felt it was their only option as the school could not meet their children's needs (Children's Commissioner for England, 2019a). There are also positive examples of outstanding provision at SEN support to manage SEN and behavior issues (Timpson, 2019) but the variation in provision and management by exclusion can also drive dependence on statutory assessment to secure provision and protection from permanent exclusion.

The Timpson Review (Timpson, 2019) has recommended that schools are held accountable for the outcomes of all the pupils they exclude taking away one of the drivers for excluding children with SEND. Concluding that this should be combined with schools gaining more control over AP funding, revised guidance and a stronger focus from Ofsted in school inspections on exclusions and off-rolling which would all be positive steps. While the DfE have broadly welcomed the report it is not yet clear if these recommendations will be implemented as they are being consulted on further (DfE, 2019d).

Five years after the introduction of the SEND reforms specific issues connected to the imbalance in legislative protections and access to specialist support and provision between the statutory and non-statutory system suggest a continuing structural problem which needs to be addressed. Any system will have to assess need to ensure accurate and effective intervention but this does not have to be tied to statutory assessment. The more resources are deployed on formative assessment and early intervention, as part of ensuring the graduated approach works well, the more effective the SEND framework can be in meeting need (Audit Commission, 2002a; Florian, 2002; DfE, 2011).

## THE FUTURE OF THE WARNOCK FRAMEWORK

Concerns about implementation of the SEND reforms have provoked a new Education Select Committee inquiry with the evidence submitted confirming support for the principles of the 2014 reforms but reflecting serious concerns about the implementation issues explored above (House of Commons Education Select Committee, 2019). Whatever recommendations the Committee makes on the functioning of the new system there are steps the DfE could take, within the current legislative framework, to address the imbalance between statutory and non-statutory accountability and provision.

### Funding

The implementation of the reforms has been undertaken during a period of sustained pressure on LA finances and school funding with significant changes to the education system and growing demand (Parish et al., 2018). The total HNB, which funds statutory provision, has increased by £1 billion since 2014/15 in recognition of rising demand to over £6 billion for 2018–19 (DfE, 2018a; Long and Roberts, 2019). However, demand for statutory assessments and support services has far outstripped this funding increase with evidence that the overall system of finance is now seriously under pressure (NAHT, 2018; Parish et al., 2018). Important as the quantum of funding is, the way in which resources are arranged to secure policy objectives also determines how children and families will experience the system and their confidence in provision. Ensuring a funding system that allocates sufficient resources outside of statutory assessment to CYP at SEN support is central to increasing confidence in the non-statutory offer.

All mainstream schools have funding allocated for SEN in their overall delegated budget, the notional SEN budget. This funding comes from the schools block of the Dedicated Schools Grant (DSG) and is distributed to each school through a funding formula. The notional SEN budget is not a ring fenced amount but schools are expected to provide additional support up to a nationally prescribed threshold per pupil per year of £6,000. The LA provides top up funding where additional provision exceeds the threshold of £6,000. These top up payments come from the LAs HNB allocation, which like the schools block is part of the DSG. In most cases pupils who secure top up funding have an EHCP. However, LAs can provide additional funding to pupils who do not have EHCPs to support early intervention to avoid the need for statutory assessment (DfE/DoH, 2015).

This spilt in funding within the DSG between the school block and the HNB can increase the pressure to seek statutory protection for pupils to secure additional support or a different placement, especially where schools feel funding is not sufficient to meet all SEN needs. This can create pressure on the HNB and potential conflict with the LA if a EHCP is refused.<sup>3</sup>

<sup>3</sup>Every LA is allocated a centrally determined amount of money for education in their DSG. The DSG is now divided into four blocks; schools, early years, central services, and the HNB. For a full explanation (see <https://www.gov.uk/government/publications/high-needs-funding-arrangements-2019-to-2020>).

