

Meeting the Needs of Children with Special Educational Needs and Disability in Birmingham



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An evidence-based report into the current situation in relation to special educational needs and disability provision in Birmingham by Bryan Nott of Places in Common together with the Independent Management Board of the Birmingham Special Educational Needs and Disability Information Advice and Support Service.



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Executive Summary

For Birmingham City Council to meet its obligations to children and young people with special educational needs and disability (SEND) it needs to urgently address a shortfall in provision. This is brought about by a number of factors which are well known but which remain unaddressed and are likely to continue to exacerbate the situation. It is possible to significantly alleviate the situation by increasing SEND provision by upfront investment.

Across the country SEND provision is under great pressure if not in crisis. **In Birmingham the SEND service has been identified as facing significant challenge in meeting needs**, not least a shortage of adequate provision, whilst at the same time experiencing a growing deficit on the high needs block of the education budget. The number of Educational Health Care Plans (EHCPs) in Birmingham is commensurate with levels nationally.

Provision for children and young people with SEND is complex and a better understanding of the different factors relevant to it will support a reasoned debate about how to improve the way in which the City can address the needs of those young people.

Local authorities are bound by a legal framework as to how they should meet the needs of children and young people with SEND. As a result, **the City Council can be compelled to undertake substantial expenditure particularly where there is a shortfall of provision.**

School budgets are under pressure generally which has reduced their ability to meet the needs of SEND pupils in the ordinary course of events. This is compounded by pressure around attainment targets which takes little account of the difficulties faced by pupils with SEND. **There is a consequent resistance to meeting the needs of SEND pupils in some mainstream schools.**

The permanent exclusion of pupils disproportionately affects pupils with SEND. In the primary sector Birmingham has a very high level of permanent exclusions compared to the national picture, having 8% of all such permanent exclusions across the country. Permanent exclusions and a lack of provision gives rise to children and young people with SEND (amongst others) being out of education for long periods thereby **putting the City Council in breach of its legal duty to provide education.**

The independent for-profit sector special school market is playing an increasingly significant role in SEND education provision. The cost of independent placements is much higher than in the state-funded sector. **Birmingham currently spends approximately £21 million per year on placements in the independent sector.** That sector is pursuing a vigorous expansion programme which is predicated on issues such as increasing levels of exclusion of SEND pupils and the denial of statutory rights to those pupils and their families by local authorities.

In the absence of adequate provision in the state-funded sector the city council may be required to undertake the funding of independent special provision. **The most straightforward way to address the increasing spend on the independent sector and to alleviate the pressure on the high needs block is to increase the placements available for SEND children and young people in the state funded sector.** Currently in Birmingham the number of specialist placements is falling significantly behind the levels of pupils with SEND and in particular with EHCPs.

For some time, Birmingham has argued for a form of a SEND 'inclusion' policy which seeks, as far as possible, to educate children and young people with SEND in mainstream settings. **It is by no means conclusive that a mainstream setting has a benefit for SEND pupils who would otherwise be placed in special provision.**

A vigorous inclusion policy will require a significant funding increase if there is any prospect of overcoming the difficulties created by the funding and attainment pressures on mainstream schools with the academy and free school establishments being particularly resistant to such a policy.

There are local authorities which are looking to significantly expand the state funded special sector in order to reduce the amount of the high needs block which is being spent on expensive independent provision. That is an approach that should be seriously considered by Birmingham City Council.

Foreword

Meeting the broad educational needs of the local population of children is the goal of any local authority and its schools. This has become increasingly difficult with general cuts in funding but no more so than in relation to children with special educational needs and disabilities (SEND). This report presents evidence helpfully, if inevitably painfully and, if not suggesting directly that Birmingham is failing, it is plain that it is not doing well by too many of its most needy children and not doing as well as some comparable authorities.

Birmingham is the sixth largest local authority in England in terms of number of maintained schools and third largest in terms of pupil numbers. Its SEND numbers are high and overstressing the high needs budget. There are too many children with special needs without school places, school exclusions are too high and disproportionately affecting SEND children and there is too much recourse to extortionately expensive and not always high quality independent provision.

The Ofsted Joint Local Area SEND Inspection of Birmingham in September 2018 gave many pointers to improvement and the City Council's *Written Statement of Action* responded with various commitments which look to be overdue if creative and determined action is not taken.

Tough as it is in times of austerity, some large authorities have shown the way, at expanding their own special school provision, at least diminishing use of independent schools and supporting mainstream schools to develop support plans for children short of the legalistic and cumbersome EHCP process.

The report should help the dialogue in Birmingham speedily to determine how it will address the growing SEND issues and put Birmingham at least on a par with other authorities in the quality and appropriateness of provision, wise and forward-looking approaches to funding and satisfaction of children and families.

Dr Carl Parsons
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January, 2020

Introduction

Crisis is a word that should not be used lightly. The delivery of support for children and young people with special educational needs or disability (SEND) in Birmingham faces very significant challenges. Taken as a whole, the situation needs dramatic improvement. For parents and carers, a system that is failing to deliver as it should will feel certainly like a crisis. On a number of measures there is significant work to do in order to improve the position. This is something that has developed over a number of years and the possibility of a quick fix is remote if not impossible. That being said there are ways, with commitment and dedication, to create the improvement needed which reflects the City Council's commitment to "Every Child Matters".

Birmingham's situation is not unique. Like many local authorities across England the budget that funds special educational needs is in significant deficit. There is a national debate around the issue of special educational needs funding which is prompted by a number of local authorities being in a similar position. Some limited additional funds have been made available to support children and young people with SEND but that has only had the effect of slowing the deterioration of an already difficult situation. It is possible that there will be a wholesale reassessment of the levels of funding needed. That may very well take some years to come to fruition and on a collective and individual level there are children and young people in Birmingham who cannot wait for a possible resolution in two or three years' time.

Beyond the financial position there are other factors which contribute to the challenging circumstances. Mainstream schools provide the education for all children without SEND and many children with SEND are also able to be supported in those settings. The pressure on mainstream schools in terms of budgets and attainment targets have made it harder for SEND pupils to have their needs met in a mainstream school. Too often that can result in problems arising that means a placement breaks down or, at worst, gives rise to the permanent exclusion of a pupil. Special schools which focus on SEND pupils have not seen available places rise quickly enough to meet the rising demand and this has led to greater numbers of pupils being placed in the high cost independent special school sector.

There is a danger that the situation in relation to SEND in Birmingham will continue to deteriorate. There have been a variety of plans and strategies put forward by the local authority which have held out the hope of an improvement in the situation. Despite the desire on the part of the local authority to achieve that improvement, objectively it has not transpired. Some positive steps such as the increasing collaboration between education, social care and health services are welcome but that alone will not be enough. The situation is urgent, if not in crisis, and this paper argues that there needs to be a bold response.

The whole of the local authority must understand the pressing need for bold steps to be taken. When finance and budgets are discussed there must be a willingness across the board to accept that action is needed even in the context of many local authority services being under severe pressure. It is possible that capital expenditure can be deployed on the basis of investing now to save revenue in the future. If every child really does matter then it is hard to see an alternative to bold and urgent steps. If those steps are taken then it is likely to capture the support of parents, carers and others dealing with SEND children and young people.

It is hoped that this report will at least provoke a debate if not shift the agenda in relation to SEND provision in Birmingham. Although the report largely focuses on the facts and figures relevant to the position in the city the problems are not unique to Birmingham. The information contained in the report is based upon publicly available data and an effort has been made to identify the source in

each respect. It also draws on the knowledge, experience and expertise of many people in the city. That has been provided freely and it is clear that there is a great willingness to engage with the local authority and others to seek to shape a SEND service in Birmingham that is second to none.

About the Author

Bryan Nott lives in Birmingham and is a Co-Founder of Places in Common, a co-operative working in public policy with a view to driving system change and leveraging the power of the collective commons on behalf of communities. He worked for over 25 years as a solicitor including heading up an Education, Public Law and Human Rights Division within a national law firm. As part of that he represented clients in relation to special educational needs in tribunal and through judicial review actions in the High Court. He is a former Birmingham City Councillor and is a board member of the Public Law Project, a national charity that promotes access to justice. He is Vice Chair of the Special Educational Needs and Disabilities Independent Advice and Support Service Independent Management Board in Birmingham.

Special Educational Needs and Disability Nationally and Locally

Children and young people who have a significantly greater difficulty in learning than their peers or have a disability which prevents them accessing learning in the same way as others are deemed to have special educational needs. Despite what might seem a straightforward definition this can be a complex area of law and policy. There are many different points of contention that can give rise to dispute in particular cases. This report does not explore all of the complexities of the system but instead focusses on the broader trends. In doing so, it is not to disregard the fact that at the level of individual cases there is a wide range of factors that apply.

As will be widely known, those with special educational needs can be educated in a range of settings. This includes mainstream schools which are the schools that cater for the broad spectrum of the school population. There are also resource bases within mainstream schools that provide specialist provision for pupils with special educational needs. Outside of the mainstream provision are special schools which provide education specifically for pupils with special educational needs. Special schools will typically have a particular focus such as visual impairment, autism, dyslexia or one or a number of a wide range of other conditions.

There are 1,318,300 children in England who have special educational needs as at January 2019. Of those, some 271,200 children have an Education Health Care Plan (EHCP).¹ Both the number of children with special educational needs and disabilities (SEND) and the number with an EHCP are increasing year on year. It can be noted that far from all children with SEND have or require an EHCP.

