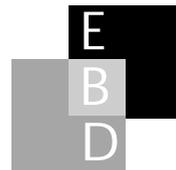


Cracking the Code for EBD

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ABSTRACT This paper examines the implications of proposed changes to the Special Educational Needs Code of Practice for England and Wales, in particular the altered criteria for determining whether children have emotional and behavioural difficulties which call for their LEA to make additional resources available to them. It is argued that those changes come from a perceived need to reduce special education expenditure and to reverse a statistical upward trend in the number of children who have special education statements. Some of the forces which may account for the proposed changes are examined.

KEYWORDS
Code of
Practice draft;
emotional and
behavioural
difficulties;
statement
criteria

Erecting fences

Economic psychologists take an interest in what they call *social dilemmas*. In such dilemmas, individual incentives are pitted against incentives for the group, with the immediate payoff for an individual who chooses not to cooperate with the group usually exceeding the payoff for each member of the group. Why, for example, would somebody pay taxes if there was no risk of being caught for failure to pay? Yet if everyone failed to pay taxes, we can see that there would be problems in providing any public services. Hardin (1968) used a parable to illustrate a classic social dilemma. In this a group of villagers all have access to common land on which to graze their cattle. It is clearly to the advantage of each villager to add to his herd, since introducing an individual cow makes little difference to the common resource yet it advantages its owner considerably. Yet when every villager follows that reasoning, the field becomes progressively over-grazed. Eventually it is destroyed and nobody benefits. What was once a productive resource for everybody ends up benefiting nobody.

Social dilemmas operate in the provision of most public goods (Lopes, 1994). Such 'goods' tend actually to take the shape of services of one kind and another. Health care which is free at the point of delivery and social security payments can be fitted within Hardin's parable. If the field is grazed

sensibly there is enough for everyone; too much grazing causes strains in the system and may lead to it breaking down. The parable also provides a framework for considering resource allocation for special educational needs (Bowers and Parrish, 2000). Its underpinning notions appear to have influenced the revised Code of Practice on assessment which the British government intends to introduce to special education services in the second part of the year 2001. They may be more prosaically reframed as a 'cake' from which only so many 'slices' can be obtained (McDonnell, 2000) but the parable's essence remains unchanged. The modified Code of Practice is there to put a fence firmly around the field. The fence appears to be there in particular to keep children with emotional and behavioural difficulties (EBD) away from the grazing or, to put the matter in more basic terms, to undermine the already unwilling acceptance that children's emotional and/or behavioural difficulties actually constitute learning difficulties that require statutory provision to be made for them.

The importance of the Code of Practice

Since 1994, England and Wales have had a set of government-approved principles and procedures which are expected to be applied by schools and LEAs (local education authorities or school districts) in identifying and assessing children's special educational needs. These principles and procedures are embodied in a document known as the Code of Practice (DfE, 1994). The status of the Code's contents varies; some parts of it outline practices required by law while other parts merely offer guidance on what is seen as good practice. The 1994 Code is the one currently adopted in England and Wales and this outlines seven areas of childhood educational 'difficulty' or 'disability'. One of them is emotional and behavioural difficulties. The 1994 Code was, quite reasonably, expected to last only for a few years. A new draft Code was therefore issued in the summer of 2000 with the intention that it should come into force, after being ratified by the British Parliament, in September 2001.

To understand the Code's significance we need to understand the importance in English law of a 'statement' of special educational needs. Most children, even those with recognized special educational needs, do not have a statement. Like the IEP (Individual Education Plan) in the USA, a statement entitles a child to provision in school which is additional to or different from that received by students with no statement. It is a legal document which is, if necessary, enforceable by the courts. When children attend a special school, whether LEA-maintained or independent, and when they are to receive regular additional assistance from specialists or ancillary workers in mainstream schools, the only way that a parent

can be assured of continuity of such provision is by means of a statement. The Code of Practice provides guidance on what difficulties may and may not warrant a statement; it is available to parents, professionals and the courts, and so is pivotal in the process of diagnosis and assessment.

Although England is traditionally less litigious than some other countries (the concept of punitive damages is not embraced by English law and so settlements in England tend to be lower than those in the USA), we have recently seen the first case of an English local authority being successfully sued for the negligence of one of its psychologists who failed to identify adequately a statemented student's learning disabilities (*Times Law Reports*, 28 July 2000, p. 31). This may well lead to more cases of LEAs and their professional staff being held to account for failing to make correct assessments or for their unwillingness to make resources available through a pupil's statement of special educational needs.

