

SEN and Disability - Decision Making and the Law



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Department
for Education



IPSEA

Aims:

- To assist local authorities and CCGs in interpreting and applying the legal requirements of the Children and Families Act 2014 to some of the key **decision** points.
- For attendees to consider their internal policies and procedures in light of the legal requirements and to disseminate key learning and actions with education, health and social care colleagues.

Plan for the day:

- Session 1 **Decision** to assess
- Session 2 The EHC needs assessment process
- Session 3 **Decision** to issue a plan
- Session 4 **Decision** about format and content of a plan
- Session 5 SEND Tribunal: single route of redress national trial
- Session 6 **Decision** about naming an education provider
- Session 7 **Decisions** on annual review



SEN law - the key legal references

1. [The Children and Families Act 2014, Part 3](#)
2. [The Special Educational Needs and Disability Regulations 2014](#)
3. [The Special Educational Needs and Disability Code of Practice 2015](#)



Terminology

- In legislation, the term “Local Authority” sometimes refers to the part of a local authority that carries out its education functions, and at other times to the part of the local authority that carries out its social care functions.
- Typically, the education department or education service deals with duties under the Children and Families Act 2014.
- Typically, the social services department deals with duties under the Children Act 1989 and Care Act 2014.

However, it's important to understand that, in law, the local authority is a single entity – no distinction is made between different departments/teams



Section 19 principles - Local Authority must have regard to:

- a) The views, wishes and feelings of the child and his or her parent, or the young person;
- b) The importance of the child and his or her parent, or the young person, participating as fully as possible in **decisions**;
- c) The importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those **decisions**;
- d) The need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.



Mental Capacity and the C & F Act

C & F Act 2014 brings in new category of young people who have SEN **and** who now have rights they can exercise

- **s.80 (5) C & F Act 2014** confirms that Mental Capacity Act 2005 definition of lack of capacity applies
- **Reg 64 SEN Regs 2014** sets out what should happen if a YP lacks capacity
- Young person does not lose all rights to express their wishes which must still be taken into account
- Also see **CoP - Annex 1**



The Mental Capacity Act 2005

s.2: *“(1) A person lacks capacity in relation to a matter if at the material time he is unable to make a **decision** for himself in relation to the matter because of an impairment of or disturbance in the functioning of, the mind or the brain”*

- Can be temporary or permanent and could be as a result of disability, condition or injury / trauma
- Relates to a specific **decision** at a specific point in time - not a ‘state of being’



Session 1

Decision to Assess



Starting an EHC needs assessment

Requirement for the LA to make a **decision** must be triggered, either by:

(1) Request for assessment;

Only from the following people:

- A child's parent;
- A young person; or
- A person acting on behalf of a school or post-16 institution.

(s.36(1) Children and Families Act 2014)

Or

(2) Local Authority becomes responsible.

(e.g. because a child or YP has been brought to the LA's attention by, amongst others, a health or social care professional.)



LA makes a **decision**

- LA must **decide** within **six weeks**.
- Section 36(8) - LA **must** assess where:
 - (a) *the child or young person has or may have special educational needs, **and***
 - (b) *it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.*(s.36(8) CFA 2014 (see also 36(10) for those over 18))

The LA is responsible for making the decision - however, other parties must co-operate.

NB: LA decision makers applying a stricter test is not lawful.



Legal definitions:

A. Special educational needs

- A child or young person has special educational needs if he or she has a learning difficulty or a disability which calls for special educational provision to be made for him or her.

(s.20(1) Children and Families Act 2014)



B. Learning difficulty

(2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she:

- (a) Has a significantly greater difficulty in learning than the majority of others of the same age, or
- (b) Has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

(3) A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).

(s.20 Children and Families Act 2014)



Special educational provision (I)

Special educational provision means **educational or training provision** that is additional to, or different from, that made generally for others of the same age in:

- (a) Mainstream schools in England,
- (b) Maintained nursery schools in England,
- (c) Mainstream post-16 institutions in England, or
- (d) Places in England at which relevant early years education is provided.

