

Howard League for Penal Reform's submission to the House of Lords Children and Families Act 2014 Committee

25 April 2022

Key points

- The Children and Families Act 2014 extended some SEND provisions to children in custody. However, it excluded young adults and did not give children in custody the same provision as children in the community
- Provision for children with special educational needs in custody remains poor
- Young Black people with special educational needs are too often punished rather than supported
- Children with SEND in custody should have the same entitlements as children with SEND in the community
- Part 3 of the Act should apply to young adults in custody.

1. Introduction

- 1.1. This response answers question 5 of the inquiry's terms of reference: *"Has the Act achieved its goal of improving provision for children and young people with SEND, in all settings including mainstream schools, special schools and further education colleges? If changes are needed, could they be achieved under the framework of the Children and Families Act 2014 or is new legislation required?"*
- 1.2. The Children and Families Act 2014 extended some provisions for young people with SEND to children in custody. However, the Act did not introduce the same provision for children in custody and in the community. In practice, children with SEND in custody are not even getting the provisions which they are legally entitled to.
- 1.3. In the community, the Act and SEND Code of Practice apply to young people aged 0–25. However, young adults in custody are excluded. There is no clear rationale for this.
- 1.4. The Howard League and the Independent Provider of Special Educational Advice (IPSEA) have worked on a joint briefing which sets out the rights of children with SEND in custody and explains how the current law and practice is failing children. This response draws on the conclusions of the briefing, which is due to be published next month (Howard League and IPSEA, forthcoming).

1.5. The Howard League has drawn on its legal work with children and young adults in custody in responding to this consultation.

2. Provision for children with special educational needs in custody remains poor

2.1. Since 2002, the Howard League has run a specialist legal service for young people aged 21 and under in custody. In its legal work, the Howard League finds that provision for young people with special educational needs in custody is inadequate.

2.2. As sections 4 and 5 of this consultation response explain, the Howard League recommends legislative changes to give young people in custody the same rights as young people in the community. However, provision for children with SEND in custody could also be improved within the framework of the Act and other existing legislation.

2.3. The Ministry of Justice publishes annual data on the needs of sentenced children in the youth justice system, based on practitioner assessments. The data points to very high levels of need among children in custody. In 2019/20, practitioners were concerned about the speech, language and communication needs of more than seven in ten children sentenced to custody (Ministry of Justice and Youth Justice Board, 2021).

2.4. There are no up-to-date figures on the number of children in custody with Education, Health and Care plans. However, data from 2014 shows that less than a third of children in custody had a Statement of Special Educational Needs or an Education, Health and Care plan (Ministry of Justice and Department for Education, 2016).

2.5. In the Howard League's experience, the special educational needs of children in custody are often overlooked and few have Education, Health and Care plans. Sentenced children's needs should have been assessed as part of a pre-sentence report, while children who have been remanded to custody should have their needs assessed by the local authority as a looked-after child. However, the Howard League frequently works with children whose neurodevelopmental disorders and speech, language and communication difficulties have not been recognised.

2.6. Children in custody have limited access to education, especially children in Young Offender Institutions (YOIs). This makes it harder for children with SEND to receive the level of support that they would in the community.

2.7. More than three-quarters of children and 18-year-olds in youth custody are in YOIs, where young people of compulsory school age are legally entitled to 15 hours of education a week (Young Offender Institution Rule 38(2)). Since 2015, Young Offender Institutions have been commissioned to provide 30 hours of education a week (Youth Justice Board, 2016).

- 2.8. Children in secure training centres are entitled to at least 25 hours of education or training each week (Secure Training Centre Rules 28(2)). Children in secure children's homes must be helped to make measurable progress towards achieving their educational potential and, in the Howard League's experience, usually receive education every day (Children's Homes (England) Regulation 8(1)).
- 2.9. In practice, children in YOIs and secure training centres did not receive the education which they were entitled to even before Covid. Educational provision was suspended altogether at the start of the pandemic, even though vulnerable children could continue to attend school in the community. It has remained unreliable since then.
- 2.10. Children who cannot attend ordinary classes in YOIs and secure training centres are often put on "outreach" timetables, where they have one-to-one or smaller group lessons. This includes children who cannot participate because of their distinct learning needs.
- 2.11. In the Howard League's experience, children placed on outreach education often get even less learning time than their peers: the number and length of sessions is determined by how many children need support from the worker, rather than how long it would take to meet each child's needs.