Statements cost money (Bowers, 1996; Fletcher-Campbell, 1996). Special school places can be very expensive. Additional resources in mainstream schools, which can only be assured for a particular student by means of a statement, whether those resources are technological, physical or human, place demands on LEAs' budgets in a climate which expects that as much money as possible should pass from the LEA to the schools in its area for them to control. Of course, support assistant time, information technology equipment, counselling and so on can in theory be provided from a school's budget. But as the law stands in England, it is hard to hold the school to account when such provision is not made. The statement places legal accountability firmly at the door of the LEA and signifies the recognition that the child to which it attaches has a relatively enduring difficulty. Such a difficulty (or disability), according to the UK's 1995 Disability Discrimination Act, includes 'physical and mental impairment' and so should encompass emotional problems which have a 'substantial and long-term adverse effect' on the individual's ability to cope.

If statements are expensive and bring with them accountability in law, then the simple answer for LEAs is not to issue them – or at least to hold back as much as possible from doing so. This can be difficult where a child has a manifest physical or sensory disability. It is hard to argue that a blind child or a child with profound and multiple learning difficulties does not require additional resources to overcome a relatively enduring problem in learning. A child's emotional and/or behavioural difficulties, on the other hand, are easier to define as short-term or to ascribe to the inadequacies of those teaching him or her. If the former is the case, the school should cope with the student from its own resources; if the school's 'inadequate' or even 'toxic' responses to the child can be defined as the cause of the problem, then a statement is obviously not called for. The observation that teachers

may 'pathologize' student behaviour as part of the process of control (e.g. Miller, 1996) can lead to an assumption that most EBDs are situationally determined and so only as enduring as the current situation encountered by the child in that school.

Assessing needs

In England and Wales, the LEA determines whether or not a child should receive a statement. Given the British government's aim to reduce the number of children requiring statements by nearly a third by the year 2002 (DfEE, 1997), the matter appears straightforward. LEAs should issue fewer statements. Nearly all of them have produced criteria for who should and shouldn't need to be seen by the gatekeepers of the process, the LEA's educational psychologists. Their task, admittedly a difficult one, is to implement the LEA's policy on special educational needs (SEN) while at the same time applying their skills and judgements in a professional way.

Yet for the overall spectrum of SEN, there hasn't been a reduction in the number of children with statements. Far from it. There has been a steady rise in numbers. In mainstream primary (5–11 years) schools, the proportion of the student population with statements rose from 1.3 percent in 1995 to 1.6 percent in 1999, while the proportion of secondary (11+ years) students with statements rose from 1.9 percent to 2.5 percent over the same period. This might, of course, be the consequence of increased inclusion in mainstream schools. It isn't: the number of children attending special schools of all types actually rose over those four years.

The continuing rise in the number of students with statements appears perverse when an LEA-commissioned consultancy report (Coopers & Lybrand, 1996) from a firm of accountants has suggested ways of reducing the numbers of statements and the British government has announced its intention to achieve the same result. What can account for it? Undoubtedly a key factor is the existence of the Special Educational Needs Tribunal, a judicial body that was constituted at the same time that the SEN Code of Practice came into force. This enables parents (and effectively schools, since they can sometimes advise and steer parents in their actions) to appeal against the decision of an LEA not to assess a child and/or not to issue a statement. If a statement has been issued, the SEN Tribunal can hear appeals against what it says about the provision to be made, while if the LEA tries to withdraw a child's statement, the Tribunal can be asked to prevent that happening. There has been a progressive increase in the number of appeals made to the Tribunal. The last recorded year (1998–9) saw 2412 appeals registered, a rise of nearly 10 percent on the previous year. If LEAs were acting in accordance with the 1994 Code of Practice, this should not present a problem for them. They

would win their cases. Yet last year they lost three-quarters of all the cases brought against them (SEN Tribunal, 2000), suggesting that their attempts to 'hold the line' are frequently ill-founded when judged against the individual circumstances of a child rather than against an LEA's cold criteria for who should and should not be seen to deserve the additional resources that a statement can bring. It could get even worse, since after much pressure from various lobby groups, the government has promised (DfEE, 1998) to allow schools to appeal directly to the Tribunal in certain circumstances.