In Birmingham as at January 2019 there were 9,437 EHCPs². Based on previous years' returns to the Department for Education there is a suggestion that 2018 saw a marked increase (from 7,612 to 9,023) however other data reported by Birmingham City Council to the Schools Forum suggests that the increase has been far more incremental³. There may therefore be a change of categorisation which has led to the difference between 2017 and 2018. It remains the case that there is a consistent rise in the number of EHCPs in Birmingham. The percentage of the total pupil population in Birmingham with an EHCP has been fairly consistent at 3.2%⁴ which is very slightly higher than the national average for England in 2019 of 3.1% reported by the National Audit Office.⁵

The report to the Schools Forum suggested that at the time of the report (December 2018) there were 65 new EHCPs created in Birmingham every month with an expectation that the trend would continue. In fact the previous report in January 2018 suggested that the figure for new EHCPs per month was 55. There is therefore a notable uplift in the rate of increase for new EHCPs in the city.⁶ This is in line with the trend nationally which has seen an increase in the number of EHCPs between 2014 and 2019 of 16.8%.⁷

Within Birmingham there are 27 special schools and 42 resource bases⁸. In the academic year 2016/17 there were 4,111 commissioned SEND places with 4,306 being available in 2017/18. The number of placements in Birmingham in the maintained (state funded) sector have been growing year on year:⁹

Financial Year	2014/15	2015/16	2016/17	2017/18
Number of Places	3,781	3,905	4,111	4,306
% increase	n/a	3.28%	5.27%	4.74%

There is a problem however that the number of commissioned places is not rising as fast as the number of children and young people with EHCPs or their forerunner, statements of special educational need (SSEN):

Date	Sept 2014	Sept 2015	Sept 2016	Sept 17	Dec 18
No. of EHCPs/SSEN	7,200	7,700	8,600	9,100	9,673
% increase	n/a	6.94%	11.68%	5.81%	6.29%

Across the period when figures are available the average increase in commissioned places was 4.43% per annum whereas the increase in children and young people with an EHCP or SSEN was 8.15% per annum based upon figures from 2014 to 2017 (if the 15 months to December 2018 is included the figure is 7.68%). Had the number of commissioned places kept pace with the growth in EHCPs and SENs there would be an additional 140 commissioned places by 2017/18.

Between December 2017 and November 2018 the number of independent school placements by Birmingham City Council was reported to have fallen by 38 (out of a total of 645) with a particular drop in the out of city placements. This follows a broad upward trend in previous years. The number of placements into the independent sector by Birmingham City Council within the city over the period has risen by 27 although that was outstripped by a dramatic fall in the out of city placements to produce the net figure of 39.¹⁰ The out of city placement figures are below:

Date	August 2015	August 2016	August 2017	August 2018	Nov 2018
No of placements in independent sector	181	209	216	196	157
% annual increase/decrease	n/a	15.36%	3.34%	-10%	n/a – 3 months

National figures suggest that the rise in the number of children with EHCPs in independent provision in a single year between 2017 and 2018 was 10%.¹¹ The drop in independent placements in Birmingham in this particular year is in stark contrast to these figures and is worthy of closer consideration as to what it means in terms of the overall position and whether it is the start of a downward trend.

A crude calculation based upon the average cost of placements and the reduction in the number of out of city placements it might be expected that a saving of about £3.33M has been achieved in the last financial year. That would be partially but by no means fully offset by the rise in placements in the city. The financial outturn reported to Birmingham City Council's Cabinet in May 2019 for the 12 months to April 2019 suggested the deficit on the High Needs Block remained under severe pressure and would have increased by £5.1M had there not been an additional allocation of £3.1M by central government in December 2019. What became the £2M overspend was partly attributed to £1M in independent placement provision cost that was considered to be savings that were not achievable and £600,000 for placements in other local authorities due to a shortage of places in Birmingham. There was a saving of £1.2M for unrealised liabilities for independent placements in the previous (2017/18) financial year.¹² At the end of the previous financial year the amount of overspend reported on independent special schools had been £4M.¹³

What is not suggested by the figures is that there was a saving of £3.33M by the reduction in out of city placements and no reference is made to what would be a notable achievement. In the recently published SEND Strategy¹⁴ and the SEND Joint Commissioning Framework¹⁵ there is also no reference to a specific strategy that has brought about this reduction in numbers. The position is the same in other publications that the City Council has put out.¹⁶

Until further information is available the reason for Birmingham's recent fall in the number of placements in one part of the independent sector is unclear. The different figures being provided appear to be inconsistent. Something which may be relevant is an increase of 44 in the number of pupils placed with other local authorities which requires Birmingham to provide top up funding.¹⁷ In any event the pressure to place children and young people in the independent sector remains strong and the ability to continue to bring down the number placed in that sector if that has currently been achieved on a sustainable basis will be difficult. In the absence of an explanation it is likely that this is a one off movement and not a trend. There continues to be very high expenditure on independent placements – much higher than the local authority would wish for or for which it budgets.

Funding

In order to understand the position in relation to SEND places in Birmingham it is helpful to understand the basic principles of school funding.

Prior to 2014/15 local authorities had a broad discretion on how to allocate funds provided by central Government to schools in their area. Since then funding has been divided into a number of 'blocks'. These are the schools block, the high needs block and the early years block. There are restrictions on local authorities moving money between those blocks although a degree of transfer can occur.

From the schools block the local authority allocates schools an amount for each pupil in the school plus a further sum for 'additional needs'. The additional needs sum is calculated based upon a number of different measures which includes socio economic factors and low attainment. There is an expectation that the first £10,000 cost of meeting a pupil's SEND will be met from the schools block. This is, to a degree, a notional allocation for SEND pupils as not all will require the £10,000 and there may be a pooling of resources to be used for the benefit of more than one pupil. The sum provided for additional needs from the schools block to schools is not ring fenced and therefore schools facing reducing budgets will feel a pressure to stretch funds as far as they can. Even if they do, the first £10,000 of a SEND child's needs will be assumed to be met direct from the school's funds.

Schools are able to bid for additional funds from the high needs block to meet needs which they cannot meet from the notional £10,000 per pupil allocated from the schools block. Each local authority will have a policy and procedure for applications by schools for additional funds from the High Needs Block. Despite this opportunity to top up support in mainstream settings, most of the High Needs Block is spent on special school or resource base provision. Both special and mainstream schools are able to apply for top up funds from the High Needs Block.

The High Needs Block of funding is also used to pay for the fees of any children and young people who are placed in independent specialist provision. It is therefore a limited sum of money that has a significant demand placed upon it. A growth in the use of independent special schools will have a disproportionate impact on the High Needs Block because of the difference in cost between state funded schools and those in the independent sector.

There are varying reports of the precise difference in cost between different types of provision. The Local Government Association in 2018 suggested the relative annual cost of provision for children and young people with SEND by setting in 2017-18 is as follows:¹⁸

- State funded mainstream provision: £6,000 (not including base costs of £10,000)
- State funded special schools: £23,000
- Independent non maintained special schools: £40,000

Other research by Schools Week based upon freedom of information requests to 110 local authorities suggested that the average spending on independent special school placements was in fact £52,000 per annum in 2015-16 and will be higher now.¹⁹ The National Audit Office in September 2019 estimated the figures to be:

- State funded mainstream provision: up to £18,000 (inclusive)
- State funded special schools: £20,500
- Independent non-maintained special schools: £50,000²⁰

Whilst precision is absent there is a clear distinction between the different settings, in particular between state funded provision and independent provision. The difference in cost between state funded mainstream and special schools is far less.

Birmingham City Council has stated the average cost of independent, out of city placements at November 2018 was £65,732 per annum for under 16s and £38,648 per annum for post 16 placements.²¹ These do not include independent placements within Birmingham. Further information in relation to different schools' costs is provided in Appendix 1 to this report which sets out 23 independent special schools based in the West Midlands area and gives details of their fees based upon their latest Ofsted Report – some fees date back to 2016 so are likely to have increased. It will be seen that there is a significant range in the fees payable from £6,000 to £90,000. For conditions such as ASC (autism spectrum condition) the figures are generally above the suggested national estimates for independent provision.

The additional cost of independent provision does not guarantee better outcomes. It is difficult to draw too great a conclusion between state funded and independent settings as there may be a broad range of factors at play. However the state funded special schools in Birmingham appear to outperform their comparators in the independent special schools sector.

In their reports, Ofsted looks at a number of factors as well as producing an overall rating. Particular measures include leadership, behaviour and the quality of teaching. Looking specifically at the Ofsted measurement of “outcomes for pupils” in the latest available Ofsted Inspection Report for 25 maintained special schools in Birmingham,²² the ratings achieved are set out in Figure 1 below:

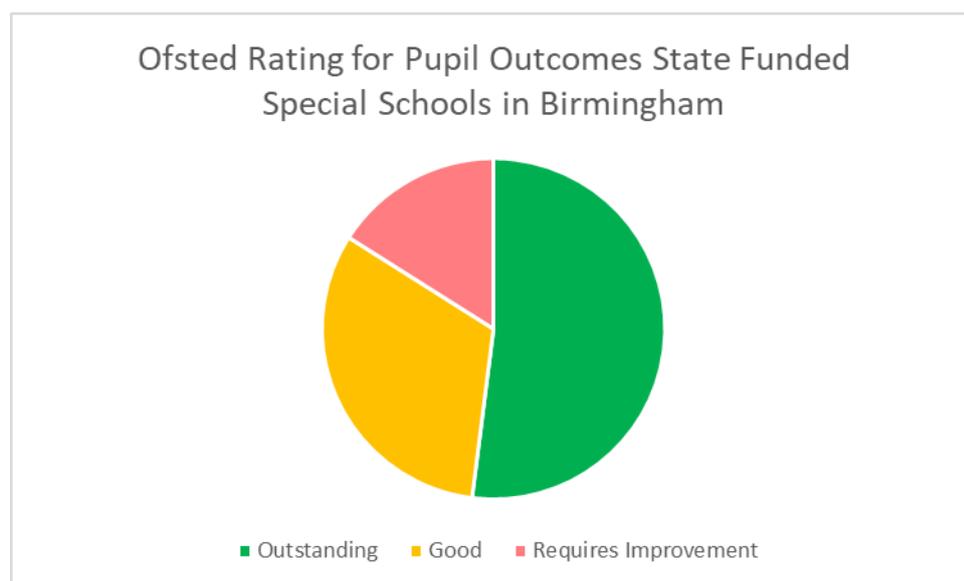


Figure 1.