3. Young Black people with special educational needs are too often punished rather than supported

- 3.1. In both custody and the community, young Black people with special educational needs are too often punished rather than given the right support. This is another area where practice urgently needs to change.
- 3.2. Black children have historically been discriminated against in special educational provision. In the 1960s and 1970s, mainstream schools failed to recognise Black Caribbean children's experiences and needs – for example, the impact of family separation for those who had recently come to join their parents in the UK – and wrongly labelled them as "*educationally subnormal*" (Coard, 2005).
- 3.3. Children from Black Caribbean and mixed white and Caribbean backgrounds remain significantly overrepresented among those identified as having social, emotional and mental health needs, the category previously described as behavioural, emotional and social difficulties (Strand and Lindorff, 2018). Children identified as having social, emotional and mental health needs are disproportionately likely to experience school suspensions and permanent exclusions (Department for Education, 2021).
- 3.4. Black children are also significantly overrepresented in youth custody, often following experiences of school exclusion. Twenty-seven per cent of children and 18-year-olds in youth custody are Black, compared to around five per cent of 10–19-year-olds in the general population (Ministry of Justice and

Youth Custody Service, 2022; Office for National Statistics, 2021). The failure to recognise Black children's needs is compounded in custody, as is the resort to punishment rather than support.

- 3.5. In its legal work with young people in custody, the Howard League finds that prison staff often misinterpret the behaviour of Black children and young Black men with SEND. For example, Howard League lawyers find that prison staff can wrongly perceive young Black people with neurodevelopmental disorders as aggressive – as in the case where a use of force statement referred to a Black autistic child's "*wide angry eyes*" as a justification for restraining him.

4. Children with SEND in custody should have the same entitlements as children in the community

- 4.1. The Act should be amended to give children in custody the same rights as children in the community. The best endeavours duty should apply to all youth custodial settings, the current needs of children in custody should be considered in Education, Health and Care (EHC) needs assessments, and children in custody should be entitled to annual reviews and should be able to appeal against the content of an EHC plan or the local authority's decision not to amend a plan following annual review.
- 4.2. In the community, mainstream schools and other settings must use their "*best endeavours*" to meet the needs of children and young people with SEND. The best endeavours duty does not apply to penal institutions (Children and Families Act 2014, s66).
- 4.3. If a child in custody receives an EHC needs assessment, the assessment is solely about their post-detention needs and does not consider their special educational needs in custody (Children and Families Act 2014, s70(5)).
- 4.4. In the community, local authorities must review a child's EHC plan every 12 months to check whether it still reflects and meets their needs (Children and Families Act 2014, s44(1)). This does not apply to children in custody. Local authorities are advised to review provision for children with SEND in custody, but they are not required to do this or to make any changes based on the review (Children and Families Act 2014, s48(2); SEND Code of Practice, paragraphs 10.66 and 10.133).
- 4.5. In the community, children and young adults have a right to appeal against the content of an EHC plan or the local authority's decision not to amend an EHC plan following an annual review. Children in custody and their parents do not have a right of appeal on these grounds. In both custody and the community, parents and young people can appeal against a local authority's refusal to carry out a needs assessment or decision not to issue an EHC plan (Children and Families Act 2014, s51; Children and Families Act 2014, s73).

5. Part 3 of the Act should apply to young adults in custody

- 5.1. The definition of detained children and young people in the Act should be extended to include young adults aged 18 to 25. This would bring the provisions for young people in custody in line with the provisions for young people in the community.
- 5.2. Part 3 of the Children and Families Bill initially excluded all children and young people in custody. This clause was criticised by parliamentarians from all parties and was removed at Third Reading in the House of Lords (HL Deb 5 February 2014). It was replaced by s70 of the Act, which provides that some provisions apply to detained children and young people. However, this only applies to young people aged 18 and under (Children and Families Act 2014, s70(5)).
- 5.3. The Bill was also amended to require youth custodial settings and youth offending teams to have regard to the SEND Code of Practice (Children and Families Act, s77(1)). Prisons holding young adults aged 18 to 25 were not included.
- 5.4. The debates on the Bill did not include any rationale for excluding young adults. None of the parliamentarians who successfully argued against the clause which excluded children in custody recommended that young adults should be excluded. Instead, the exclusion of young adults was largely overlooked.
- 5.5. Lord Ramsbotham, who had been instrumental in challenging the exclusion of children in custody, explained at Report Stage that he was:

nervous that we have people under the age of 18 in young offender institutions, but health and care plans continue from nought to 25; and we have the problem of the over-18s who will be dispersed elsewhere and who will now, under plans from the Ministry of Justice, no longer go to young offender institutions, but may be sent to adult institutions all over the country (HL Deb 7 January 2014).

Special educational provision for young adults was not addressed by either the government or other Peers. The government did not mention the exclusion of young adults in bringing its Third Reading amendments and did not provide any rationale for this.

The Howard League for Penal Reform

25 April 2022

Legislation

Children and Families Act 2014

The Children's Homes (England) Regulations 2015

The Secure Training Centre Rules 1998

The Young Offender Institution Rules 2000

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