The SEN Tribunal's decisions are binding on LEAs. Whatever order a Tribunal makes, however resource-intensive or expensive (e.g. placement in an independent special school), it has to be complied with by the LEA. The Code of Practice is crucial in shaping the Tribunal's decision. Like any judicial body it has to consider the law, in this context mostly education law. The law requires it (Education Act 1996, Section 313) to 'have regard to' any part of the Code which seems relevant to its decision. At present, of course, the Tribunal has to consider the 1994 Code of Practice. It seems that the answer for government is simple: the Code of Practice is due for change, so make sure that when it is changed it doesn't lead to the same situation as at present. In particular, target areas which are already open to a range of interpretations and where causes of difficulty are open to argument depending on which model of causation anyone wants to apply. What better area could there be than EBD? It is perhaps not coincidental that the person hired by the government to steer (and write) the revision of the Code was formerly a high-ranking administrator for special education in an LEA.

The revised Code of Practice (DfEE, 2000, 7.17) is much vaguer on what should be taken into account in assessing students' emotional and/or behavioural difficulties than the one which is currently in force. It uses a little over 180 words to cover the whole area. That is tight writing. It then refers readers to a government circular (9/94) for elaboration. That can be construed as an avoidance tactic because, as we have seen, there is nothing in law to require the SEN Tribunal to take account of anything other than what is in the Code itself. In England, government circulars are issued and reissued; they invariably draw readers' attention to the fact that they merely provide guidance. It is hard to see how a Tribunal will be able to use the revised Code's text alone, in the way that it can at present, to reach a decision on whether a particular child's EBD are sufficiently complex or severe to require a statement.

Are EBDs a special educational need?

It seems that it all depends on your point of view. Certainly the 1994 Code of Practice includes EBD within its list of learning difficulties. The Code's

revision uses slightly different terminology, 'behaviour, emotional and social development', but the notion of EBD as a learning difficulty requiring special educational provision remains. However, a discussion document issued early in the life of the present government (DfEE, 1997) suggests strongly that part of the strategy for including children with EBD in mainstream schools involves separating the notion of 'behavioural difficulties' from that of 'special educational need'. This can be seen in action in Pace's (1998) account of his experience as a special educational needs coordinator in a Birmingham mainstream school. He cites administrative documents within Birmingham LEA which warn schools that the Code of Practice's staged process of assessment should not apply to any but the rarest cases of emotional and behavioural difficulties. Chronicling what he sees as 'the attempt to remove EBD as a category of SEN' (p. 16), Pace cites the cases of two of his students 'in desperate emotional states' (p. 16). In one case a local education authority educational psychologist suggested that the school could do more to help the child. In the other a psychologist acknowledged the young person's 'very obvious' difficulties but decided that the Code of Practice did not apply.

Of course, Pace's (1998) observations may just represent a way of deflecting responsibility away from the school. That would, I suspect, be the response of some educational psychologists in his LEA. Describing Birmingham's 'Framework for Intervention', which began in 1997, in a journal read largely by educational psychologists, Williams and Daniels (2000) suggest that earlier attempts to separate matters of behaviour and discipline from those of emotion and behaviour are flawed. It reduces teachers' stress, they suggest, to see the problems they encounter as stemming from the child and to define those problems as requiring outside intervention or additional resources. Changing school and staffroom culture appears to be the objective of the Framework, with a conscious unwillingness for the psychologist to address individual problems directly. Underlying it is an 'ecosystemic' (Cooper and Upton, 1990) view of student behaviour and an approach to intervention whose fundamentals were elaborated some years ago by Burden (1981).

The *de facto* separation of EBD from the Code of Practice noted by Pace (1998) can be seen in another article (Daniels and Williams, 2000) which deals explicitly with attempts to reduce the number of statements in that LEA. 'The Framework for Intervention', they say, 'was always designed to be an approach for authority-wide implementation in the same way as the Code of Practice operates on special educational needs' (p. 226). I have some sympathy with a 'systems' approach (see, for example, Bowers, 1989) to the role of external support services, although from Pace's (1998) account it seems that the consultant role is being combined with that of

gatekeeper of resources. That is not a usual combination, since it can bring an element of coercion to the process and so contaminate the process of consultation. My central concern, however, lies in Pace's observation that an intervention approach which seeks to separate EBD from SEN will direct itself to 'visible or loud' (p. 16) conduct disorders but ignore emotional problems which are not antisocial or disruptive but which nevertheless render it difficult for children to benefit from schooling. These are learning difficulties and should be treated as such. To deal with them otherwise, however noble the reasons may seem, is to seek to circumvent the law.