Previously LAs were able to manage this tension by allocating schools block resources to the HNB to support provision and by transferring money from the HNB to support schools without recourse to statutory assessment. However, the new national funding formula limits LAs ability to reallocate DSG funding between the schools block and HNB to 0.5% of the total budget without appealing to the DfE for permission to vary the allocation. A sign of the stress this has put on the system is that 38 LAs applied for additional flexibility and 22 were allowed to transfer funds above 0.5% in 2018–9<sup>4</sup>. The HNB is also still dependent on historical factors for 50% of the funding leading to disparities in resourcing for similar sized LAs based on previous practice and more recent changes in the profile of needs (Marsh, 2017; Parish et al., 2018). It is also becoming less financially tenable for LAs to manage the increasing demand for EHCPs with 85–90% of the HNB now dedicated to meeting individual identified needs in statutory assessments (Parish et al., 2018, p. 5; Children's Commissioner for England, 2019b). This leaves a shrinking discretionary amount within the HNB to support early intervention and specialist teaching services which help schools enhance their offer at SEN support. An analysis of 9 LAs spending on EHCPs found that the increased spend on statutory support "was placing great strain on the support delivered 'pre-statutory' to children with SEND without an EHCP, including.... behavioral and speech, language, and communication support." (Children's Commissioner for England, 2019b, p15). Post 16 provision has also been undermined by the lack of joined up support, funding, take up of apprenticeships and lack of support to meet additional demand (Hunter, 2019).

LAs have responded by exploring traded service models for specialist services and non-statutory EP support. Traded models transfer the costs directly to schools and other settings which often results in reducing the non-statutory offer as schools and settings do not have the capacity to pick up the costs and specialist provision is reduced (National Sensory Impairment Partnership, 2017). As a consequence this risks draining resource from non-statutory provision which will in turn drive more demand for EHCPs. This financial squeeze is also undermining the utility of statutory plans in protecting resources with the average spend per EHCP reduced from £26,700 to £23,800 in the last 4 years (Bryant and Swords, 2018). While another study suggests a 20% fall in value from 2014/15 to just over £19,000 (Hunter, 2019). There are also concerns that the EHCPs are not sufficiently well-resourced to be implemented successfully (Robinson et al., 2018). The DfE has responded to this funding crisis by pumping £250 million more into the HNB for 2018–2020 and £100 million for special school places (DfE, 2018h) delivering additional funding from 2018 to 2021 of £365 million overall (DfE, 2019c). Further, DfE announced £31 million to enhance the number of free training places for EPs to cope with additional demand for specialist support (DfE, 2018h). Important as the additional resources are these can only be a short term panacea if the funding system does not also address some of the underlying weakness in the SEN support offer which helps drive additional demand for EHCPs and special school provision. The DfE has launched a national

<sup>4</sup>House of Commons. Written Answer. Nick Gibb, 7th March 2019.

consultation on how funding is distributed between LAs and schools. Including if schools should have an increased notional budget for SEN (DfE, 2019e).

The SEN notional budget is based on a funding formula which does not always accurately reflect the level of needs and numbers of CYP with SEN in individual schools (Parish and Bryant, 2015, p. 12). While allocating funding directly to individual pupils encourages over-identification of SEN, the current system imposes a penalty on many schools that wish to support a more inclusive approach by not always fully funding schools who take more than the average number of children with SEN. Further, the introduction of delegated funding for schools never fully addressed accountability for their delegated SEN resources which are not ring-fenced (Lunt and Evans, 1994). It is not always clear how much delegated funding is applied to SEN by schools or how effective any additional resources have been in securing better outcomes (Parish and Bryant, 2015; Ofsted, 2018). A large amount of expenditure in schools is spent on TAs but this continues to risk conflating TA time with support rather than developing SEN pedagogy with a focus on outcomes (Webster and Blatchford, 2018). The DfE have now instigated a review of how schools use the delegated SEN budget and its cost effectiveness.

The £6,000 threshold for schools SEN obligations was introduced to address consistency and to counteract “the perverse incentive for schools to argue for increased costs of support so that they would have the full costs met” (DfE, 2019e, p13). This has worked well in some areas as LAs and many school heads have welcomed the clarity of expectations but they also pointed to the importance of the overall budget for schools. Parent’s views have been mixed. Clarity on the threshold has allowed them to hold schools to account for provision and discuss how resources are being deployed. However, schools have not always been able to demonstrate how resources have been used and parents have struggled to get needs recognised. Generally the idea of a “notional” budget could be confusing as it does not always guarantee resources (Parish and Bryant, 2015). Due to the pressures on school funding there is an incentive to pass costs onto the HNB by appealing for an EHCP to secure top up funding or special school placement (Parish et al., 2018; Hunter, 2019). This funding approach can have a detrimental effect on consistency of provision and parental confidence with significant levels of variation between schools relating to the numbers of children with SEN they accept, how they deploy their delegated resources and what additional support services are available from the LA to call on.