A comparison has been made by looking at the independent special schools in the West Midlands (set out in Appendix 1) which might reasonably be thought to form the potential alternative place of education for young people in the City with SEND. The outcomes are set out in figure 2.

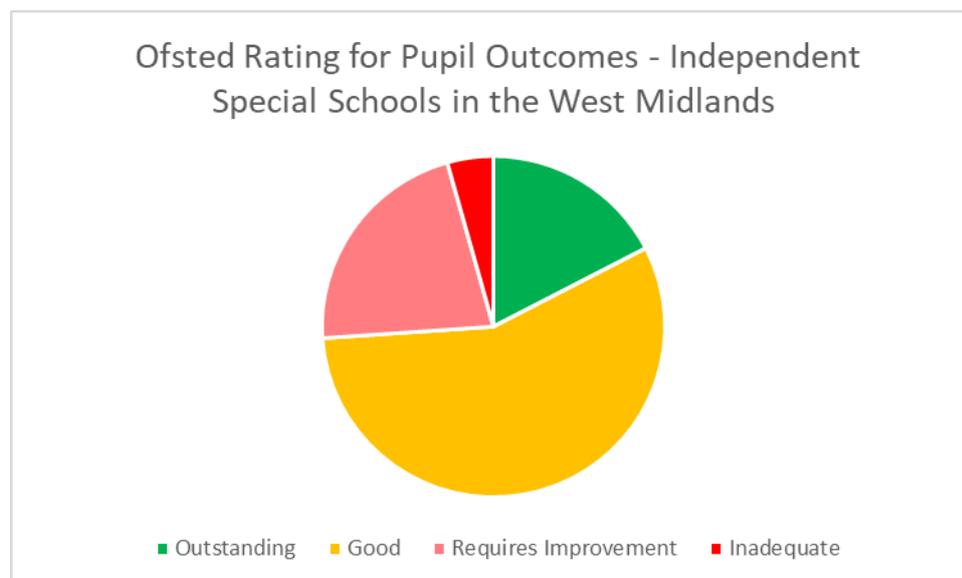


Figure 2.

It can be seen that the independent sector has a proportion of pupil outcome ratings in the “outstanding” or “good” categories, by contrast in the state funded schools in Birmingham there is a much greater proportion of schools achieving ‘outstanding’ outcomes, fewer rated as requiring improvement and none deemed inadequate. The ratings in relation to “outcomes for pupils” broadly followed the ratings in other categories across the schools. It should be made clear that there is a wide range of schools in both groups and therefore the comparison makes a general point that may not reflect on individual establishments. Having said that the evidence from the Ofsted reports suggests that the significant additional funds spent on independent provision does not achieve outcomes that are better than, or necessarily comparable to, the state funded special school sector.

Birmingham’s Budgetary Position

Birmingham built up a cumulative deficit on its High Needs Block by 2017/18 of £13.8M and, as has been referenced above, there was an expectation that it would grow by £5.3M in 2018/19.²³ The situation has been alleviated by a Department for Education (DfE) allocation of an additional £3.1M for High Needs in December 2018. This has resulted in a rise in the deficit on the High Needs Block of £2M to £15.8M.²⁴ The additional £3M will be replicated in 2019/20 but not necessarily thereafter. Changes to the Dedicated Schools Grant (DSG) funding formula will see an increase in High Needs funding of £6M from 2019/20.

On the face of matters the additional funding could have the effect of reducing the deficit year on year given that it would suggest a net surplus of £4M in 2019/20 and a net surplus of £1M thereafter if the additional £3M funding ceases at that point. That presupposes that current levels of expenditure are adequate and that there will be no further pressures on revenue in future years. Additional funding for SEND has also been signalled prior to the 2019 general election but it is by not clear how much will be received and over what period. In reality there are significant pressures beyond the current budgetary position including the impact of the recent OFSTED Local Area

Inspection, which has prompted a Written Statement of Action from the Council, as highlighted in its Annual Financial Plan.²⁵

This report goes on to consider below the increasing pressure on budgets that arise from the shortage of SEND places and the consequent growth in the use of the independent sector to meet needs at a significant cost. The budget for independent school places increased by £2M (with a target of a further associated £2M savings which was not wholly achieved) in 2018/19. The increasing expenditure is indicative of the difficulties faced.²⁶ The reality is that even with the additional funds from Government there remain rising budgetary pressures on the High Needs Block such that significant action is required.

The City Council has avoided a requirement to report to the DfE with a budget recovery plan as it has managed to reduce the overspending on the DSG to under 1% which would trigger the obligation for such a report.²⁷ Even so the Council has a stated aim of a local recovery plan to address the overspending on the High Needs Block. This means the Council's High Needs Block budget is facing the pressure of a 'recovery plan' that relates to overspending whilst at the same time needing to find ways of addressing the shortcomings in the service identified by the Ofsted Local Area Inspection. Notably, in terms of the ability of Birmingham City Council to achieve this, 97% of local authorities responding to a survey expected high needs expenditure to continue to increase into the future.²⁸ Birmingham would therefore need to achieve something that almost all other authorities see as unachievable whilst also addressing significant shortcomings in its existing service.

Legal Position

Just as with the budgetary framework in which the SEND sector operates it is important to have a basic understanding of the legal framework and in particular the rights of young people with SEND as it relates to education. What follows is not a comprehensive legal guide but some key principles of the law relating to the education of children and young people up to the age of 25. These have a significant impact on the way in which local authorities are able to deal with the overall SEND situation.

For children and young people with SEND who do not have an EHCP, their needs will nearly always be met in mainstream schools. The schools will (at least notionally) apply the basic funding and the additional funding received from the Schools Block to meet the needs of a pupil with SEND up to the sum of £10,000. In the event that a pupil's needs cannot be met from the additional SEND support budget then it is possible that the school could apply for top up funding from the local authority's High Needs Block. In reality in those circumstances it is more usual that a request would be made for an EHCP. Very often top up funding will only be provided to support pupils who already have an EHCP.

The process for obtaining an EHCP is covered by statute, regulation and statutory guidance and an EHCP is legally binding on the local authority.²⁹ A local authority has to first consider whether an assessment of the need for an EHCP should be carried out. If so, an assessment has to take place which will determine either that there should be an EHCP or that it is possible to meet the needs of the pupil from the Schools Block funding. If it is determined that an EHCP should be issued then the local authority has to set out within the plan the details of the child or young person's SEND, how the SEND will be provided for and the educational establishment at which it will be met. At each stage of the process the parents, carers or if appropriate the young person has a right of appeal to the Special Educational Needs and Disability Tribunal.

The process of identifying a school to be named in an EHCP is that the local authority will try to identify which school or schools it feels are capable of meeting the needs of the pupil or student as set out in the EHCP. It is also possible for the parents or carers to put forward proposals for a school to be named. The local authority will then consult the schools concerned to determine whether they are able to meet the need of the child or young person. It is possible for a school to be able to meet the needs of a child or young person but if they do not have the capacity to admit her or him then it will not be possible to name the school in the EHCP.

Consideration of schools is not limited to the publicly funded sector such as local authority maintained schools, academies or free schools. It is possible for independent provision to be considered. Even if the local authority is putting forward a publicly funded school a parent or carer can nominate an independent special school. In line with the concept of 'parental choice' it is the case that there is a presumption that a child or young person will be educated in the school put forward by a parent or carer.³⁰ The consequences of that, if unrestricted, is that very significant funds could be spent on independent provision when there is an alternative, cheaper and perfectly adequate setting available.

The rules relating to the naming of schools in an EHCP do place some restriction on the right of parents or carers to secure their choice of school. In essence the local authority can decline the parental preference in the event that the proposed provision:

- Is not suitable for the child or young person.
- Is incompatible with the efficient education of others.
- Is incompatible with the efficient use of resources.³¹

Unsurprisingly, there has been significant litigation around the question of whether local authorities are entitled to decline to name particular schools put forward by parents. The finer detail of that litigation is not important for the purposes of this report. In relation to the issue of whether independent provision should be named it is the last test that is usually most relevant from a parent or carer's point of view. The reason is that in the vast majority of circumstances an independent special school will be more expensive than provision in a maintained school, academy or free school. On the average figures quoted above the difference in cost between a mainstream school and an independent school will be in a bracket of £32,000 and £46,000 and between a maintained special school and an independent school in a bracket of £17,000 and £29,500.

Every case is different and so the divergence in the figures between independent and maintained provision may vary significantly from case to case. It should also be borne in mind that the local authority is also under an obligation to demonstrate that their more cost effective proposal is suitable for the child or young person. However in general it is the case that suitable maintained provision will be more cost effective than an independent setting. Therefore, in the circumstances where both the local authority proposed placement and the independent special school placement are deemed to be able to meet the pupil's needs, the local authority provision will usually be preferred.

A difficulty arises where there is an inadequacy of suitable provision in the state funded school sector to meet the needs of all children and young people in an authority that have SEND. If there is no place available in a state funded institution then a parental preference of an independent special school (assuming it is capable of meeting the pupil's need) will be highly likely to be named in an EHCP as there can be no question that it is an inefficient use of resources. The reason that inefficiency does not arise is that there is no more cost effective alternative being put forward. The

lack of suitable provision, considered further below, is a very real problem in Birmingham and elsewhere. In June 2019, a Freedom of Information Act request by BBC Newsnight produced an admission of 66 children with an EHCP having no school place available in Birmingham according to the local authority.³² As discussed below the figure is likely to be much higher.