In the current (1994) Code of Practice there are nine descriptive passages to guide the process of statutory assessment of pupils who are thought to have EBD. They embrace academic under-achievement, unpredictable or violent behaviours, obsessions, including those relating to eating disorder, impaired social interactions with peers or adults, withdrawn or isolated behaviours, risk of suicide and substance or alcohol abuse. Bullying and/or being the victim of bullying are taken into account, as are problems of mental as well as physical health. Although the 1994 Code scarcely mentions actual emotions in young people (anger is the exception), they can be inferred from many of the descriptors. For example, absence of adequate peer relationships and extremes of sadness have been found to be connected, while continued unhappiness is (unsurprisingly) strongly linked to bullying and taunting by peers (Reynolds et al., 2000). These are emotional difficulties which any teacher knows will affect a child's capacity to learn. In representing children and their parents at SEN Tribunal hearings, I have found that the Code of Practice currently in force permits the consideration of *internalizing* as well as *externalizing* conditions. The latter include the 'hard-to-miss' elements of disruptive and antisocial behaviours (Rutter et al., 1998); internalizing behaviours, on the other hand, are more subtle but no less intrusive for the individual concerned. Childhood depression and deep-seated anxiety may not always disrupt the working of a classroom or a school but they can have a profound effect on learning and academic achievement. I take this to be one of Pace's (1998) chief complaints about the LEA approach which he describes.

The revised Code of Practice

My criticisms of the new Code of Practice may seem harsh. The book in front of me (DfEE, 2000) as I write this paper may contain fewer than 200 words of guidance on 'behaviour, emotional and social development', but it has five whole pages on the same topic in a subsequent section entitled 'SEN Thresholds: Good Practice Guidance in Decision-Making on Identification and Provision for Pupils with Special Educational Needs'. Indeed,

those pages include three case studies to illustrate that guidance. There is actually *more* here than there is in the current Code. This guidance is the product of a year's 'research' commissioned by the DfEE from Newcastle University. It may seem harsh to use inverted commas, but I do so because the research brief issued by the British government in June 1999 seemed to have all the hallmarks of a consultancy exercise rather than what would usually be termed 'research'. Having sat recently on a government-convened committee to which the outcomes of the exercise were explained, I heard little to change that view. But that is not the issue here. The key matter is that even though this guidance may be bound into a book together with the SEN Code of Practice, it is *not* part of the Code. It is government guidance. It will not have to be set before the UK Parliament for approval by its members under the terms of Section 314 of the 1996 Education Act. Since it is not part of the Code, the SEN Tribunal will have to give it as much or as little weight in its deliberations as any other piece of guidance from government, the LEA or any other source.

So what does the revised Code itself contain? Just eight bullet points. They outline what children who fit practically the whole spectrum of EBD (Cooper, 1999) may need. They are hard to interpret. Try this direct quotation:

Children and young people who demonstrate features of emotional and behavioural difficulties . . . may require help or counselling for some, or all, of the following:

- flexible teaching arrangements
- help with development of social competence and emotional maturity
- help in adjusting to school expectations and routines.

(DfEE, 2000, 7.17)

So they need help or counselling for flexible teaching arrangements. Or help or counselling to help with developing social competence and emotional maturity. Or help or counselling to help in adjusting to school expectations. Frankly, this part of the revised Code provides a syntactically challenged list of truisms. It is hard to see how a Tribunal, faced with a real case, with all the complexities that will inevitably surround it, could rely on guidance of that nature to shape its decision.

We could attribute the paucity of detail in the new Code to incompetence on the part of those compiling it. This may be so. However, an alternative explanation is that it is intended to offer little of any use to a Tribunal (and to higher courts which may at times have to judge the outcome of a Tribunal) in reaching a decision on whether a local authority has acted reasonably in assessing, or failing to assess, a child's special educational needs when that child is thought to have difficulties of affect or behaviour.

In the last two years I have represented seven children before the Tribunal whose difficulties could be placed – in part at least – within the current Code of Practice’s section on EBD. Fortunately I was successful in persuading the Tribunal of the appropriateness of all those appeals. We won. If the revised Code had been in use, I seriously doubt whether any of those children would have received the assessment or the provision to which they are entitled in law.