To address these issues the DfE could reintroduce greater flexibility in how LAs manage their HNB to allow more focus on the SEN support category to improve school capacity. This needs to be coupled to a more accurate formula or alternative means of funding schools based on identified needs. One solution would be to secure more accurate measures of the current school population with SEN which forms part of Ireland’s reforms of SEN and then fund the identified needs within schools (NCSE, 2013). Alternatively it has been suggested that the threshold for consideration of top up funding is moved to a higher figure while delegating more resources to schools. Other proposals include;

improving the accuracy of proxy indicators in predicting SEN in the formula, providing a clearer guide to how the core funding for the schools budget is made up and then support schools in monitoring how this is deployed, which would allow the concept of the notional budget to be removed (Parish and Bryant, 2015; DfE, 2019e). Delegating more resources to schools could transfer conflict from the parent with the LA to parent with the school though it would also encourage issues to be resolved at that level (Crawford et al., 2011).

Raising the threshold could reduce the need for statutory assessments by ensuring SEN needs are met earlier, increasing parental confidence in the schools offer. However this would need stronger accountability mechanisms on schools to demonstrate how they are allocating the notional budget. A study of local variation in SEN found that “Our hypothesis that a lower use of statements indicated better support for children with SEN in mainstream schools was broadly supported by the data. The local authorities which appeared most confident about their mainstream provision generally had a lower percentage of SEN pupils with a statement, a lower rate of appeals” (Lewis et al., 2010, p116). It would be important that increasing the threshold is not funded simply by a reallocation of current funding between different blocks of the DSG. Overall there needs to be an increase in the quantum of funding to LAs for SEN.

One area where there is additional funding for SEND indirectly is through the Pupil Premium. There is a strong association between pupils with SEND and children in poverty (Shaw et al., 2016). It is also “the most disadvantaged children, and those who are persistently disadvantaged, who are more likely to have a Statement at age 7” (Parsons and Platt, 2013, p. 21) and they are also more likely to be dissatisfied with their EHCP (Shepherd et al., 2018). Because of the association between poverty and SEND there is a strong crossover in funding between the two groups. Pupils with SEN are more likely to be eligible for free school meals (FSM), the gateway for receipt of the pupil premium, with 28% of pupils with SEN compared to 13% of pupils without SEN claiming FSM (DfE, 2019b). Pupil Premium funding also has the advantage that schools have to account for its use and the funding is significant, currently £1,320 for pupils in reception to year 6 (Primary) and £935 at secondary school with £2,300 for children in local authority care or similar provision (DfE, 2018i).

There have been concerns that FSM funding is being applied outside of its intended target group with 30% of head teachers saying the funding the school received for poorer pupils was being used to plug gaps in their budget (Sutton Trust, 2017). A National Audit Office study also found that “there is a clear risk that, in some cases, the Pupil Premium could be replacing rather than supplementing” SEN funding (National Audit Office (NAO), 2015, p. 25). While pupils who are identified as SEN and are in receipt of FSM perform worse than pupils with SEN or pupils in receipt of FSM separately (DfE, 2018; Sutton Trust, 2019) Nevertheless building on a model of a specific fund with greater accountability for how it is deployed and that can be pooled at school level has attractions as a means of identifying alternative funding for SEN to enhance the overall schools offer. Though this would require developing a more objective measure

of SEN to avoid risking over identification, which the pupil premium achieves through being tied to FSM entitlement. A move towards aligning the SEN and disability definitions further might help here.