(s.21 Children and Families Act 2014)



Special educational provision (II)

- Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).
(Section 21(5) Children and Families Act 2014)

DC & DC v Hertfordshire (SEN) [2016] UKUT 0379 (AAC)

- Acknowledged that the **decision** as to whether a particular provision is or is not educational is a “vexed one”.
- Reiterated - no “bright line test” to determine whether provision is educational or not; must go back to the definition of education as “***systematic instruction, schooling or training***”.



Unlawful reasons to refuse EHC needs assessment

- The school/college hasn't spent £6,000 on SEN provision
- No report from an educational psychologist
- Need at least 3 terms worth of 'assess, plan, do review' from the school or similar from the college
- All the professionals involved agree a EHC Plan is not needed

Joint Local Area Inspections have found:

- A significant number of parents feel that needs are only identified after constant fighting and pushing
- A lack of clarity and transparency about thresholds for agreeing EHC needs assessments
- A widespread perception that only educational professionals can request an assessment for an EHC plan



Decision not to assess

- Right to make an appeal to the First-tier Special Educational Needs and Disability Tribunal (SENDIST) – two months, or one month from issue of mediation certificate if later.
- Local authority must notify the child's parent or the young person of the reasons for that determination (**decision**) and include all required information in that notice – Reg. 32 The SEN and Disability Regulations 2014
- Consideration of mediation is compulsory.
- Hearing will be held on the papers.



Decision to assess



- In 2016, 72% of all new requests for EHC needs assessments were agreed. (DfE, SEN2, 2017)
- In 2017, 77% of all new requests for EHC needs assessments were agreed. (DfE, SEN2, 2018)



Refusal to assess - appeals to tribunal

	Appeals registered	Refusal to assess	% of total
2012 – 13	3,602	1,307	36%
2013 – 14	4,063	1,631	40%
2014 – 15	3,147	1,015	32%
2015 – 16	3,712	1,185	32%
2016 – 17	4,725	1,494	32%



% of refusal to assess appeals are withdrawn or conceded without a hearing

2012 – 13	88%
2013 – 14	81%
2014 – 15	n/a
2015 – 16	79%
2016 - 17	80%



Buckinghamshire CC v HW (SEN) [2013] UKUT 0470 (AAC)

- Stated that ‘necessary’ is a standard that is “somewhere between indispensable and useful or reasonable.”
-
- Rejected argument that the FTT had been wrong to order an assessment without identifying the SEP the child required – that was the point of the assessment!
- Rejected the argument that the Tribunal should have looked only at the position at the time of consideration, and not into the future, despite this being a child about to transfer to secondary school



MC v Somerset CC [2015] UKUT 0461 (AAC)

Even if provision for the child exceeds School Action Plus, if the child had access to provision required then it may be lawful for the authority not to assess

However, it might be necessary to assess if:

- there was insufficient awareness of the special educational provision which a child requires
- if the child needed to have a statement of SEN to access the relevant provision



Cambridgeshire CC v FL-J [2016] UKUT 0225 (AAC)

- Refusal to assess case 2014 Act.
- Considered the two limbs of the test involved in determining whether a LA needed to carry out the assessment:
 - (1) Has the young person a learning difficulty or disability? **and**
 - (2) Is it one for which special educational provision may be necessary?
- Judge Jacobs: “*The issue at the initial stage is a provisional and predictive one; it is only when an assessment has been made that a definitive **decision** has to be made.*”



Case study 1

In tables, look at the refusal to assess case study



- Applying the legal test, would you agree to assess?
- What 2 or 3 points support your **decision**?





Session 2

The EHC Needs Assessment Process



Information and advice **to be obtained** for EHC needs assessment (reg 6(1))

The LA **must** seek advice on SEN/ provision/outcomes:

- (a) Child's parents or the young person.
- (b) Head or principal of school/post-16 settings that they are attending.
- (c) Medical advice and information from a **health care** professional.
- (d) Educational psychologist.
- (e) Advice and information in relation to **social care**.
- (f) Advice and information from any other person Local Authority thinks appropriate.
- (g) Advice and information in relation to prep for adulthood and independent living (for pupils in or beyond year 9).
- (h) Any person the child's parent or young person reasonably requests.
 - If HI and/or VI issues - specialist educationalist.