Even where a local authority puts forward a proposed placement in a maintained mainstream or special setting the shortage of available SEND places means that very often the proposal is not ideal. As a consequence when a parent or carer exercises their right of appeal to a tribunal they have a reasonable prospect of persuading the tribunal that the alternative to their proposed independent special school does not meet the child's needs. This would mean that the tribunal would be required to name the independent provision in the EHCP as the only proposal that meets the relevant criteria. All the evidence suggests that local authorities, including Birmingham, have a significant shortage of SEND places on which to call and there will often be an attempt to put forward a placement proposal which is making the best efforts to meet a pupil's needs without necessarily succeeding in doing so.

A further factor arises in relation to situations where there are insufficient places for SEND children particularly with an EHCP. Under s19 of the Education Act 1996 the local authority has a duty to provide all children of compulsory school age with an education. Statutory guidance and case law makes it clear that such education should be provided without delay, be full time and be of a quality that is commensurate with the education other children receive and be suitable for the pupil.³³ In some areas of local authority services the restrictions on budgets can lead to there being delays or rationing of provision to service users – whether the local authority in question wishes such a state of affairs to exist or not. In relation to education this is not legally possible given the duty under s19 - although in reality there are many children and young people who are out of education for extended periods of time.

Taking everything together in relation to the legal position, where there is a lack of places for children and young people with SEND the situation can easily become very difficult for a local authority to manage. Through the policy approach that arose out of its Inclusion Commission, Birmingham City Council is seeking to make limited resources go further. This is being done by seeking to avoid provision becoming formalised in an EHCP, instead using informal support plans and to support more SEND children in mainstream settings.³⁴ In many respects this is an attempt to ration what is a limited resource which is the approach that many local authorities are forced to adopt in the face of budgetary pressures.

Attempting to make the local authority's limited resources go further is a high risk strategy given that in the absence of the strategy succeeding there is every prospect that the situation will have become markedly worse. Families unhappy at the provision that is available (if any) can and will seek legal redress. The Cambian Group who style themselves as the largest (private sector) provider of specialist education and behavioural health services for children in the UK have identified this, stating in 2018:

“Increased parental awareness of available services and ability to appeal for specific services is driving independent sector growth.”³⁵

Independent special education provision which is much more expensive than local authority places will fill the gaps that exist. As more children and young people with EHCPs are placed in independent provision the High Needs Block will become further depleted and a vicious circle of deterioration in the situation will be created.

Exclusions

School exclusions disproportionately affect children with SEND. This is despite particular protection that is written into statutory provisions in relation to exclusion policy and practice and the wider protection afforded people with disabilities of the Equalities Act 2014. Those protections have demonstrably failed to avoid a situation where pupils with SEND are far more likely to be excluded than those without SEND. This is relevant to the issue of school places in Birmingham and elsewhere because it is both a symptom of the shortage and has the effect of exacerbating the situation.

The national picture in relation to exclusion of pupils with SEND could not be clearer. Statistics published by the Department for Education indicate that 46.7% of all pupils that are permanently excluded have SEND. Pupils with SEND who have an EHCP are 20 times more likely to be permanently excluded from primary schools than pupils without SEND. Pupils without an EHCP but with an identified special educational need or disability are 16 times more likely to be permanently excluded from primary schools. In the secondary sector pupils with an EHCP are more than twice as likely to be permanently excluded and pupils without an EHCP but with an identified special educational need or disability are nearly five times as likely to be permanently excluded.³⁶

In reality the figures for children and young people with SEND who are excluded will be higher than the published figures as there will also be pupils who are permanently excluded who are yet to be identified as having special educational needs. Whilst many pupils with SEND will navigate their school career without any difficulty those with challenging behaviour or who struggle to access learning which does not fit their framework of needs are at a very significant risk.

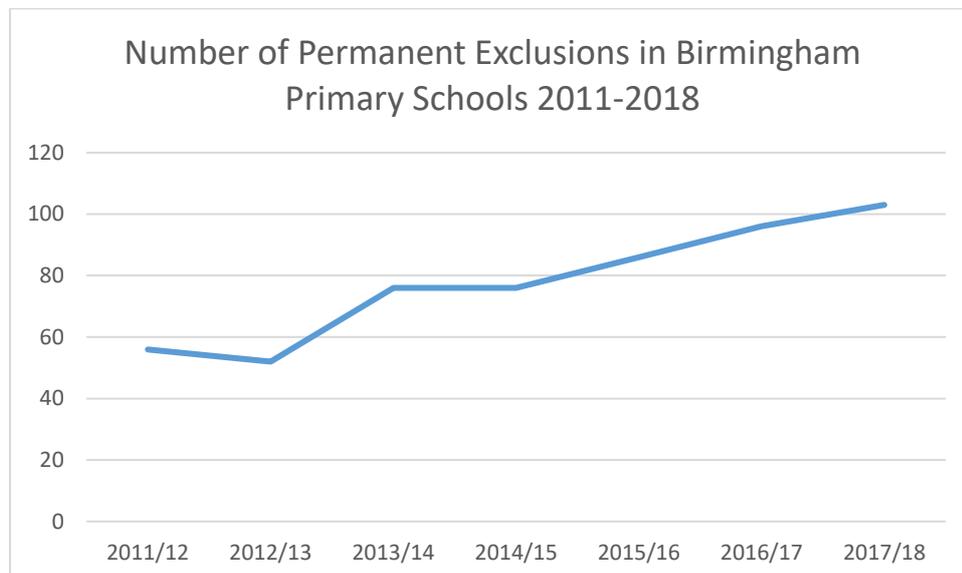
The statutory guidance provides that, in dealing with exclusion, schools should avoid discrimination and take positive steps to promote equality. It specifically recognises that pupils with SEND are at a greater risk of exclusion and directs schools to take steps to identify and address special educational needs.³⁷ None of this has had the effect of bringing down the worryingly high levels of exclusion amongst SEND pupils.

Birmingham's Inclusion Commission recognised that "there are too many exclusions of pupils with special educational needs" in the City.³⁸ This was further recognised in the report of the Ofsted Joint Local Area SEND Inspection of Birmingham in September 2018.³⁹ In the City Council's "Written Statement of Action" responding to the Ofsted Inspection a commitment was made, that by June 2020, the local authority will have 'unpacked':

"...the reasons sitting behind persistent absence, fixed term and permanent exclusions for those children who have SEND, and then to develop strategies to address these reasons."⁴⁰

It is undoubtedly the case that Birmingham has as much of an issue with the exclusion of pupils with SEND if not a situation which is worse than the national picture. Certainly in the primary sector Birmingham's permanent exclusion rate is more than 2.5 times the national average.⁴¹ It is reasonable to assume therefore that SEND pupils are disproportionately at risk of being excluded in Birmingham primary schools relative to the national picture. Nationally primary school children with SEND are 16-20 times more likely to be excluded than those without SEND. It would be remarkable if the generally much higher exclusion rates in Birmingham did not put them at even greater risk. Secondary school permanent exclusion statistics are closer to the national averages both in the most recent figures and in the recent past however they are never below the national averages.

Focussing on the primary school situation, over the past seven years permanent exclusions in Birmingham primary schools have increased significantly, almost doubling, as the figures below show:⁴²



Birmingham primary school permanent exclusions have always been significantly above the national average. Birmingham has 2.5% of the national primary school population⁴³ yet 8.5% of the total national primary school permanent exclusions based upon an average of the last seven years' figures.⁴⁴ Nationally primary school exclusions fell last year whilst in Birmingham the numbers continued to increase.

The reason exclusions matter in relation to the issue of school places is that the trend in Birmingham, as well as nationally, may be partly caused by a shortage in appropriate places or support for children with SEND. Additionally, the situation is likely to remain difficult due to the strain on schools budgets. The Birmingham City Council response to the Ofsted Local Area Inspection recognised the impact of falling support staff numbers, particularly teaching assistants.⁴⁵ The effect of the reduction in support staff is, as the local authority states, that the capacity of schools to meet the individual needs of pupils, particularly those with SEND, has fallen.

An important factor here is the requirement of schools to meet the first £10,000 of provision for children and young people with SEND from the existing school funds. As we have seen, the figure of £10,000 per pupil is a notional figure and is not ring-fenced. With pressure on school budgets there is not likely to be a significant reserved fund for contingencies that occur. Therefore, if behavioural issues arise that require support, the question for the school management team will be what other resource can be cut to fund the additional assistance?

The Local Government Association research into SEND and High Needs funding found that a major contribution to the situation was:⁴⁶

“...a range of national policy decisions which, taken together, have not created an environment in which mainstream schools are rewarded or incentivised for being inclusive.”

Factors cited include curriculum changes, the focus on inspections and the accountability regime including the Progress 8 measure that seeks to measure individual pupil growth from the end of

primary school to the end of Key Stage 4. In relation to the latter, the focus on academic achievement and also a weighting towards progress at the higher ends of academic achievement has not incentivised a broad focus on the whole school population.⁴⁷ Whilst the Department for Education has introduced changes to Progress 8 to take into account the performance of ‘outliers’, to the extent that inclusion has been disincentivised for some time the damage is already done and the changes appear to have had a minimal impact.⁴⁸ The National Audit Office has also supported the view that the pressure of attainment targets is a reason for less SEND pupils attending mainstream schools.⁴⁹ Children and young people with SEND can present disruptive and challenging behaviour and teaching assistants and other support staff provide a critical role in supporting pupils. That support helps with learning, avoids situations escalating and reduces the disruption to other pupils that might otherwise give rise to fixed term or permanent exclusion. A key feature of very many EHCPs is the provision of a teaching assistant resource to support a young person which demonstrates their value. As stated, a local authority is obliged to fund the support specified in an EHCP; however for children with SEND that do not have an EHCP and who are being supported from pre-existing school resources the drop in non-teaching staff will inevitably leave them at greater risk of exclusion.