## Accountability

Robust accountability mechanisms are essential to ensure greater focus on SEND in schools and the LA across both statutory and non statutory provision. A significant legislative innovation of the SEND reforms was to include a new statutory duty to involve parents and CYP (Children and Families Act, 2014; Clause 19) in decision making following from recommendations in the Lamb Inquiry (Lamb, 2009a; Adams et al., 2017). These measures specifically required engagement at the level of strategic planning through the Local Offer, EHCPs, and SEN support (Lamb, 2013). Enhancing parental engagement through legislation could be seen as modernizing Warnock's insistence on greater parental involvement in the process of statutory assessment and giving it statutory force (Warnock, 1978, sec 4.21, 9.19, 12.1). The strategic engagement of parents and CYP through the Local Offer and co-production has significantly increased their influence in strategic planning, which in turn can support the development of more appropriate services and a different culture of service provision and assessment (Lamb, 2013, 2018; Adams et al., 2017; Ofsted/CQC, 2017). However, the opportunity to secure more appropriate provision in schools is limited because there was no strengthening of the legal requirements on schools to secure adequate provision for children with SEN in the reforms. The legislation continues to rely on the "best endeavors" duty for schools to meet needs.

The lack of LA powers also limits the ability of parents to influence policy at school level via strategic engagement through the Local Offer. LAs are therefore left with limited direct levers to use with schools to secure a focus on SEND and need to rely on schools collaboration, which only works to the extent they are willing to participate and have the capacity (Curran et al., 2018; Parish et al., 2018). While enhanced information requirements were introduced through the SEN Information Report (DfE/DoH, 2015), which requires schools to provide an account of their SEN offer, these are not used effectively enough as an accountability mechanism even though they are linked to the Local Offer (Lamb, 2018). LAs are left with limited opportunities to influence the school offer at SEN support which can then impact on demands for EHCPs. This is then exacerbated if health and social care services are also not available outside of statutory provision to schools (Ofsted, 2018; Parish et al., 2018).

The accountability of schools and settings could be improved by greater delegation of funding but then holding them more accountable for ensuring adequate provision and outcomes. The Local Offer could also be used more proactively by LAs in this context to establish what should be made ordinarily available in schools as part of their use of delegated SEN funding and link this to a clear account of the schools offer in the SEN Information Report (Lamb, 2013). This approach has already been undertaken by some LAs with success (Council for Disabled Children, 2016; Bryant and Swords, 2018). The DfE should also consider how an enhanced SEN Information Report, designed to function more as

a direct analog to the Local Offer, could strengthen accountability with parents. This needs to be aligned to increased powers for LAs to hold schools and settings to account should they fail to be able to demonstrate how they have developed effective SEN support provision.

With the importance of Multi Academy Trusts (MATs) growing, including their role in directly providing SEN support services to their own schools, DfE could require MATs to produce a trust wide SEN Information Report. This would encourage a more strategic and consistent schools offer from MATs and ensure that they are more accountable for their SEN provision which is often less scrutinized by LAs. Especially as there have been concerns that sponsored academies could be deregistering pupils at the SEN support stage to look more attractive to parents and meet accountability standards (Black et al., 2019). The Timpson Review found that sponsored academies had the highest rates of permanent exclusions but thought this related to their role in turning around challenging schools (Timpson, 2019, p. 46).

The local area SEND inspections undertaken by Ofsted and the Care Quality Commission (CQC) have secured a strategic focus on the reforms. With 42 of the first 83 reviews requiring LAs to write statements of action on how they will improve due to weaknesses in implementation (Ofsted, 2019b). Delivering cultural change to the system by relying solely on inspection and compliance is going to be counterproductive in the long run if the aim is to win hearts and minds. Nevertheless inspection can play an important part, within an overall strategy, in implementing the reforms through focusing LAs on strategic delivery and then ensuring new ways of working are embedded and maintained. The DfE have confirmed a second round of inspections and repeat visits for those LAs who are required to produce a statement of action. Local area SEND inspections need to be retained over the longer term as an accountability mechanism with strengthened powers to hold health and social care to account given the concerns that lack of coordination between services remains a major problem (Ofsted, 2018, p. 8, 12).