Exception to seeking new advice

- “The local authority must not seek any of the advice referred to in paragraphs (1)(b) to (h) if such advice has previously been provided for any purpose **and**
 - (a) the person providing that advice, **and**
 - (b) the local authority **and**
 - (c) the child’s parent or the young personare satisfied that it is sufficient for the purposes of an EHC needs assessment”.
- (Reg. 6(4) The Special Educational Needs and Disability Regulations 2014)



Information and Advice

Information and advice should:

- be clear, accessible and **specific**
 - describe the needs of the child or young person
 - describe the provision that may be required to meet needs
 - describe the outcomes that are intended to be achieved by the child or young person receiving that provision
 - include strategies for the achievement of outcomes
- Professionals should limit their advice to areas in which they have expertise.
 - May comment on the amount of provision they consider a child or young person requires – LAs should not have blanket policies which prevent them from doing so.
 - LA **must** give to those providing advice copies of any representations made by the child's parent or young person, and any evidence submitted by or at the request of the child's parent or the young person.



Duty to co-operate in EHC needs assessments

- “Where a local authority requests the co-operation of a body in securing an EHC needs assessment in accordance with section 31 of the Act, that body must comply with such a request within **6 weeks** of the date on which they receive it.”

Exceptions:

- Child or young person fails to keep appointment
- Absent from the area for continuous period no less than 4 weeks
- Exceptional circumstances affect the child, young person or parent
(Reg. 8(1) The Special Educational Needs and Disability Regulations 2014)



Joint Local Area SEND Inspections findings

- In Bolton good examples exist of joined-up working both within health teams and other partners. For example, the team around the child' model at the child development unit.
- In Trafford a small team of children's community nurses provides effective support to children who require nursing care in the community. There is close collaboration with the local authority. The team responsible for children who have complex and additional needs is integral to the successful identification of any emerging safeguarding concerns within vulnerable families. Joint visits from these two teams are routinely offered. This ensures a coordinated approach to care and minimises the potential stress on families who would otherwise have to deal with numerous professionals.



Joint Local Area SEND Inspections findings

In one LA (2018):

- Weaknesses in joint working approaches and the process for assessing children's and young people's needs have led to stark weaknesses in the quality of EHC plans
- The contribution of healthcare and social care professionals to EHC plans is deficient. This seriously hampers children's and young people's healthcare and social needs being met. EHC plans are too focused on educational outcomes, even when a child or young person has significant healthcare and/or social needs.





Session 3

Decision to issue a plan



After the assessment

When the assessment is completed, the LA will **either**:

- Issue a draft EHC plan; **or**
- **Decide** not to issue an EHC plan.

Decision not to issue an EHC plan must be notified in 16 weeks.

NB: Local authority must notify the child's parent or the young person of the reasons for that determination (**decision**) and include all required information in that notice – Reg. 32 The SEN and Disability Regulations 2014

In 2017, **93.3%** of EHC needs assessments resulted in LAs issuing an EHC plan



Legal test for issuing an EHC plan

37(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan:

- (a) The local authority must secure that an EHC plan is prepared for the child or young person, and
- (b) Once an EHC plan has been prepared, it must maintain the plan.

(s.37(1) Children and Families Act 2014)



Manchester CC v JW [2014] ELR 304

- UT confirmed that it may be necessary to order a statement of SEN (or assess for one) if a school or LA, despite having the necessary resources, simply refused to use their best endeavours to provide the required SEP for a child.

JP v Sefton MBC [2017] UKUT 0364 (AAC)

- Upheld the Ft-T **decision** that an EHC plan was not required as the necessary provision was available and would be made available through a mainstream school setting.



Buckinghamshire CC v SJ [2016] UKUT 0254 (AAC)

- UT rejected LA's argument that since the young person, who was aged 20, had made minimal progress, and was not capable of further 'study', there was no need for an EHC plan.
- Rejected "any suggestion that the attainment of qualifications is an essential element of education".
- Endorsed the Tribunal's focus on the practical realities of the situation – without an EHC plan, the therapies and SEP which the young person required would simply not be delivered in the adult care home in which he now lived.



Hertfordshire CC v (1) MC, (2) KC. (SEN) [2016] UKUT 0385 (AAC)

- The UT considered what ‘necessary’ means for the purpose of determining whether an EHC Plan was needed pursuant to s.37 C&F Act 2014.
- The UT reiterated clearly that it can mean more than what the SEND Code suggests.