In the absence of greater levels of support in mainstream schools the options for pupils with SEND are to seek an EHCP and potentially to be placed in a special school setting. The aspiration of the Birmingham Inclusion Commission is to reduce the number of EHCPs through greater levels of non-EHCP based support in mainstream education, this included a concept of ‘support plans’ as a less formal package of assistance.⁵⁰ Twelve months after the publication of the Inclusion Commission report, the local authority Written Statement of Action in response to the Local Area Ofsted Inspection does not refer to support plans but commits to ensuring mainstream schools take a collaborative approach to an inclusive education by September 2019.

Ofsted highlighted in its report the high number of pupils who are out of education which was acknowledged by the local authority:⁵¹

“Parents raised concerns about children and young people who are not in education. As leaders are aware that too many pupils who have SEN and/or disabilities are not in school, one of the targets within the education delivery and improvement plan is to reduce this number. This is yet to have a significant and sustained impact.”

The authority’s Written Statement of Action seeks to reduce the number of children not in education by August 2020. The existence of children with SEND without a school place is one feature of the reality of there being insufficient school places. The experience of the writer is that there is significant difficulty in excluded children accessing Birmingham’s pupil referral unit, the City of Birmingham School.

A pupil referral unit is designed to be a short term provision for children and young people who are excluded (formally or informally) from education in order to avoid gaps in education and to enable consideration of a suitable educational setting to take place. There is effectively a waiting list to access the City of Birmingham School due to a lack of available places. This is a situation that should not exist given that paragraph 1 of the statutory guidance states that excluded children must begin full time education no later than the sixth day following a permanent exclusion [my emphasis].⁵² The reality is that excluded children are offered limited periods of tuition which will typically be accessed

online which does not reflect the full time education that is legally required. That education has to be of the same quality as the education which is offered to other pupils in the City.⁵³

Where there are children with EHCPs who are out of school one option is for them to be placed in the independent special school sector. Given their right to education under s19 of the Education Act 1996 and a right to have provision named in section I of an EHCP, in the absence of alternative options there will effectively be a right to insist upon a suitable independent special school place. As noted above, Birmingham acknowledged in 2019 there are 66 children with EHCPs who do not have a school or college placement. A report suggested that in fact the number is 250 although Birmingham City Council stated that it was a figure they did not “recognise”.⁵⁴ The statistics published by the Department for Education record 220 pupils in Birmingham with EHCPs not in education, employment or training in January 2019 which is supportive of the higher figure.⁵⁵

It is notable that the private Kedlestone Group are well aware of the opportunity that arises from high levels of exclusions, particularly in relation to SEND children and young people:

“The market for special needs schools remains strong despite the challenging economic and politically uncertain environment. An increase in the number of children being taken into care combined with an increase in exclusions from mainstream schools will continue to drive demand.” [my emphasis]⁵⁶

The Kedlestone Group is a private sector company providing “residential and day schools together with children's homes for young people with social, emotional and mental health needs and those on the autistic spectrum.” They are not the only private sector education provider whose business model is in part predicated on the increase in exclusions from state funded schools. The impact of the increasing exclusions and the number of children and young people out of education is to drive the expenditure of the High Needs Block budget on independent special school provision.

Places

Birmingham City Council has acknowledged a shortage of special educational needs places.⁵⁷ As noted above whilst the number of SEND places has been increasing, the number of EHCPs is increasing at twice the rate creating a growing shortfall in places. There has also been a significant increase in children and young people being placed in the independent sector.

The most acute need for places is said to be in relation to pupils with Autistic Spectrum Condition (ASC) and Social, Emotional and Mental Health (SEMH). One third of the placements in the independent sector are recorded as having ASC as their primary need and one third, SEMH.⁵⁸ This is leading to increasing costs in terms of the placement of these pupils and also increasing publicly funded transport costs as pupils travel further to access suitable education.

There are a number of issues behind the rising pressure on places. Part of that is the pressure on budgets across all schools. As discussed, it is also said to be a result of the pressure on attainment in schools with limited resource being focussed on results rather than inclusion. It is noted that this generates a trend towards pupils who might previously have had their needs met in a mainstream setting with appropriate support being placed in special schools and resource bases. What this suggests is that the situation is more serious than just the fact that the rise in EHCPs is twice the rise in special educational needs places available. In reality because of the other pressures on schools in terms of performance, which hampers inclusion, there is increasing pressure on special school and resource base places over and above that reflected by the increasing EHCP numbers.

The City Council reported to the Schools Forum in 2018 that a framework for SEND educational placements in independent settings was being implemented to ensure they meet stringent quality assurance and submit a tender and fee structure to be part of the framework.⁵⁹ Whilst this holds out the offer of a means of controlling both resources and a return on investment, in reality if there are not enough places in the state funded sector there is no practical control that can be applied in circumstances where an independent setting alone can meet a child's need.

The difficulty in keeping down the placement of children and young people in independent settings has been seen in the last year's financial figures for Birmingham City Council. The reported outturn on the 2018/19 High Needs Block included overspending of £1M in independent placement provision that was attributed to "savings not achievable".⁶⁰ It is worth bearing in mind that the additional £1M is likely to be an on-going cost and not related to a single year as placements are an annual, not a one off, cost.

Private Sector Opportunities in the Independent Special Sector

The independent special school sector has long existed and played a role in providing education for children and young people, especially where they present with particularly complex needs. Many independent special schools have charitable status which offers benefits in terms of tax allowances and funding opportunities. Non-maintained special schools which are approved under s342 of the Education Act 1996 are required to be not for profit. Where independent schools are charitable or not for profit, any surplus income generated would need to be applied to their charitable objects which will typically relate to the provision of education to young people.

There are other independent schools that are 'for profit' or based in the private sector. These schools can apply for the approval of the Secretary of State under section 41 of the Children and Families Act 2014. Doing so gives parents and carers a right to request that the school is named in an EHCP and if it is so named the place must be funded by the local authority. Authorisation under section 41 does also mean that a school cannot refuse to accept a pupil if that school is named in an EHCP.

Where independent special schools are not authorised under section 41 it is still possible for local authorities to place pupils at the school but technically they cannot be required to do so. In reality where there is a shortage of appropriate SEND places the local authority will have limited choice about whether to allocate to a non-section 41 approved school if it is to meet its duty to provide an education for a child under s19 of the Education Act 1996. At the same time the school in question will be able to exercise a discretion as to which pupils it accepts which allows it to manage the challenges it faces in dealing with its overall school population.

The supply of special educational provision is seen as being a significant opportunity in the private sector. The Cambian Group, which as previously mentioned holds itself out as the largest private sector supplier of special educational needs provision, identified the "annual addressable market value" (the potential earnings it might achieve if it supplied 100% of the available market) as being £4.7bn.⁶¹ Whilst it is inconceivable that the private sector will reach a point of providing 100% of special educational needs provision at present local authorities provide 83% of SEND school and college places with the remaining 17% split between the private and voluntary/charitable sectors.

There is therefore an obvious incentive on the part of the private sector to grow its current share of the 'market'. As has also been noted above the strategy of private sector companies is based upon the increasing number of exclusions from mainstream schools and the growth in awareness of

parents and carers of the ability to appeal for specific educational provision. In addition the increase in “the prevalence of higher need autism spectrum disorder as a primary need” and the annual growth in the numbers of pupils with special educational needs (as part of a wider growth in overall pupil numbers) is seen as key drivers.⁶²

Growing market share is not the only strategic aim of private sector providers. In 2018 Cambian Group’s announcement of interim results to the stock market included the following report:

“The Group’s ongoing focus is to fill existing capacity, increase fee levels and reduce the cost base to increase margins. Good progress has been made in increasing average fee levels and average occupancy levels have remained stable.”⁶³

Shortly after the publication of that statement Cambian Group were acquired by a competitor, CareTech Holdings PLC, in a deal said to be worth £372M.⁶⁴ This supports the view that the independent special school market remains, in the opinion of the private sector, very attractive.

One example of a private sector school which has opened in Birmingham is the ARC Oakbridge School in the Jewellery Quarter in 2018. It has a capacity of up to 40 children with autism spectrum condition and is not approved under section 41 which means it retains a discretion as to the pupils it accepts onto its roll. At the time of an Ofsted inspection in January 2019, shortly after it opened, there were eight pupils on the school roll referred from Birmingham and Solihull local authorities. The annual fees are £55,000 per pupil.⁶⁵ It is worth remembering that as a school that is not approved under section 41, unlike other independent special schools a local authority cannot be forced to name the school as a placement for any pupil.

In the Ofsted inspection the Oakbridge School achieved ‘good’ ratings across all areas which suggests it offers a reasonable learning opportunity. Clearly the existence of the school expands the availability of SEND places in the local area. Putting to one side questions of relative quality between independent and publicly funded providers, what is indisputable is that placing a pupil at schools such as Oakbridge consume considerably more public funds than a maintained special school. It is for this reason that local authorities are able to exercise a discretion to decline to name a school where it does not constitute an efficient use of resources.⁶⁶ However for SEND children and young people out of education or struggling in a mainstream setting this is an attractive opportunity to which the local authority seemingly has no alternative.

Oakbridge School is part of the Kedlestone Group which was incorporated in 2012 and is itself part of the Kyanite Limited group of companies. The Kedlestone Group has quickly built up a portfolio of residential and day schools for young people with special educational needs across the country through acquisition and new starts. Up until 2016 the annual accounts were showing significant losses but in 2017 a profit of £2.87M was achieved and in 2018 this was increased to £4.54M.⁶⁷ The turnover in 2018 was £28M and the highest paid director received remuneration of £379,940.