There are also many other aspects of the schools framework which undermines the inclusivity of the schools. For example the Progress 8 accountability system weights performance measures toward the academic end of the spectrum and schools fear failing inspections without good Progress 8 figures. Schools then become concerned that children with SEND will potentially bring down the overall schools rating on Progress 8 scores, given they have the largest attainment gap compared to those with no SEN of all the comparison groups, which can then drive exclusions and off-rolling (House of Commons Education Select Committee, 2018; Leckie and Goldstein, 2018; Parish et al., 2018; DfE, 2019f). The newly proposed Ofsted schools' inspection framework may help in this respect by moving focus onto the quality of the educational offer and away from floor standards in making judgements (Ofsted, 2019c).

## The Legal Framework and Assessment

We should not confuse the process of producing a particular type of statutory assessment (statements/EHCPs) with the overall output of a legally binding plan of the services needed (Florian,

2002). There are other ways to secure statutory protection of provision without the level of bureaucracy inherent in the current statutory assessment model. The disability rights framework incorporated into the Equality Act (2010) provides a different route to statutory protection of education provision for CYP with disability. In 2012 the duty in the Equality Act for schools to make reasonable adjustments (auxiliary aids and services) was brought into force (Equality and Human Rights Commission, 2015). This has improved its relevance by securing individual rights to education support that previously would have been seen as falling under SEN provision. In doing so the change addressed criticisms of rights based approaches that focus only on common or generic barriers but which do not address specific individual needs where these required additional support (Norwich, 2010).

The SEND CoP (DfE/DoH, 2015) aimed to integrate the requirements of a rights based approach for disabled CYP (Equality and Human Rights Commission, 2014) with the needs based Warnock framework. While the new CoP also encourages disability and SEN to be treated together for the purposes of the legislation where the disabled pupil has SEN (DfE/DoH, 2015, p. xviii), this has left the application of the SEN and disability definitions in an uneasy tension (Norwich, 2014). Further, there are concerns that the disability definition relies on a within-child approach which is in danger of reinforcing the central legacy of the Warnock framework with its focus on individual entitlement to provision (Norwich and Eaton, 2014). However, the overall approach of the equality legislation does have a strong focus on anticipatory duties and planning.

Legal protections in the rights based approach could help in securing educational support for many CYP with SEND without resorting to EHCPs. Further, through the anticipatory duty to plan for access and stress on removing barriers to learning rights legislation focuses on addressing the overall context of education provision and helps promote a more inclusive culture. There is also a legal right to appeal to SENDIST against a failure to make reasonable adjustments, or where there is disability discrimination, direct or indirect discrimination, harassment or victimization (Equality and Human Rights Commission, 2014). This secures statutory protection but in a different way from the current statutory assessment model. It also retains a resource allocation mechanism through the concept of reasonableness and is not therefore an open ended funding commitment (Equality and Human Rights Commission, 2015).

A rights based approach would allow exploration of a broader concept of the goals of an inclusive education system, guided more by the idea of enhancing capability rather than identifying individual deficits and which could support a more positive ethos in schools (Terzi, 2010; Norwich, 2017). Clarifying and extending the disability definition would also open up the possibility of incorporating a wider understanding of disability based on international definitions such as the International Classification of Functioning Disability and Health for Children and Youth (Castro and Palikara, 2016). However, the rights framework has been under-utilized and under-enforced since its inception (Lamb, 2009b). This is reflected in the low number of disability cases referred to SENDIST with only 138 registered appeals on discrimination grounds in 2017/18 (Ministry of Justice, 2018)

and inconsistent implementation of the disability equality duties. Therefore, securing parental confidence via the Equality Act framework would depend on a much more vigorous promotion and implementation of rights legislation than has been evident in recent policy. It would also need the Equality and Human Rights Commission to be encouraged and funded to take a much more proactive enforcement role in respect of SEND and not leave parents to police the system. While this would be a step change in approach and focus it would be within an already established legal framework. This would need to be seen as part of a longer term cultural shift in moving from a discretionary system to a rights based system.