Gloucestershire CC v EH (SEN) [2017] UKUT 85 (AAC)

- A Tribunal can find a plan for a young person is “necessary” in the absence of a clear educational programme, particularly where the young person has suffered educational anxiety.



CB v Birmingham City Council (SEN) (Special educational needs - other) [2018] UKUT 13 (AAC)

- *“the provision the LA expects to make available as published in its local offer is a relevant consideration in working out what will, on balance, be available from a school’s internal resources.”*
- *“It is open to a parent who disbelieves the local offer to provide evidence showing that it does not represent what is expected to be available, or that a particular school will not be able to make the provision expected under the local offer.”*
- Should be evidence that a child's needs 'can' and 'will' be catered for without recourse to an EHC plan.



Decision not to issue a plan

- Right to make an appeal to the Tribunal – two months, or one month from issue of mediation certificate if later.
- Local authority must notify the child's parent or the young person of the reasons for that determination (**decision**) and include all required information in that notice – Reg. 32 The SEN and Disability Regulations 2014
- During period of Single Route of Redress National Trial, LAs must inform parents they can ask for recommendations about health and social care.
- Consideration of mediation is compulsory.



Case study 2

In tables, look at the decision not to issue a plan case study



- Applying the legal test, would you issue an EHC plan?
- What 2 or 3 points support your **decision**?





Session 4

Decision about format and content of a plan



A Good Education Health and Care (EHC) plan



- Meets the requirements of the Act, regs and the Code.
- Describes positively what child or YP can do.
- Clear, concise, understandable and accessible.
- Is co-produced.
- Sets good, relevant outcomes.
- Tells the child or young person's story well/ coherently.
- Identifies each and every need.
- Includes provision to meet each and every need.



Some common issues

- Missing out complete sections.
- Using the letters required by the Code, but content of the sections not matching that required by Code.
- Putting several sections together (often E, F, G, H1, H2) and not labelling the different elements, or not labelling them clearly enough.
- Lack of specificity and/ or quantification in provision sections (F, G, H1 and/or H2).
- Using an additional section on Resources/ Funding as a substitute for specified and quantified provision in Section F.
- Overly lengthy and / or not easy to understand.



Activity: Content of an EHC Plan

Section A	
Section B	
Section C	
Section D	
Section E	
Section F	
Section G	
Section H1	
Section H2	
Section I	
Section J	
Section K	



Describing needs: education, health and social care (Sections B, C and D)

- Plans should identify ***all*** needs with reference to current levels of functioning and achievement.
- Needs must be recorded as needs, not as provision.
- Needs should be identified rather than conditions.
- Should be evidence of what the child or YP can do.
- May specify non-SEN health care needs and non-SEN social care needs.



Examples of needs in an EHC plan

- Maisie is working significantly below age related expectations, however she has made promising progression in writing. She records her work to show understanding through using symbols. Maisie cannot read but is good at listening to topics she is interested in but if tired or not keen will shut down. She can maintain concentration on a task for up to 15 minutes.
- Maisie has mobility difficulties due to dystonic quadriplegia affecting all four limbs, cerebral palsy and epilepsy and uses an electric powered wheelchair. This has a significant impact on her mobility and on her ability to carry out everyday tasks.
- Maisie's limited mobility means that she faces significant challenges in joining in with social activities of her choosing including family outings and holidays.



Describing provision: education, health and social care (Sections F, G. H1 and H2)

- All needs must have corresponding provision
- Provision must be:
 - Specific - say exactly what the provision is.
 - Quantified - how much of it, who will deliver it.
 - Linked to outcomes (E).
- Can be helpful to show the outcomes and provision in one table – but must be labelled **clearly**.
- Consider CAFA s.21(5) - does it educate or train?
- May specify other health care provision which is not linked to their learning difficulties or disabilities, but which should be coordinated with other services in the plan, e.g. routine dental check ups.
- Other social care provision not linked to learning difficulties or disabilities could be included.



Activity: Section F, G or H1 or H2?

