



SEN and Disability - Decision Making and the Law

Accompanying resource pack

Autumn 2020

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SEN LAW - THE KEY LEGAL REFERENCES

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

TERMINOLOGY

- In legislation, the term “Local Authority” (LA) sometimes refers to the part of a LA that carries out its education functions, and at other times to the part of the LA that carries out its social care functions.
- Typically, the education department or education service deals with duties under the CFA 2014.
- Typically, the social care department deals with duties under the Chronically Sick and Disabled Persons Act 1970, Children Act 1989 and Care Act 2014.

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



MENTAL CAPACITY AND THE CFA 2014

- CFA 2014 brought in a new category of young people who can make decisions in their own right.
- A “young person” is someone over compulsory school age but under 25.
- S.80(5) CFA 2014 confirms that Mental Capacity Act 2005 definition of lack of capacity applies.
- See the [Mental Capacity Act 2005 Code of Practice](#) and Annex 1 of SEND CoP 2015.
- Young people do not lose their right to express their wishes – these must still be taken into account.

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 a disturbance in the functioning of, the mind or 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'.



CASE LAW, LGSCO DECISIONS AND FINDINGS FROM LOCAL AREA SEND INSPECTIONS

Session 1: Decision to assess

Requesting an assessment – see LGSCO decision [North Tyneside Metropolitan Borough Council \(18 001 599\)](#)

Definition of learning difficulty and disability – see [Hertfordshire CC v \(1\) MC, \(2\) KC. \(SEN\) \[2016\] UKUT 0385 \(AAC\)](#)

Definition of special educational provision – see:

- [DC & DC v Hertfordshire \(SEN\) \[2016\] UKUT 0379 \(AAC\)](#)
- [The Royal Borough of Kensington & Chelsea v GG \(SEN\) \[2017\] UKUT 0141 \(AAC\)](#)

Refusal to assess – see:

- [Buckinghamshire CC v HW \(SEN\) \[2013\] UKUT 0470 \(AAC\)](#)
- [MC v Somerset CC \[2015\] UKUT 0461 \(AAC\)](#)
- [Cambridgeshire CC v FL-J \[2016\] UKUT 0225 \(AAC\)](#)
- [Nottinghamshire CC v SF and GD \[2020\] EWCA Civ 226](#)

Session 2: EHC needs assessment process

Timescale for providing advice and information – see LGSCO decision [Hampshire County Council \(15 011 838\)](#)

Observations from Local Area SEND inspections:

- Camden: Joint commissioning is underpinned by sound financial arrangements to support children and YP with complex needs. These arrangements, which rely on contributions from health, education and social care partners, ensure that children and YP receive the help they need in a timely fashion.
- Doncaster: Local area leaders are committed to improving the life chances of children and YP with SEND. The strategies that they have used have secured improvements to the quality of health, education and social care provision. This is having a positive impact on the quality of services for most children and YP.
- In one LA (2018):
 - Weaknesses in joint working approaches and the process for assessing children's and YP'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 YP's health and/or social care needs being met.
 - EHC plans are too focused on educational outcomes, even when a child or YP has significant health and/or social care needs.



Session 3: Decision to issue an EHC plan

Legal test for issuing a plan – see:

- [JP v Sefton MBC \[2017\] UKUT 0364 \(AAC\)](#)
- [Buckinghamshire CC v SJ \[2016\] UKUT 0254 \(AAC\)](#)
- [Hertfordshire CC v \(1\) MC, \(2\) KC. \(SEN\) \[2016\] UKUT 0385 \(AAC\)](#)
- [Gloucestershire CC v EH \(SEN\) \[2017\] UKUT 85 \(AAC\)](#)
- [CB v Birmingham City Council \[2018\] UKUT 13 \(AAC\)](#)

Session 4: Decision about format and content of an EHC plan

Special educational provision – see [HN v South Tyneside Council \(SEN\) \[2019\] UKUT 380 \(AAC\)](#)

Specification and quantification – see:

- [B-M and B-M v Oxfordshire CC \(SEN\) \[2018\] UKUT 35 \(AAC\)](#)
- [SB v Herefordshire CC \(SEN\) \[2018\] UKUT 141 \(AAC\)](#)
- [JD v South Tyneside \[2016\] UKUT 9 \(AAC\)](#)
- [BB v London Borough of Barnet \(SEN\) \[2019\] UKUT 285 \(AAC\)](#)

Observations from Local Area SEND 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.
- Bath and NE Somerset (2019): The proportion of EHC plans completed within the 20-week timeframe is high and still improving. EHC plans are clear. They describe the child or YP well. The expected outcomes are clearly recorded.
- Wigan (2018): Leaders know what a good 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.