One attraction of operating in this sector can be seen by virtue of the fact that despite an operating profit before tax of £4.6M the group was able to reduce its tax liability to just £62,256 in 2018 (1.3% of its turnover). Kyanite Limited which is Kedlestone Group’s parent company is a private limited company registered in Jersey. As such there is limited financial information available.⁶⁸ From the information that is available the company appears to be predominantly owned by a family who have previous involvement in the agri-foods sector.⁶⁹

Oakbridge School and Kedlestone Group Ltd offers a local example of the type of opportunity that exists in relation to the provision of SEND places by the private sector. If there were a surplus of

SEND places in Birmingham and elsewhere then there would not be a strong business model for the companies to move into the area because of the ability of the local authority to consider the efficient use of resources when looking at placements for a pupil or student who has an EHCP. As it is the shortage of SEND places means there are opportunities for the private, for profit, sector to open up schools in a given area in the knowledge that local authorities will have little alternative but to place pupils with them notwithstanding the significantly higher fee levels and there is no actual obligation on the local authority to do so.

Oakbridge currently has a maximum capacity of 40 pupils. Once it is at capacity the total fees generated would be £2.2M. Birmingham City Council appear to have accepted the role that the school will play in providing education to children and young people in the city. At the formal opening of the school in 2019, the Cabinet Member for Education, Skills and Culture stated:

“It is so important that children who have additional challenges and need space away from a mainstream school will have this specially designed environment specifically for young people with autism...”⁷⁰

The reality is that there is a strong market opportunity for organisations such as Kedlestone to fill the space that has been created by the lack of SEND places in the state funded sector. The problem for Birmingham City Council is that as more money is spent on high cost places for pupils whose need could be met in a state funded school, there is ever more pressure on the High Needs Budget and less resources available to tackle the wider problems it has. Increasing use of independent provision is an inevitability but it is a short term solution with long term consequences.

Other Approaches to the Special Educational Needs Places Shortfall

There are local authorities that are looking at ways of addressing the shortage of SEND places in the state funded sector. Like other cities, Manchester is facing considerable pressure in relation to children and young people with SEND. It has seen a higher increase in the number of EHCPs than Birmingham between 2015 and 2017.⁷¹ Overall however the two cities had a very similar percentage of children and young people with EHCPs (Manchester, 3.4%⁷²; Birmingham, 3.2%⁷³). Manchester has 204 pupils or students in independent provision in 2018/19 at a cost of £6.3M⁷⁴ per year or 9%⁷⁵ of its High Needs Block allocation. This compares to Birmingham which was said to spend a total of £21M⁷⁶ per year on independent provision (as at December 2017) or 17.6%⁷⁷ of its High Needs Block allocation.

Manchester City Council has approved expenditure of £20M of Basic Needs capital grant to provide an expansion of special school places which is in addition to a DfE allocation of £4.9M.⁷⁸ The intention behind this commitment is to significantly bring down the expenditure on independent provision. Whilst there are limits on local authority capital spending as there are on other aspects of expenditure this is clearly a strategy that has merit in terms of controlling future expenditure and achieving the maximum benefit to children and young people as a whole.

Another local authority that has pursued a strategy which is focussed on increasing the number of state funded special educational needs places is Essex County Council. Essex has a similar number of EHCPs to Birmingham with 8,286 in 2018.⁷⁹ The County Council’s view following a review in 2015 was that by 2020 there would be a shortfall of 344 special needs places. The Council approved capital funding and the Schools’ Forum agreed an ‘invest to save’ scheme which involves borrowing capital to be repaid over time. Funds have also been successfully secured from central government. The intention is to create an additional 400 SEND places and to significantly reduce the spending on

“expensive and poor quality independent places” so as to help the broad range of children with special educational needs with the additional funds.⁸⁰

In Birmingham the expansion that has taken place in recent years has been outpaced by the expansion in EHCPs as stated above. The School Place Planning Requirements 2018/19 to 2024/25 report of Birmingham City Council published in 2018 does not deal with the current or projected demand for special school places in the city over the period. It is stated that this will be included in future versions of the report but it should be noted that the report was an update on the previous report of November 2016 so it may be that the demand for SEND places may not be incorporated into overall school place planning until December 2020. It appears there is an absence of accurate intelligence as to where in the city there is a need for additional SEND places and what type of provision that should be. As it is, in the report itself there is not an indication of any expansion in SEND places for the years 2018/19 and 2019/20.⁸¹

Elsewhere there is in fact some evidence of continuing modest expansion of special school places with a proposal to increase places at the Pines Special School from 190 to 230 incrementally over a period of time starting in September 2019.⁸² Additionally there is a proposal to increase the places at the Skilts School, a special school, from 64 to 120 by September 2021.⁸³ It should be noted that until recently there were already 80 pupils on the role at the school.⁸⁴ If this is complete and correct it does suggest a tailing off of an already limited SEND place expansion. Even if further expansion will take place, on the evidence available regarding current rates of increase this is unlikely to be at the levels that would keep pace with demand, let alone catch up with the already widening of the gap between demand and provision.

Mainstream Inclusion

Birmingham City Council has stated its intention to drive up the levels of inclusion of SEND pupils in mainstream school settings. This might be seen as an alternative to the approach taken by local authorities such as Manchester and Essex in expanding special school provision. It might also be seen as a strategy of last resort when no other options seem viable. The difficulty is that what might appear to be a straightforward solution is very difficult to deliver.

It is notable that one of the local authorities that holds itself out as leading the ‘inclusive’ approach to special educational needs is expanding special school provision. Newham London Borough Council states that it is well known “nationally and internationally” for a high level of inclusion of SEND pupils in mainstream schools.⁸⁵ Yet the local authority has recently bid for funds to build a 100 place special school in the borough⁸⁶ and has announced an increase in places at another special school.⁸⁷

The challenge of achieving a high level of inclusion in mainstream settings is likely to be behind the fact that of all local authorities, Newham was found to perform the worst in complying with the statutory timetable for completing EHCPs. Local authorities are required to finalise an EHCP within 20 weeks and figures for 2017 showed that Newham achieved this in just 1.4% of cases.⁸⁸ One possible reason for the performance is in the current environment the council is struggling to adhere to its policy of meeting SEND pupils needs in mainstream settings.

Throughout this report the pressures on SEND provision has been set out. At the heart of that is the funding pressure. A London Councils Report from June 2019 noted that whilst turning to an inclusive approach and use of mainstream schools might achieve savings in fact:

“Funding was raised as a key prerequisite for successful inclusion. It was also highlighted as the most significant barrier to inclusion in the current financial climate.”⁸⁹

This conclusion supports the view that whilst there is ostensibly a cost differential on current figures between placements in publicly funded mainstream settings and special schools in favour of the mainstream settings, increasing inclusion in mainstream schools is likely to see a significant increase in the cost of those mainstream settings.

If Birmingham was to achieve the shift to provision in mainstream settings that it has suggested is its aim, it will not only need to address the financial pressures of doing so it will need to secure the support of the parents, carers and young people who rely upon the service. For the strategy to succeed, they will need to be persuaded that an EHCP is not necessary and in many cases that in the absence of a publicly funded special school place they should not turn to the independent special school sector. Recent evidence suggests that confidence in Birmingham’s delivery of special educational needs services is low which will make a shift in policy towards mainstream inclusion difficult.

The Ofsted Area Inspection Report found that “there is a great deal of parental dissatisfaction” with SEND services in Birmingham.⁹⁰ Additionally there have also been surveys carried out in November 2018 and June 2019 in relation to the views of parents and carers.⁹¹ Taking one measure, overall satisfaction with the EHCP application and assessment process the figures give cause for concern. In November 2018, 49.1% of respondents to the survey said that their experience of the process was either poor or very poor.⁹² That contrasted with 25.75% that said that their experience was either good or very good. In June 2019 the figures had shifted slightly to 44.45% and 28.57% albeit on a sample size in June 2019 which was nearly half the first one in November 2018.⁹³

Birmingham City Council’s stated strategy requires there to be a high degree of trust between parents and the local authority. On the recent evidence there is much work to be done to build that trust and this also reflects the experience of those working with parents and carers in Birmingham, including the writer. It is not just the overall confidence in the assessment process there are also marked deficits in satisfaction with the experience of contact with the SENAR service, dealing with concerns raised, accessing support services and transitions to adult services.

The debate over the inclusion of children and young people with SEND in mainstream education is a broad and at times partisan one. A study reported in the Journal of Research in Special Educational Needs in 2016 looked specifically at records relating to pupils with autism spectrum condition.⁹⁴ In reviewing previous studies the authors note that there is no consensus about the benefits of inclusion in mainstream schools over placement in a special school setting. They do comment that “there is a great deal of evidence to suggest that when children with ASD lack social competence, they can experience a number of negative academic and socio-behavioural outcomes in mainstream settings”. The 2016 study itself concluded that children they looked at who were in special schools performed better in English than those they considered in mainstream settings. Beyond that the academic outcomes between the settings were considered to be similar.

Conclusion

The purpose of this report has been to set out what is seen as a critical situation in the provision of special educational need in Birmingham. It is hoped that the effect of doing so is to promote urgent action to reset the policy agenda from one which, in the view of the author, is likely to perpetuate children and young people with SEND receiving inadequate support and unacceptable outcomes.

There is relevant information that is not publicly available; the report should be considered in that context. The detailed future plans of the local authority are such an example. Having taken note of that limitation it is still the case that there is a very considerable amount of information available and this report is therefore put forward in the belief that it forms a credible argument for urgent action.

Birmingham City Council essentially has three possible approaches to the education of children and young people with SEND:

1. They can turn to the independent special school sector to accept children for whom there is not a place in the maintained sector.
2. They could initiate a significant expansion of special school places in the maintained sector by taking an 'invest to save' approach.
3. They could try to manage the existing resources more efficiently, seeking to minimise the need for EHCPs, placement of pupils in special schools and the use of the independent special sector where there is not space in the state funded special schools.