1. Cognitive behavioural therapy to teach a child to deal with anxiety.
2. 2 hours per day help at home from a personal assistant to support feeding and dressing/undressing for an 8 yr old child.
3. Mindfulness training for a pupil with an anxiety disorder to enable them to remain calm, keep focused in class and relate to other children at playtime.
4. Quarterly monitoring of hearing loss and use of hearing aids by the audiology service.
5. 4 hours a week help from a personal assistant to access social activities in the community for a 15 year old.
6. Training for teaching and support staff in tracheostomy management.
7. Constant 1:1 supervision due to high risk of medical complications and emergencies.



Specification and Quantification: L v Clarke & Somerset (1998)

- In **L v Clarke & Somerset County Council [1998] ELR 129** Laws J held that “the real question ... is whether [the statement] is so specific and clear as to leave no room for doubt as to what has been **decided** and what is needed in the individual case”.
- In **B-M and B-M v Oxfordshire County Council (SEN): [2018] UKUT 35 (AAC)** Rowley J held that “[...] *even for children in specialist provision, the requirement of specificity [cannot] be abandoned where detail could reasonably be provided*”
- **SB v Hereford County Council (SEN): [2018] UKUT 141 (AAC)** - where evidence supports it, class sizes and staff:pupil ratios may be specified, while in other cases the evidence may support a need for greater flexibility. The key question is whether the EHC plan is specific enough to deliver the provision required.



Examples of poor specification (JD v South Tyneside [2016] UKUT 9 (AAC))

Special educational provision	Upper Tier Tribunal view
<i>“It is recommended that the needs and objectives as previously outlined should be met by the following”.</i>	A recommendation clearly leaves doubt as to what is being required; in fact, it suggests nothing at all is required.
<i>“Individual programmes tailored to her needs...These programmes can be provided on an individual basis or in a group situation as deemed appropriate by her school (SENCO)”.</i>	The bare provision for programmes tailored to needs adds nothing.
<i>“Access to multi-sensory teaching may be helpful using visual, auditory and kinaesthetic teaching”.</i>	Whether provision may be helpful is beside the point. Part 3’s purpose is to specify the educational provision that is required. It is not at all clear what, if anything, is required by this entry.



Specificity and Quantification

Activity: In groups of 2 or 3

- Jenny will receive up to approximately 90 mins of speech and language therapy delivered by a qualified speech and language therapist as appropriate, subject to termly review.
- Social care services provided as detailed in Maisie's Family Service Plan for short breaks.
 1. On a scale of 0-10, how (a) specific and (b) quantified are these extracts from an EHC plan?
 2. How could each be improved?



Examples of good specification and quantification

- Katya will work with a higher level teaching assistant (HLTA) for 15 minutes every morning to support her in choosing between 2 simple options presented through the 'Choices' card system.
- Joe will receive a 30 minute session twice a week focussing on developing his social use of language. The sessions will be delivered by a teaching assistant (TA) with one other child. The programme will be developed by a Speech and Language Therapist who will train the TA in delivering the sessions and review his progress on a termly basis.
- Termly visits in school from a physiotherapist to review Maisie's postural care needs.



EHC plans: Examples of good practice: Local Area Inspections

West Berkshire (2018) - EHC plans are of good quality and completed on time. Professionals and members of the parent carer forum regularly check the quality of EHC plans. EHC plans include precise and relevant educational outcomes. Suitable provision is clearly identified.

Wiltshire (2018) - The local area ensures that EHC plans are issued in a timely way. The most recent EHC plans are of a higher quality and include information about health, education and social care.

Wigan (2018) - Leaders know what a good education, health and care (EHC) plan looks like. They have ensured that education, health and social care staff all contribute meaningfully to plans and that the voices of the child and family are evident. Training for staff is helping to make the quality of these plans more consistent.



Issuing the draft EHC plan

- Regulations require the draft EHC plan to be issued at least 30 days before the final plan.
- Section I of draft plan **must be left blank**.

Rights of parent/young person on receipt of draft EHC plan:

- To request a school or other institution - section 38(2)(b)(ii)
- To make representations - section 38(2)(b)(i)
- To request a meeting to take place with a LA officer (SEN Reg 13)



Issuing the final EHC plan

- Within 20 weeks of the original request or of the LA becoming responsible, the finalised EHC plan is issued to the parent or young person.
- Must name school and type of school – type where name not yet known.
- The final EHC plan can differ from the draft only as a result of any representations made by the child's parent or the young person, and **decisions** made about the school or other institution to be named in the EHC plan.