Session 5: The annual review process

Delay – see LGSCO decision [Essex County Council \(18 010 985\)](#)

Ceasing to maintain – see [B&M v Cheshire East Council \[2018\] UKUT 232 \(AAC\)](#)



Session 6: Decision about naming an education provider

Parental preference (fall back position) – see [KC v London Borough of Hammersmith and Fulham \(SEN\) \[2015\] UKUT 177 \(AAC\)](#)

Incompatibility with the efficient education of others – see [NA v London Borough of Barnet \(SEN\) \[2010\] UKUT 180 \(AAC\)](#)

Incompatibility with the efficient use of resources – see [Essex CC v SENDIST \[2006\] EWHC 1105 \(Admin\)](#)

Requirement to apply s.9 Education Act 1996 – see [O v London Borough of Lewisham \[2007\] EWHC 2130, \[2007\] ELR 633](#)

Right to mainstream – see:

- [Bury Council v SU \[2010\] UKUT 406 \(AAC\)](#)
- [ME v Southwark LBC \[2017\] UKUT 0073 \(AAC\)](#)
- [AKT and another v Westminster CC \[2018\] UKUT 47 \(AAC\)](#)

Relevance of the child's views – see [St Helens Borough Council v TE and another \[2018\] UKUT 278 \(AAC\)](#)

EOTAS – see [Derbyshire CC v EM and DM \(SEN\) \[2019\] UKUT 240 \(AAC\)](#)



CASE STUDIES

Case Study 1: Fay (Refusal to Assess)

Fay, aged 9, is a twin born prematurely.

Fay's parents feel that she is affected socially, emotionally and academically. They report that she has difficulties with concentration, distractibility, playing, socialising, and learning.

A report from a consultant educational psychologist, that Fay's parents paid for when Fay was entering Year 1, indicated that Fay's scores were all in the average range save for one which was just below. She found her an emotionally intelligent girl who had low self-esteem and who was acutely aware of her difficulties in acquiring literacy skills.

A consultant community paediatrician was not persuaded that Fay was on the autistic spectrum, but put in place an action plan, including obtaining a more in-depth speech and language report. However, an occupational therapist has conducted a test of her visual motor integration and visual perception test. Both put her at the 2nd percentile and for motor co-ordination at the 3rd percentile. This assessment concluded that Fay has some specific learning difficulties which might be assisted by strategies implemented in school. The final assessment to decide whether Fay meets the diagnostic criteria for ASC, and with the specific recommendations for support, is awaited. In the meantime, the consultant has written to the school to suggest that another assessment by an educational psychologist might be helpful.

Fay's anxiety has always increased throughout the school day. For the past 12 months, Fay has not been able to attend school due to a deterioration in her mental health. The school has been sending some work home for her to complete.

School report that prior to Fay being home educated, she was receiving some differentiated work and a range of practical curriculum recommendations were made by the SENCO to aid Fay's acquisition of literacy and numeracy skills. The class teacher and teaching assistant were implementing some of these recommendations. The school hadn't sought advice about Fay's needs from an educational psychologist although the class teacher had used the parents' report from Year 1 to help plan some interventions. The school had not asked for top-up funding from the local authority.

The local authority has produced guidance criteria for its internal decision-making panel. Whilst the criteria are used to support decision-making, each case is considered individually. However, the EHC needs assessment was refused because, amongst other things, the panel did not feel that enough of the criteria had been evidenced. In particular, there was no up-to-date information from the school and the historic information did not show that Fay experienced extreme difficulties in accessing the curriculum. Nor did it demonstrate that the SENCO or a specialist teacher had devised appropriate targets for Fay to work towards.



Case Study 2: Carl (Naming an education provider)

For the purpose of this scenario, please imagine today's date is 15 June 2020.

Carl is 11 years old. He has a diagnosis of autism and has attended The Little School, which is the local mainstream primary school, since the age of 4. This is a small village school and Carl is well known by all the teachers and pupils at the school. Carl has an EHC plan which provides for full-time 1:1 support from a learning support assistant.

Carl is due to move to secondary school in September. In December last year, Carl's parents were asked to fill in the local authority's Common Application Form setting out their three preferences for Carl's secondary school placement. They put down The Medium School as their first choice which is an academy special school in the adjoining local authority's area. It is approximately 12 miles from the family home.

Carl's parents attended an annual review meeting in mid-February and they were asked at this which secondary school they'd like Carl to attend. They again said they wanted him to go to The Medium School. Carl's parents were sent an amendment notice at the end of May in response to which they made a third request for The Medium School to be named.

It is now 15 June and yesterday Carl's parents received a final amended EHC plan for Carl which names The Big School in Section I. This is the local maintained mainstream school, which is approximately 1.5 miles from the family home. Carl's parents were very upset to discover that the EHC plan does not name The Medium School. They called their SEN Officer as soon as they received the EHC plan to ask why their choice of school hadn't been named. The SEN Officer told them that because of Carl's autism, the local authority thinks it's important for him to continue his education with the children he has gone through primary school with. He also said that the local authority did consult The Medium School, but they said they were full. Carl's parents have lodged an appeal with the SEND Tribunal.



Statutory timescales for EHC needs assessment and EHC plan development

