

SEN and Disability - Decision Making and the Law



November and December 2017



Department
for Education



IPSEA

Aims:

- To assist Local Authorities in interpreting and applying the legal requirements of the Children and Families Act 2014 to some of the key decision points.
- For attendees to disseminate key learning and actions with education, health and social care colleagues.

Plan for the day:

- Session 1 Decision to assess
- Session 2a The EHC needs assessment process
- Session 2b Decision to issue a plan
- Session 3 Decision about format and content of a plan
- Session 4 Decision about naming an education provider
- Session 5 Decisions about ceasing a plan



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](#)
4. [The Care Act 2014](#)



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.
- In the Children and Families Act 2014, the term “local authority” means the education department or education service.
- In the Children Act 1989 and Care Act 2014, the term “local authority” means social care, as it is that part of the local authority that has responsibility for making decisions and complying with the duties under these Acts.

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: A LA policy 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***”.



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.
- 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)



Refusal to assess - appeals to tribunal

	Appeals registered	Refusal to assess	% of total
2011 - 2012	3,557	1,298	37%
2012 - 2013	3,602	1,307	36%
2013 - 2014	4,063	1,631	40%
2014 - 2015	3,147	1,015	32%
2015 - 2016	3,712	1,185	32%



% of refusal to assess appeals are withdrawn or conceded without a hearing

2011 – 2012	87%
2012 – 2013	88%
2013 – 2014	81%
2014 – 2015	n/a
2015 – 2016	79%



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?



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.*”



The Royal Borough of Kensington & Chelsea v GG (SEN) [2017] UKUT 0141 (AAC)

- In circumstances where a young person is enrolled on a higher education course, or has aspirations to pursue higher education, this should not be used as the sole reason to exclude the young person from the Children and Families Act 2014 entitlements





Session 2a

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.

Note - All of this applies equally to EHC needs assessment carried out as part of transition.



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)



From statements to EHCPs - Transition Process (I)

- Must send formal notification of transfer to start process giving at least two weeks notice.
- Must involve an EHC needs assessment (Article 20 The Children and Families Act 2014 (Transitional and Saving Provisions) (No. 2) Order 2014).
- Must involve an invitation to a meeting with the LA.
- Must send the final EHCP within 18 weeks of the formal notice expiry date.
- If the decision is not to make a EHCP following assessment, then must notify parent within 14 weeks of the formal notice expiry date.



From statements to EHCPs - Transition Process (II)

- Any statement of SEN for which a transfer review has not been completed by 31 March 2018 will continue to remain in force from 1 April 2018, until a transfer review has been completed and a decision is made about future provision.
- Children and young people who have statements, for which a review has not been completed by 31 March 2018, do not lose support. For these children and young people, LAs will remain responsible for ensuring that provision in their statements is made.





Session 2b

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.



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)



Case study 2



In tables, look at the refusal to issue a plan case study

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



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) JP v Sefton MBC [2017] UKUT 0364 (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



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.
- Consideration of mediation is compulsory.





Session 3

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 children and 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 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.



Content of an EHC Plan

Section A	Views, interests and aspirations of child and their parents or young person
Section B	All of the child or young person's special educational needs (SEN)
Section C	Health care needs which relate to the child or young person's SEN
Section D	Social care needs which relate to the child or young person's SEN
Section E	<p>The outcomes sought. These are the intended result of provision which is being put in place - they are NOT the provision itself.</p> <ul style="list-style-type: none">• range of outcomes over varying timescales• arrangements for monitoring progress – review and transition arrangements• forward plans for key changes
Section F	The special educational provision required by the child or young person
Section G	Health care provision
Section H	<p>H1 – social care provision required under Chronically Sick and Disabled Persons Act 1970</p> <p>H2 – other social care provision</p>
Section I	Placement – the name and type of institution to be attended by the child or young person
Section J	Where there is a personal budget, the details of this and the outcomes it should support
Section K	A list of the advice and information gathered

Section B: special educational needs

- Plans should identify a range of needs with reference to current levels of functioning and achievement.
- All key needs should be clearly stated – *could* be numbered.
- LAs can choose how they reflect the range of needs.
- Should be evidence of what the child or YP can do.
- Also include needs for health and social care provision that are treated as special educational provision because they educate or train the child or YP.