Session 5

SEND Tribunal: single route of redress national trial



Single Route of Redress – National Trial

- Until recently, any complaint about health or social care aspects of EHC plans needed to be dealt with through separate complaints processes.
- Since April 2018, parents and young people can ask the SEND Tribunal to make **non-binding recommendations** on the health and social care sections of the EHC plan.
- The aim is to create a more holistic, person-centred view of the child or young person's needs, bring appeal rights in line with wider remit of EHC plans, and encourage joint working.
- Trial running for 2 years **across all 152 LAs/CCGs** in England.
- Hearings will be listed for **two days**, and representatives from health and social care (as relevant) must attend if requested.



Key points

- The appeal must be about a special educational issue (eg section B, F or I) **in order to also appeal** a health and/or social care issue
- Applies to **all appeals** except refusal to assess
- The Tribunal will expect LAs to comply with relevant requirements under health and/or social care legislation. For example:
 - where the case concerns a disabled child and the parent is arguing they need social care support, the LA **should have given consideration** to the child's social care needs
 - LA/CCG policies on eligibility in regard to provision cannot override law – e.g. s. 37 CAFA 2014 states EHC plan must specify “any health care provision **reasonably required** by the learning difficulties and disabilities which result in him or her having special educational needs”



Key points (cont.)

- Recommendations are non-binding, but health and social care are generally expected to follow them – parents will be able to go to the relevant Ombudsman or seek judicial review against **decisions** to not follow recommendations
- Ofsted and CQC incorporating into SEND local area inspections
- LAs and CCGs will be reimbursed for reasonable costs incurred during the trial (excluding legal fees), up to £4,000 per case. Guidance on what can be claimed and how can be found in the national trial toolkit
- Evaluation in tandem looking at (a) implementation processes, (b) perceived outcomes on families and agencies and (c) economic/cost data to inform a **decision** on continuation



Roles and Responsibilities

LAs

- **Must** notify parents and young people of the Tribunal's extended powers in all relevant **decision** letters
- **Must** include the extended right to appeal in local offers
- **Must** provide evidence to the Tribunal from health and/or social care within the timeframe set by the Tribunal
- Can seek permission to bring additional witnesses to the hearing
- **Must** send health and social care's responses to the recommendation to the evaluator at SENDletters@IFFResearch.com within one week

Health and social care commissioners

- **Must** respond to any request for information and evidence within the timeframe set by the Tribunal
- If required, **must** send a representative to attend the hearing to give oral evidence
- **Must** respond in writing within 5 weeks following a recommendation to the parent or young person and the LA setting out the steps they will take or why they will not follow the recommendation



Support package

- Ongoing support through a helpdesk (0207 651 0308, SENDdeliverysupport@mottmac.com) and newsletters
- DfE SEND adviser and NHS England support
- Toolkit of support materials (<https://www.sendpathfinder.co.uk/send-single-route-of-redress-national-trial>) including:
 - Guidance document for education, health and social care professionals and parents and young people
 - Webinar of local area induction training events in 2018
 - Template wording for local offers and **decision**/response to recommendation letters
 - Guidance and forms on claiming expenses
 - FAQs (Autumn 2018)
 - Webinar for parents (Autumn 2018)
- IASS and VCS organisations can provide support to families by disseminating information on the trial, supporting the preparation of cases and at hearings, and signposting to mediation and further support.





Session 6

Decision about naming an education provider



LA duty to consult

- LA must consult governing body of the school or other institution requested (section 39(2)(a)) and if a LA maintained school or other institution is in another local authority, that local authority (section 39(2)(c)).
- The educational institution should respond within 15 calendar days (Code).
- LA must proceed to make a **decision** (even in the absence of a response from the educational institution after 15 calendar days) and issue the final plan within 20 weeks of the original request or of the LA becoming responsible.