In essence Birmingham has adopted the third approach as its intended strategy which may be born as much out of a perceived necessity as an actual desire. There is no doubt that there are extreme pressures in relation to the education of children with SEND as there is in relation to education generally and in relation to wider services. There is however a problem for the City in that whilst the third approach may be the strategy, the first approach looks like being the reality. This can be seen in the £1M overspend in 2018/19 related to independent placement provision that was attributed to "savings not achievable".⁹⁵

Where the demand for SEND places is outstripping the increase in the availability of such places the challenge for the local authority is not simply to find a way of managing the available resources better in relation to the existing cohort of pupils and students. It might be thought that the answer is that fewer EHCPs should be issued but this disregards the legal entitlement to such plans and the wider pressures that increase the need for them. Mainstream schools are less able or willing to manage SEND pupils from ever-reducing budgets which is then driving numbers towards special schools. Increasing numbers of permanent exclusions are manifestation of the position and add significantly to the pressure. All the time there is additional demand being placed on the High Needs Block resources.

The consequences of the Written Statement of Action, which was a response to the concerns identified in the Ofsted Local Area Inspection published in September 2018, is unlikely to result in a freeing up of Birmingham's resources. Given that the inspection team found that pupils with SEND are making weak academic progress, are more frequently absent or excluded, experience too long waiting periods for therapy and support and often receive poor quality EHCPs⁹⁶ there is an inevitability of more resources being needed to be applied to address these issues. It would be extraordinary if addressing those issues as well as the other matters highlighted in the inspection report could be achieved by spending less money even if there may be particular areas where resources could be better or more efficiently used.

Importantly the national context supports the argument that there are financial pressures and demands for increasing places for children and young people with SEND that Birmingham City Council cannot easily resist. As has been noted, in December 2018, 97% of local authorities expected high needs expenditure to continue to increase into the future.⁹⁷ Furthermore the National Audit Office (NAO) has found that in the 2017/18 financial year 81.3% of local authorities overspent their

high needs budget a figure that has nearly doubled since the new funding regime was introduced in 2013/14.⁹⁸ The number of EHCPs, the number of children and young people in special schools and in independent special schools are all increasing.⁹⁹ The NAO conclusion on the national picture is telling and has implications for Birmingham:

Many local authorities are failing to live within their high-needs budgets and meet the demand for support. Pressures – such as incentives for mainstream schools to be less inclusive, increased demand for special school places, growing use of independent schools and reductions in per-pupil funding – are making the system less, rather than more, sustainable.¹⁰⁰

Trying to tackle the increasing expenditure on independent special school places has to compete with the pressures the NAO have identified and in Birmingham in particular, the other financial demands arising out of the Written Statement of Action. Despite the overall demands, the second approach set out above – increasing the number of SEND places in the state funded special school sector - is in the writer's view the only way to avoid ever increasing expenditure on the independent sector becoming reality.

It is possible for local authorities to apply capital budgets to increasing SEND places as can be seen from Essex and Manchester's approach. There may be partnerships to be had with other partners or local authorities to achieve this increase. It will take a front loading of resources as SEND places are created whilst the existing framework of provision exists. However the potential return on investment of capital spending on expanding SEND places now will have a year on year benefit just as every additional placement in the independent special school sector does not just impact on one year's resources but will tend to impact for a number of years. Birmingham is often described as a 'young' city and its growing population is likely to continue to generate demand for SEND services into the future. Investing now will ensure that we provide a bright for future for every child for many years to come.

Appendix 1

Independent Special Schools in the West Midlands Area¹⁰¹

School Name	Ofsted Report Year	Fees Low (£)	Fees High (£)	Local Authority Area	Ofsted Rating for Achievement of Pupils	SEND Conditions Referenced in Report*
Arc Oakbridge School	2019	55000	55000	Birmingham	Good	ASC
Arc School Ansley	2018	50160	50160	Warwickshire	Good	SEMh ASC ADHD
Arc School Napton	2018	50160	50160	Warwickshire	Good	SEMh ASC
Arc School Old Arley	2018	50160	55875	Warwickshire	Good	SEMh ASC ADHD
Bloomfield School	2016	38025	38025	Sandwell	Good	SEMh
Bow Street School	2017	27066	27066	Wolverhampton	Outstanding	SEMh
Chase House School	2017	41500	41500	Walsall	Good	ASC
Foundation For Conductive Education (THE)	2016	25000	34000	Birmingham	Outstanding	Movement disorders
Homeschool Social Enterprise	2018	6000	6000	Sandwell	Inadequate	N/A
Hopedale School	2016	30000	30000	Staffordshire	Outstanding	SEMh ASC
Maple Hayes Hall School	2017	14527	19490	Staffordshire	Outstanding	Dyslexia
New Elizabethan School	2017	70054	70054	Worcestershire	Good	SEMh ASC ADHD
Norton College	2018	35000	35000	Worcestershire	Good	SEMh
Rugeley School	2017	90000	90000	Staffordshire	Requires Improvement	ASC
RYAN Education Academy	2017	14000	25000	Birmingham	Good	SEMh
Silver Birch	2016	6600	6600	Birmingham	Good	SEMh ASC ADHD
Spring Hill High School	2018	29000	86000	Birmingham	Good	SEMh ASC ADHD
St Pauls Community Development Trust	2017	19000	19000	Birmingham	Requires Improvement	Exclusions
Sunfield Childrens Homes	2018	87013	87013	Worcestershire	Requires Improvement	ASC
The Island Project School	2018	48429	71970	Solihull	Requires Improvement	ASC
Values Academy	2016	24525	24525	Birmingham	Good	Behaviour ASC
Values Academy Nuneaton	2018	25605	25605	Warwickshire	Requires Improvement	SEMh ASC
Woodbury School	2018	58500	58500	Wolverhampton	Good	SEMh

*Key

ASC – Autism Spectrum Condition

ADHD – Attention Deficit Hyperactivity Disorder

SEMh – Social Emotional and Mental Health

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- ¹ Department for Education, Special Educational Needs in England, January 2019, published 4 July 2019.
- ² Based upon annual SEN2 return submitted by Birmingham City Council and reported at <https://www.gov.uk/government/statements/statements-of-sen-and-ehc-plans-england-2019>
- ³ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – December 2018
- ⁴ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – December 2018
- ⁵ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p17
- ⁶ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018
- ⁷ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p17 – the baseline figures will include statements of special educational needs under the previous system.
- ⁸ Birmingham’s Strategy for SEND and Inclusion 2017-2020, p6
- ⁹ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – December 2018
- ¹⁰ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – December 2018
- ¹¹ ISOS Partnership, “Have we reached a ‘tipping point’? Trends in spending for children and young people with SEND in England”, December 2018, p21
- ¹² Corporate Revenue Budget Monitoring Report 2018/19, Draft Out-Turn Report, reported to Birmingham City Council Cabinet, 14 May 2019, p33.
- ¹³ Birmingham City Council, High Needs DSG Funding Block, 2017/18, report to Schools Forum, July 2018.
- ¹⁴ Birmingham City Council, SEND Strategy 2019-2023, undated.
- ¹⁵ Birmingham City Council, Birmingham SEND Joint Commissioning Framework, June 2019.
- ¹⁶ See for example the Birmingham SEND Monthly Newsletters for June, July and August 2019 available here https://www.birmingham.gov.uk/downloads/download/2846/birmingham_send_monthly_newsletters.
- ¹⁷ Birmingham City Council, Written Questions to Cabinet Members, Minutes of the Meeting of Birmingham City Council on 9 July 2019, p3989.
- ¹⁸ ISOS Partnership, “Have we reached a ‘tipping point’? Trends in spending for children and young people with SEND in England”, December 2018, p22
- ¹⁹ Schools Week, “Private special school places cost £480 million per year.” 4 March 2017, accessed at <https://schoolsweek.co.uk/private-special-school-places-cost-480-million-per-year/>.
- ²⁰ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p34
- ²¹ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – December 2018
- ²² Maintained special schools taken from the data published by the Department for Education and cross-checked with Birmingham’s Strategy for SEND and Inclusion 2017-2020, p9
- ²³ Birmingham City Council Financial Plan 2019-2023, p59
- ²⁴ Corporate Revenue Budget Monitoring Report 2018/19, Draft Out-Turn Report, reported to Birmingham City Council Cabinet, 14 May 2019, p33.
- ²⁵ Birmingham City Council Financial Plan 2019-2023, p60
- ²⁶ Birmingham City Council, High Needs DSG Funding Block, 2018/19 indicative at March 2018, report to Schools Forum, March 2018.
- ²⁷ Corporate Revenue Budget Monitoring Report 2018/19, Draft Out-Turn Report, reported to Birmingham City Council Cabinet, 14 May 2019, p34.
- ²⁸ ISOS Partnership, “Have we reached a ‘tipping point’? Trends in spending for children and young people with SEND in England”, December 2018, p4
- ²⁹ Children and Families Act 2014, s42
- ³⁰ Children and Families Act 2014, s39(3).
- ³¹ Children and Families Act 2014, s39(4).