Section C: health needs relating to SEN

- A direct contribution by health about health needs should be evident or it should be stated that there are no health needs.
- Needs must be recorded as needs, not as provision.
- Key needs should be identified rather than conditions.
- Implications for educational setting should be included.
- May also specify non-SEN health care needs.



Examples of health needs relating to SEN

- 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 has been experiencing long absence seizures. Following a seizure she may appear confused and is unable to concentrate.
- Maisie has a cortical visual impairment, slight myopia and has prescribed glasses. This affects her ability to navigate safely in unfamiliar or busy environments.



Section D: social care needs relating to SEN

- Key social care needs *identified through the EHC needs assessment* should be clearly set out.
- It should be clearly stated if there are no social care needs.
- The LA may also choose to specify non-SEN social care needs.



Examples of social care needs relating to SEN

- Maisie has extremely limited mobility, as described in the health needs. This means that she faces significant challenges in joining in with social activities of her choosing including family outings and holidays.
- She has little understanding of how to manage her money and is at risk of others taking advantage of this.
- Maisie finds it difficult to engage in social activities. This results in her being socially isolated outside the structure of the school day.



Section F: special educational provision

- Provision must be:
 - Specific - say exactly what the provision is.
 - Quantified - how much of it, who will deliver it.
 - Details given for each SEN (Section B).
 - Linked to outcomes (E).
- Can be helpful to show the outcomes and provision in one table – must label **clearly** which is Section E (outcomes) and which is Section F (provision).



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?



Section G: health provision

- This section should be as detailed and quantified as Section F.
- If it educates or trains (e.g. speech and language therapy) it should normally be in Section F unless there are exceptional reasons for not doing so.
- If health needs are identified in Section C, there should be provision to match.
- The LA and CCG may also choose to specify other health care provision reasonably required by the child or young person, which is not linked to their learning difficulties or disabilities, but which should sensibly be coordinated with other services in the plan, e.g. routine dental check ups.



Section H1 and H2: social care provision

- H1 - provision made for an under-18 resulting from section 2 of the Chronically Sick and Disabled Persons Act 1970.
- H1 includes: practical assistance at home; provision of meals; travel assistance; facilitating holidays; telephone or special equipment provision; non-residential short breaks.
- H2 must only include services not provided under CSDPA eg services provided under the Children Act 1989 or the Care Act 2014.
- H2 services could include adult social care provision for over 18.
- Other social care provision not linked to learning difficulties or disabilities could be included.
- If it educates or trains it should be in Section F (e.g. a community based programme aimed at developing independence skills).



Duties under the Children Act 1989

- S.17 Children Act 1989 makes provision for “children in need”:

It shall be the general duty of every local authority ...

*(a) to safeguard and promote the welfare of children within their area who are in need; **and***

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs.

(S.17(1))



Duties under the Children Act 1989

- A child is considered to be in need if:
 - *he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority;*
 - *his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or*
 - **he is disabled.**



Duties under the Children Act 1989

- In order to determine whether a child is a child in need, the LA must assess the child. If the social care team thinks the child might meet the definition of a child in need, a child in need assessment should be undertaken.
- A child in need assessment could be triggered by the paperwork sent to the social care team by the SEN team.
- If an assessment determines that a child is a child in need, the assessment should form part of the social care advice and information and the content of any Child in Need Plan should be recorded in Section F or H (depending on whether it is special educational provision).