A rights based approach to education might also secure support with parents if the proposed extension of the Tribunals powers to health and social care provision within EHCPs, currently being piloted by the First Tier Tribunal, is successful (DfE, 2018k). By addressing one of the major weaknesses of the current statutory framework parents could have the confidence that complex needs are covered through a single right of redress. Though it will be important that, as the Tribunal recommendations are non-binding on health and social care, they are nevertheless acted on. The Scottish system of statutory assessment, where the Coordinated Support Plan (CSP) reserves statutory assessment for those with complex needs who need support from more than one agency (Scottish Government, 2017), provides an interesting contrast. Scotland has a much lower number of statutory plans, with only 0.3% of all pupils with a CSP compared to 3.1% of pupils with SEND in England with EHCPs, though there are other types of non-statutory assessment in Scotland (Riddell et al., 2019). Since 2002 the number of pupils in special schools has also fallen by 19% suggesting that more provision is being made in mainstream and that the Scottish system has a strong commitment to enhancing non-statutory provision (Scottish Parliament, 2017). Scotland also has a much lower rate of appeals to the Tribunal per head of population (Riddell et al., 2019). This suggests that even if not a deliberate policy intention, the effects of the policies pursued around statutory assessment in England and Scotland have led to completely different ways of meeting complex needs (Riddell et al., 2019).

There have also been criticisms of provision in Scotland which echo some aspects of the English experience including the need to ensure greater investment in specialist staff in mainstream and special provision, the difficulty of obtaining statutory protection for those in deprived areas, the detrimental impact of budget restraints on provision, and the need to enhance parental and CYP engagement in the whole process (Scottish Parliament, 2017; Riddell, 2018; Riddell et al., 2019). These concerns emphasize the need to invest in the quality of the non-statutory offer as part of any approach to reduce the over-reliance on statutory assessment (Scottish Parliament, 2017).

## CONCLUSION

The statutory assessment framework, initiated by the Warnock review over 40 years ago, has undergone significant legislative

and policy reforms culminating in the Children and Families Act (2014) in response to parliamentary inquiries, and continuing challenges about its effectiveness and utility from regulators, parents and advocacy groups. The current reforms aim to address weakness in the Warnock framework. The intention of EHCPs to have a more person centred focus with a greater emphasis on outcomes and extension to a wider age group have all been supported. However, serious questions have been raised about the implementation of the more complex assessments, the lack of integration with health and social care, the inconsistent quality of the plans and LAs capacity to deliver against a background of rising demand. These concerns have been further amplified in evidence to the latest Education Committee Inquiry (House of Commons Education Select Committee, 2019). This is despite many examples of good practice and satisfaction with aspects of the EHCP process and the provision it secures (Adams et al., 2017; Ofsted/CQC, 2017; Bryant and Swords, 2018; Lamb, 2018).

The reasons for the growth and durability of statutory assessment should not be underestimated as they are, in part, rooted in the lack of capacity to meet need, ensure parental confidence and secure rights outside of the statutory framework. Recent Governments have strengthened the statutory assessment framework in which they have invested policy capital and resources but have not sufficiently matched this with enhancing the non-statutory offer.

To create greater confidence in the reforms overall the DfE's implementation strategy needs to balance the focus on improving the quality and delivery of EHCPs with new measures to enhance the non-statutory offer. This needs to address parental concerns by ensuring that the system works with them to support better outcomes and easier access to specialist

support outside of the statutory framework. Confidence in the non-statutory offer could be improved by better implementation and integration of the disability rights requirements into the SEN framework. At the same time extending the Tribunals powers to health and social care provision would address the main structural weakness in the design of EHCPs and drive the integration of services as originally envisaged by the reforms.

Increased focus on the non-statutory framework would also allow more scope for embedding other aspects of the 2014 reforms such as improving the Local Offer, reviewing how well SEN support is functioning, personalization for all CYP with SEND and supporting parents and CYPs engagement. The review of the reforms and CoP provides the opportunity to reconsider how well the new system is meeting the needs of all CYP with SEND. The measures explored here build on the existing legislative and policy frameworks but look to integrate the SEN framework more closely with the disability rights framework. Such a strategy would also need to be supported by increased funding linked to greater delegation to schools and a more SEND sensitive accountability and inspection framework to help change the overall culture in the system. There would also need to be more direct investment in the workforce to ensure that schools and other settings are highly skilled in supporting CYP with SEND as Warnock originally intended (Warnock, 1978, sec 12.1).

## AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

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**Conflict of Interest:** The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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