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- ³² BBC News, Hundreds of special needs pupils 'squeezed' out of school, 19 June 2019, accessed at <https://www.bbc.co.uk/news/education-48663873>.
- ³³ See: Department for Education, "Alternative Provision, Statutory Guidance for Local Authorities" January 2013 published at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/268940/alternative_provision_statutory_guidance_pdf_version.pdf. Also R(Y) v Croydon LBC [2016] ELR 138.
- ³⁴ Birmingham's Strategy for SEND and Inclusion 2017-2020, p16
- ³⁵ Cambian Group PLC Annual Report and Accounts 2017, published 20 March 2018, p9
- ³⁶ Permanent and fixed-period exclusions in England: 2016 to 2017, published 19 July 2018 at <https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2016-to-2017>.
- ³⁷ Exclusion from maintained schools, Academies and pupil referral units in England: A guide for those with legal responsibilities in relation to exclusion. See paragraphs 9-12 and 19, 21 and 25. Published by Department for Education. September 2017
- ³⁸ Birmingham's Strategy for SEND and Inclusion 2017-2020, p12
- ³⁹ Letter from Simon Mosley to Colin Diamond dated 3 September 2018, "Joint local area SEND inspection in Birmingham".
- ⁴⁰ Birmingham City Council, SEND Improvement Programme, Written Statement of Action, undated.
- ⁴¹ Permanent and fixed-period exclusions in England: 2016 to 2017, published 19 July 2018 at <https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2016-to-2017>.
- ⁴² Based upon Permanent and fixed-period exclusions in England from 2011 to 2018 published by Department for Education at <https://www.gov.uk/education/school-discipline-and-exclusions>.
- ⁴³ Birmingham Pupil Population Statistics 2017-2018, accessed at <https://www.compare-school-performance.service.gov.uk/download-data> - Birmingham has 128,670 primary school pupils against a national primary school pupil population of 5,035,029.
- ⁴⁴ Based upon Permanent and fixed-period exclusions in England from 2011 to 2017 published by Department for Education at <https://www.gov.uk/education/school-discipline-and-exclusions>.
- ⁴⁵ Birmingham City Council, SEND Improvement Programme, Written Statement of Action, undated, page 32: "The current financial position of many schools has seen the number of support staff being reduced. This has led to a decrease in the capacity of schools to meet the individual needs of children and young people."
- ⁴⁶ ISOS Partnership, "Have we reached a 'tipping point'? Trends in spending for children and young people with SEND in England", December 2018, p4
- ⁴⁷ See Department for Education, Secondary Accountability Measures, Guide for Maintained Schools, Academies and Free Schools, March 2019, p22. For example: "The Progress 8 score for each pupil will always be determined by dividing the points total for their best eight qualifications by 10 (the eight qualifications with English and maths both double-weighted), regardless of how many qualifications the pupil sits."
- ⁴⁸ Education Data Lab, "Provisional GCSE and equivalent results 2018: The impact of changes to Progress 8", 16 October 2018, accessed at <https://ffteducationdatalab.org.uk/2018/10/provisional-gcse-and-equivalent-results-2018-the-impact-of-changes-to-progress-8/>.
- ⁴⁹ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p31
- ⁵⁰ Birmingham City Council, Birmingham's Strategy for SEND and Inclusion 2017-2020, p18
- ⁵¹ Letter from Simon Mosley to Colin Diamond dated 3 September 2018, "Joint local area SEND inspection in Birmingham".
- ⁵² Department for Education, "Alternative Provision, Statutory Guidance for Local Authorities" January 2013.
- ⁵³ Department for Education, "Alternative Provision, Statutory Guidance for Local Authorities" January 2013, paragraph 30.
- ⁵⁴ BBC News, Hundreds of special needs pupils 'squeezed' out of school, 19 June 2019, accessed at <https://www.bbc.co.uk/news/education-48663873>.
- ⁵⁵ Department for Education, Statements of SEN and EHC Plans: England, 2019, published 30 May 2019
- ⁵⁶ Kedlestone Group Limited, Annual Report and Financial Statements, Year Ended 31 December 2018, p2
- ⁵⁷ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018
- ⁵⁸ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018 p4

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- ⁵⁹ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018
- ⁶⁰ Corporate Revenue Budget Monitoring Report 2018/19, Draft Out-Turn Report, reported to Birmingham City Council Cabinet, 14 May 2019, p33.
- ⁶¹ Cambian Group PLC Annual Report and Accounts 2017, published 20 March 2018, p9
- ⁶² Cambian Group PLC Annual Report and Accounts 2017, published 20 March 2018, p9
- ⁶³ Cambian Group PLC Unaudited results for the six months to 30 June 2018, published 12 September 2018
- ⁶⁴ “UK’s CareTech completes £372M acquisition of Cambian Group”, S&P Global Market Intelligence, 18 October 2018, accessed at <https://www.spglobal.com/marketintelligence/en/news-insights/trending/u01mvxait6waigkdonjva2>.
- ⁶⁵ Ofsted Inspection Report, 29-31 January 2019, Arc Oakbridge School.
- ⁶⁶ Children and Families Act 2014, s39(4).
- ⁶⁷ Based upon Kedlestone Group Ltd annual accounts filed at Companies House for the years 2012 to 2018.
- ⁶⁸ The Tax Justice Network’s Financial Secrecy Index 2018 report on Jersey scores the territory as having a 100% secrecy score for the “Public Company Accounts” category.
- ⁶⁹ Information based on Annual Return filed with Jersey Financial Services Commission Companies Registry dated 23 April 2019.
- ⁷⁰ Cllr Jayne Francis, quoted in Birmingham Mail, 9 May 2019, p24
- ⁷¹ Manchester experienced a 38.6% increase over the period compared to an 18.9% increase in Birmingham. SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018 p2
- ⁷² Manchester City Council, Report to Schools Forum, Update on Special Educational Needs and Disabilities (SEND) and the High Needs Strategic Review, 13 May 2019.
- ⁷³ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018 p3
- ⁷⁴ Manchester City Council, Report to Schools Forum, Update on Special Educational Needs and Disabilities (SEND) and the High Needs Strategic Review, 13 May 2019.
- ⁷⁵ High Needs Block figure taken from Education & Skills Funding Agency, Dedicated schools grant (DSG): 2018 to 2019 financial year allocations accessed at <https://www.gov.uk/government/publications/dedicated-schools-grant-dsg-2018-to-2019>.
- ⁷⁶ Birmingham City Council, SEND High Needs Budget – Demand and Supply Pressures Report to Schools Forum – January 2018 p4.
- ⁷⁷ High Needs Block figure taken from Education & Skills Funding Agency, Dedicated schools grant (DSG): 2017 to 2018 financial year allocations accessed at <https://www.gov.uk/government/publications/dedicated-schools-grant-dsg-2017-to-2018>.
- ⁷⁸ Manchester City Council, Report to Schools Forum, Update on Special Educational Needs and Disabilities (SEND) and the High Needs Strategic Review, 13 May 2019, p12
- ⁷⁹ Department for Education, Essex County Council Special Free School Bid, March 2019, p3.
- ⁸⁰ Department for Education, Essex County Council Special Free School Bid, March 2019, p3.
- ⁸¹ Birmingham City Council, The School Place Planning Requirements 2018/19 to 2024/25. Appendix 8.
- ⁸² Birmingham City Council consultation on School Organisation The Pines Special School, accessed at <https://www.birminghambeheard.org.uk/people-1/thepines>.
- ⁸³ Birmingham City Council consultation on School Organisation The Pines Special School, accessed at <https://www.birminghambeheard.org.uk/people-1/skiltsrelocation/>.
- ⁸⁴ Ofsted Inspection Report, 5-6 December 2017, Skilts School.
- ⁸⁵ Newham London Borough Council, Places for All, A School Place Planning Strategy 2018 to 2023, p38
- ⁸⁶ Newham London Borough Council, Places for All, A School Place Planning Strategy 2018 to 2023, p39
- ⁸⁷ Newham London Borough Council, News Report: New specialist school set to provide extra places for Newham children with £11.7 million of funding, 12 March 2018, published at <https://www.newham.gov.uk/Pages/News/New-specialist-school-set-to-provide-extra-places-for-Newham-children-with-£11-7-million-of-funding.aspx>
- ⁸⁸ Newham Recorder, Newham named as the worst council for supporting children with complex special needs, 18/1/19 accessed at <https://www.newhamrecorder.co.uk/news/education/newham-council-worst-for-supporting-children-with-complex-special-needs-1-5856619>
- ⁸⁹ London Councils, Inclusive Practice, The role of mainstream schools and local authorities in supporting children with SEND, July 2019, p13

⁹⁰ Letter from Simon Mosley to Colin Diamond dated 3 September 2018, "Joint local area SEND inspection in Birmingham"

⁹¹ BVSC Engagement with Parent, Carers and the Voluntary Community Sector regarding the Ofsted / CQC SEND Inspection of Summer 2018, November 2018 and Birmingham City Council, Birmingham SEND Partnership SEND Parent and Carer Survey, June 2019

⁹² BVSC Engagement with Parent, Carers and the Voluntary Community Sector regarding the Ofsted / CQC SEND Inspection of Summer 2018, November 2018, p12.

⁹³ Birmingham City Council, Birmingham SEND Partnership SEND Parent and Carer Survey, June 2019, p5

⁹⁴ Waddington, E. and Reed, P., Comparison of the effects of mainstream and special school on National Curriculum outcomes in children with autism spectrum disorder: an archive-based analysis. *Journal of Research in Special Educational Needs*, 2016, 17(2), pp.132-142.

⁹⁵ Corporate Revenue Budget Monitoring Report 2018/19, Draft Out-Turn Report, reported to Birmingham City Council Cabinet, 14 May 2019, p33.

⁹⁶ Letter from Simon Mosley to Colin Diamond dated 3 September 2018, "Joint local area SEND inspection in Birmingham"

⁹⁷ ISOS Partnership, "Have we reached a 'tipping point'? Trends in spending for children and young people with SEND in England", December 2018, p4

⁹⁸ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p8.

⁹⁹ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p32.

¹⁰⁰ National Audit Office, Support for pupils with special educational needs and disabilities in England, 5 September 2019, p49

¹⁰¹ Schools drawn for Department for Education Data on Special schools and colleges approved under section 41 in England and Wales 2019 and Independent special schools in England including non-maintained special schools (and excluding section 41 approved special schools and colleges) 2019 both accessed at <https://www.gov.uk/government/publications/independent-special-schools-and-colleges>.