Conditional duty to name

- Where the parent or young person wants a section 38(3) type of school:
 - a) A maintained nursery school
 - b) An Academy
 - c) A maintained school
 - d) An institution within the FE sector
 - e) A non-maintained special school
 - f) An institution approved by the SoS under s.41
- This is the type of school or college which can be *requested* in an EHC plan
- **Must be named** unless LA can establish one of the three conditions.
- NB if child or young person is placed in a residential setting the LA is required to visit at least twice a year – statutory guidance, November 2017

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656849/Visiting_children_in_residential_special_schools_and_colleges.pdf



Legal test - Section 39(4)

Must be named unless:

- (a) Unsuitable for the age, ability, aptitude or SEN needs of the child or young person concerned; or
- (b) The attendance of the child or young person at the requested school or other institution would be incompatible with:
 - (i) the provision of efficient education for others; or
 - (ii) the efficient use of resources.



Right to a mainstream education

Must be educated in a mainstream school unless:

1. Parent or young person does not wish it.
2. Incompatible with the provision of efficient education of other children and no reasonable steps can be taken to prevent this.

(Section 33 Children and Families Act 2014)



Where the parent or young person wants an independent school

Duty on the LA to: “... have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.”

(Education Act 1996 Section 9)

Hammersmith & Fulham LBC v (1) L & (2) F; and (3) O & (4) H v Lancashire CC, [2015] UKUT 0523 (AAC):

- Found that a difference of £11,500 is not necessarily unreasonable public expenditure.



Unlawful reasons for refusing to name:

- school is in another LA
- school is full
- there is a nearer suitable school
- school is 'too academic'
- child doesn't fit the profile of the other pupils
- child is doing fine where they are
- child's needs could be better met in a special school



Essex CC v the SEND Tribunal [2006]

EWHC 1105 (Admin)

- Case under EA 1996 looking at meaning of the phrase “*incompatible with the efficient use of resources*”.
- It is only where the extra cost is ‘significant’ or ‘disproportionate’ that the parent’s preferred placement is displaced.
- In this case, the Court found that the additional cost to the LA of the child’s attendance at the school of the parents’ preference, of between £2,000 and £4,000, was not incompatible with the efficient use of resources.



NA v London Borough of Barnet (SEN) [2010] UKUT 180 (AAC)

- Looked at phrase: “*incompatible with provision of efficient education for others*”.
- “*There needed in the circumstances to be some clear identification of just what difference it was found that D's admission (not the admission of all four children with appeals pending) would have and to the efficient education of which children... so as to meet the strong test of incompatibility.*”
- Implications: High threshold for LA **decisions**. The Tribunal will expect clear evidence of the difference the admission of an extra child or YP will make.



O v Lewisham [2007] EWHC 2130, [2007] ELR 633

- Even where the duty to name the school requested by parents has been displaced by (e.g.) “inefficient use of resources”, the EA1996 s9 obligation is still in play

s.9 “must have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.”

(Education Act 1996 Section 9)



Bury Council v SU [2010] UKUT 406 (AAC)

- “Suitability” is not a relevant condition for the purposes of section 316 Education Act 1996.
- The requirement for compatibility with the child receiving the special educational provision which his learning difficulty calls for was removed following the amendments made by the 2001 Act.
- Only issue is whether the attendance would be incompatible with the education of other children (section 316(3)(b)) and that incompatibility cannot be removed by the taking of “reasonable steps”.



ME v Southwark LBC [2017] UKUT 0073 (AAC)

- Even if a particular mainstream school fails at the s.39 stage, the same school remains a candidate when it comes to the duty to secure mainstream, unless that involves incompatibility with the efficient education of others which cannot be removed by the taking of reasonable steps.





SESSION 7

Decisions about Annual Review



What is the Annual Review?

- Its purpose is to monitor progress towards achieving outcomes and consider whether changes are required, including any changes to provision, outcomes and placement, or whether the plan should cease to be maintained
- A process which involves a number of steps **including** a meeting
- The annual review is not the meeting itself so the date of the meeting does not dictate the date of the next annual review



The Annual Review process

- **Step 1** – Well in advance of meeting, obtain information and advice from parent/YP, head teacher, SEN officer, social care and health
- **Step 2** – at least two weeks before date of meeting, send invites to all of the above along with copies of all information and advice obtained
- **Step 3** – Hold meeting
- **Step 4** – Within two weeks of meeting, provide annual review report
- **Step 5** – Within four weeks of meeting, LA makes a **decision** and notifies parent/YP – **decision** itself completes ‘the annual review’ – **not** the meeting.