Threshold criteria

In the absence of anything else, the Tribunal and others will probably turn to the DfEE’s guidance mentioned above. This can be changed at any time, of course. It seems likely that LEAs which have developed their own such criteria (i.e. most LEAs) will claim that theirs are as good as or better than the DfEE’s, that they are understood locally and that they provide clearer guidance than anything in the Code of Practice. That would be hard to refute.

The actual descriptors which the Newcastle team attach to what they term ‘higher levels of difficulty’ are uncontroversial. ‘Higher levels’ presumably indicate the possible need for a statement of special educational need; they cover much of the same ground as the 1994 Code of Practice, although more superficially, and it is difficult to see why those words could not have found their way into the revised Code. The section on EBD differs from the current Code in its inclusion of case studies. The only purpose which such studies can be expected to serve is as illustrations of the guidance. Interestingly, none of the three students described here (in contrast to descriptions elsewhere in the guidance) has a statement of special educational need. One is in a primary school reception class, one is in Year 1 and one is in Year 7. It is worth looking briefly at them.

The child in the reception class is a war refugee whose parents have been forced to flee their country of origin. As might be expected, there is multi-agency involvement with him. A recent review of distress in refugee children (Hodes, 2000) suggests that exposure to high levels of violence, disruption of social and family life and associated losses places such children at great risk of psychiatric disorders. Fortunately Mohammed, the case example, appears to have escaped relatively unscathed. He is timid and easily upset but that seems to be all. He has an individual education plan and a ‘circle of friends’. The school seems to have enough resources of its own to provide him with 5 hours a week of learning support assistant time, although it is unclear what happens in those 5 hours.

The behaviour problems shown by the boy in Year 1 (fidgiting, inappropriate vocalizations, problems in interacting with peers) are, we are told,

typical of many pupils with low attainments. Although we are given very little information, what is described in this thresholds document is indicative of what Rasmussen and Gillberg (1999) describe as 'DAMP', or deficits in attention, motor control and perception. He is being 'monitored' by the SENCO (Special Educational Needs Coordinator). Rasmussen and Gillberg observe that such children, who 'have difficulties concentrating, sitting still, listening, interacting in an age-appropriate fashion with peers, and participating in games and physical education' show problems which very often 'peak at ages 7 to 10 years, upsetting the child, parents and teachers' (p. 146). Maybe the case study could have looked at him when he is 2 years older.

Comorbidity of problems also occurs in the third case. Here a girl in Year 7, 'reluctant to comply with teacher requests', who 'displays some aspects of autistic spectrum disorders and of specific learning difficulties' and whose reading and spelling are more than 3 years behind her chronological age, is presented to us. She already receives 5 hours a week from an LSA (Learning Support Assistant) attached to the LEA's behaviour support service although, as we know, without a statement that could be withdrawn at any time. Unsurprisingly, she has an IEP, and advice (we're not told from whom) has been offered to her parents 'on ways of raising her attainments and managing her behaviour'. The SENCO is 'monitoring the situation' and may refer her for statutory assessment. She should do so quickly. This is obviously a child whose problems are sufficiently complex for the LEA to determine whether or not a statement is required. If that SENCO waits much longer she may find herself at the wrong end of a lawsuit in years to come.

In conclusion

I began this article by referring to economic psychology. There are not many psychologists who would attach that label to themselves, yet I suspect that many of the decisions made by LEA psychologists these days have to take financial considerations into account. The revised Code of Practice appears to offer ways of reducing costs in the future, while complying with the *Zeitgeist* of systems thinking and inclusion. I have no problem in principle with either of these, although linear cause-effect thinking on the part of those espousing systems theory can lead too easily to shifting attributions of causality to the teacher or the school (Plas, 1986). However, the Code of Practice was developed to assist in identifying the educational needs of vulnerable children. To seek to decouple it from the statutory rights which accompany recognizably severe problems seems to constitute a denial of the connection between children's emotional problems and failure to learn.

A recent paper, whose authors represent the disciplines of teaching,

psychiatry, paediatrics and social work (Place et al., 2000) reminds us that the tendency to focus on behavioural issues in educational settings can lead to children's internalizing problems going unrecognized. Those sentiments reflect the ones expressed by Pace (1998) following his experience of his LEA's attempts to reduce the extent of external involvement with EBD students in his school. A Code of Practice which marginalizes or denies the learning difficulties of children with potentially deep-seated problems does no service to special education in England and Wales.

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