Duties under the Care Act 2014 (s.58)

Provision for the carrying out of child's needs assessments:

“Where it appears to a local authority that a child is likely to have needs for care and support after becoming 18, the authority must, if it is satisfied that it would be of significant benefit to the child to do so and if the consent condition is met, assess:

- (a) whether the child has needs for care and support and, if so, what those needs are, and
- (b) whether the child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be.”



Duties under the Care Act 2014

- For young people with EHC plans, transition planning should start from Year 9 and the child's needs assessment should take place as part of one of the annual reviews of the EHC plan.
- If the young person continues to require the support of an EHC plan after the age of 18, the Care and Support Plan should become part of the EHC plan and the care and support aspects of the plan will be provided under the Care Act.



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.



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

Special educational provision	Upper Tier Tribunal view
<p><i>“It is recommended that the needs and objectives as previously outlined should be met by the following”.</i></p>	<p>A recommendation clearly leaves doubt as to what is being required; in fact, it suggests nothing at all is required.</p>
<p><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></p>	<p>The bare provision for programmes tailored to needs adds nothing.</p>
<p><i>“Access to multi-sensory teaching may be helpful using visual, auditory and kinaesthetic teaching”.</i></p>	<p>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.</p>



Examples of 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.



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”.



Single Route of Redress – Pilot

- Extended the powers of the First-tier Tribunal SEND – could make recommendations on health and social care aspects of EHC plans.
- Piloted in 17 LAs between June 2015 and August 2016

Aims of the pilot:

- A person-centred approach to decision making – a more holistic view of needs at the Tribunal, in line with EHC plans
- To make things easier and less stressful for families
- Improve joint working and commissioning

Findings from the pilot:

- Some evidence that extended powers resolved health and social care issues presented to Tribunal -some improvements in joint working
- Small number of cases – insufficient evidence to judge whether the system was less stressful for families
- Insufficient evidence to judge the impact of the pilot with regard to health and social care responsiveness to recommendations, or any wider implications for health and social care sectors



Single Route of Redress – National Trial

- From April 2018, extended to cover all 152 LAs, to gather evidence to inform a decision about long-term roll-out.
- Scope of the trial:
 - The trial will run for two years
 - Will involve all 152 local areas
 - An appeal **must** be made about the educational (SEN) aspects of a plan for the Tribunal to also be able to make recommendations on the health and social care aspects
 - Recommendations will be non-binding - health and/or social care partners will need to write to the parents and LA
- In Jan and Feb 2018, all regions will have induction events to introduce LAs (education and social care) and CCGs to the pilot, and will provide further details



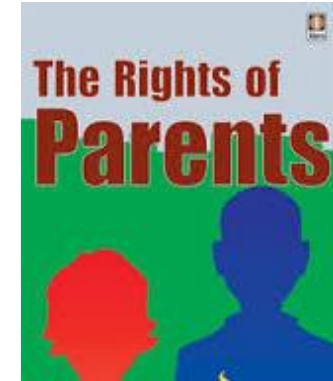
Timing of issue of draft plan

EDUCATION, HEALTH AND CARE PLANS

- Regs do not say when draft plan should be issued.
- It must be at least 30 days before the final date to meet the consultation obligations.
- 14 weeks would give sufficient time (i.e. to be finalised in 20 weeks from the beginning).



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 require a meeting to take place with an LA officer (SEN Reg 13).



LA duty to consult



- Governing body of the school or other institution requested (section 39(2)(a)).
- 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 can proceed to make a decision in the absence of a response from the educational institution after 15 calendar days.



Issuing of finalised 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.
- Note: for transition EHC needs assessments, it is 18 weeks following the expiry date of the 2 week notice period.





Session 4

Decision about naming an education provider



Section I: placement

- Must state name and type of school – type where name not yet known.
- These details only to be included in the final EHCP – **draft EHC plan must be blank.**



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.



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.



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



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)



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)



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.



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.



SESSION 5

Decisions about ceasing a plan



Ceasing to maintain EHC plans

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)?



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