Whole process must be completed within 12 months of plan being issued or the last AR



Step one

- The person arranging the meeting must obtain written advice from:
 - The child's parent or the young person;
 - The head or the principal;
 - The LA SEN officer;
 - A health care professional identified by the responsible commissioning body; and
 - An officer of LA from the part of the LA exercising the social services function
- All of above must be invited to attend the meeting - SEND Regs 2014, Reg 20(2) and (4)



Step two

At least two weeks' notice of the date of the meeting must be given and the advice obtained under step one must be circulated to all concerned at least two weeks in advance of the review meeting (SEND Regs 2014 – reg 20(3) and (4))



Step three

- The meeting takes place.
- The duty to ensure a meeting takes place as part of the annual review process is the LA's, not the school's.



Step four

- Within two weeks of the meeting, the head (or the LA if the child/young person does not attend an institution) must prepare and send out a report recommending any changes to the plan, and referring to any difference between those recommendations and recommendations of others attending the meeting
(SEND Regs 2014 – regs. 20(7), (8) and (9))
- The report must include all the advice and information obtained under step one.



When things go wrong

The most common problems parents report are:

- No real notice of meeting
- Reports are not prepared and distributed or not in enough time for proper consideration and comment before the meeting
- Surprises sprung on parents at meeting
- Parents' views not recorded
- The annual review report goes to the LA but the LA then either does nothing or does not inform the parent/young person of their **decision**



Step five

The LA **must then decide** whether it proposes to:

- (a) continue to maintain the EHC plan in its current form;
- (b) amend it; or
- (c) cease to maintain it,

and must notify the child's parent or the young person and the person referred to in paragraph (2) (b) [the head or principal etc] within four weeks of the review meeting (The SEND Regs 2014 Reg 20 (10))



Decision 1 - maintain the EHC plan with no change

Within 4 weeks of the meeting **decision** is notified which must include (among other things):

- Right to appeal (including information about the Single Route of Redress National Trial)
- Mediation information



Decision 2 – propose to make changes to the EHC plan

Within 4 weeks of the meeting, the **decision** is sent to the parent or young person.

- If the plan needs to be amended, the local authority should start the process of amendment without delay (para 9.176)

Common issues include:

- No draft EHC plan is sent
- In situations where a change of placement has been discussed, LA requires parent to agree school **before** sending the draft EHC plan
- Delays because of a 'panel' needing to agree changes



Amending an EHC plan

Under **Regulation 22**, LA must:

- (a) send the parent/YP a copy of the EHC plan together with a notice specifying the proposed amendments, and evidence supporting those amendments
- (b) provide the parent/YP with notice of their right to request the authority a particular school or other institution
- (c) give them at least 15 days, beginning with the day on which the draft plan was served, in which to—
 - (i) make representations about the content of the draft plan;
 - (ii) request that a particular school or other institution be named in the plan;
 - (iii) request a meeting with an officer of the LAy, if they wish to make representations in person.



Decision 3 - Cease to maintain EHC plan

s.45 (1) CFA 2014

A local authority may cease to maintain an EHC plan for a child or young person only if—

- (a) the authority is no longer responsible for the child or young person, or*
- (b) the authority determines that it is no longer necessary for the plan to be maintained.*

NB re over 18s – section 45(3)

- (3) When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.*

Remember regulation 30(1) for over 18 NEETs

Also remember Buckinghamshire CC v SJ [2016] UKUT 0254 (AAC)



Discuss in groups

“She has had her statutory entitlement to education. Anything she accesses now should be working towards employability and independence. We have to ensure that public funds are used efficiently and where employment is not a realistic outcome we would not support a study programme”

To what extent does this reflect s.45(3)?



Circumstances in which the AR **must** be concluded by a particular date

- 31st March in the case of a transfer from secondary school to a post 16 institution
- 15th February in the case of any other phase transfer
- When YP transfers from one post-16 institution to another at least 5 months before the transfer takes place

Regulation 18 SEN Regs 2014



Summary - key learning about implementing the SEN legal framework

- LA policies must be based on the law.
- LA policies are not the law.
- Blanket policies are unlawful - every individual **decision** must be determined based on the individual circumstances of the child or young person.
- Just because a proposed special educational provision does not exist is not a reason for not writing it into an EHC plan.



QUESTION & ANSWER SESSION

