Education Otherwise Than In School ("EOTIS") -and- the Section 19 duty to make suitable education 'otherwise'

SE19/South East RIIA: SEND Legal Training – Session #4
Thursday 12 November 2026

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Outline of the session

- Naming of a setting in Section I, EHC Plan
  - Statutory Exceptions
- Education Otherwise Than In School/College ('EOTIS/C')
- Refusal to attend the school named on an EHC Plan
- Section 19, Education Act 1996
  - Duty to make suitable education 'otherwise'
- EBSA and AP (briefly!)

What are the key sources of law?

Education Act 1996	Children and Families Act 2014 ('CAFA')	'The SEND Regulations'	Statutory Guidance	Other Key Sources
Comprehensive framework governing education in E&W. [Link]	Established the EHC Plan system. [Link]	Special Educational Needs and Disability Regulations 2014	2015 Special Educational Needs and Disability Code of Practice: 0 to 25 ("the SEND Code of Practice")	Children's Wellbeing and Schools Act 2026
As relates to SEND - not completely replaced by CAFA 2014.	Sought to join up services.	Adds detail to CAFA provisions; tends to set out the process.	Expectation is that will be followed. Take care with interpreting 'guidance'.	Equality Act 2010
Relevance - questions of parental preference (Section I)	Extended scope of 'statements' (now EHC Plans) to post-16	SEND (First Tier Tribunal Recommendations Power) Regulations 2017	Explains how LAs, schools, and professionals should identify, support and meet the needs of CYP with SEN.	Tribunal Procedure Rules
(Specialist) School Transport still underpinned by EA 1996; Part IV – duties on LAs and on providers to support children w/SEND.	Rights of appeal are codified in the CAFA 2014	Relevant for 'extended appeals'	Intention: to help ensure consistent approach across the country.	Children Act 1989

Reminder: what does the law say about the naming of a school in an EHC Plan?

Naming a setting in an EHC Plan

- Section I of a finalised EHC Plan must set out:

'*- the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I)*' – **Regulation 12(1)(i) Special Educational Needs and Disability Regulations 2014.**

- Exception: EOTIS – Section I must be left blank (case law including *Derbyshire CC v EM and DM* [2019]; *NN v Cheshire East Council (SEN)* [2021]).

- A draft EHC Plan must not name a specific institution or a type of institution – **Section 38(5) Children and Families Act 2014**.
    - NB//this applies to drafts of a first EHC Plan – reviews of EHC Plans following a different process. It will be expected that amendment notices set out the setting/type of setting to be named.

- When issuing a draft EHC Plan (first Plan) or a proposed amended EHC Plan (following review) – parent or young person must be informed of their right to request a particular school or other institution named in the EHC Plan.

Parental/Young Person Preference

- Parents/the young person has a right to request that a particular setting ('school or other institution') is named in the EHC Plan.
- This is a broad right although not completely unfettered.
  - Applies to a setting that falls within the list described at Section 38(3) Children and Families Act 2014:

(a) a maintained school;

(b) a maintained nursery school;

(c) an Academy;

(d) an institution within the further education sector in England;

(e) a non-maintained special school;

(f) an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval).

- Starting point: where a request is made for a setting listed above to be named in the EHC Plan – the Local Authority must secure that the EHC Plan names this setting.
- Limited statutory exceptions.
- Evidential bar is set quite high.

Statutory exceptions

- Where a request is made for a setting (which falls within the list at Section 38(3) Children and Families Act 2014) is be named in the EHC Plan – rebuttable presumption that the Local Authority must secure that the EHC Plan names this setting.
- 'Conditional Duty to Name'. **Section 39(3) Children and Families Act 2014.**

- The Local Authority does not need to name parental/young person's preference where it can show that one of the exceptions in Section 39(4) Children and Families Act 2014 applies:
    I. The school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned ('suitability exception')

The attendance of the child or young person at the requested school or other institution would be incompatible with—

II. The provision of efficient education for others; or
III. The efficient use of resources.

- For the Local Authority to show that one of the statutory exceptions applies.
- Role of setting consulted very important: robust evidence required to establish an exception applies – often this evidence can only come from the setting itself.

Also consider Section 9 Education Act 1996

- If it is determined that naming the setting is incompatible with the efficient use of resources, consideration must then also be given to S.9 Education Act 1996.

[LAs] shall 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.

- Also, applicable where a request has been made for a setting not within the list at s.38(2)(b) Children and Families Act 2014 i.e. wholly independent settings.
- 'Conditional Duty to Name'/statutory exceptions not relevant.
- However, that does not mean that Local Authorities can ignore parental request for independent setting.
- Following *IM v Croydon* [2010] UKUT 205 (AAC), three stage for comparison of settings:

(1) Are both schools appropriate?

(2) If they are, which is the parental preference?

(3) Would naming the parent's preference be incompatible with the provision of efficient instruction and training **or the avoidance of unreasonable public expenditure**.

‘The avoidance of unreasonable public expenditure’

- No clear rules on what might constitute unreasonable public expenditure.
- Case law indicates that a modest difference in the costs of respective placements might be sufficient to rebut parental request.
- However, other decisions indicate that a parentally preferred placement which was 60% more expensive than the Local Authority’s preferred placement was not inevitably unreasonable.
- A difference of £70,000 in the context of two placements which both costs over £200,000 each not inevitably unreasonable although the Tribunal noted that it might require “quite exceptional circumstances” for the more expensive placement to be named.
- Clear and robust rationale needed.

How should consultations with settings be undertaken?

Consultations

- Insofar as possible, Local Authorities should be prepared to actively manage the consultation process.
- Is it necessary to make follow up enquiries with the setting consulted?
- Whilst it is the LA's responsibility to adduce evidence e.g. of (un)suitability, for the most part this evidence will come from the setting itself.
- Tension: LA may wish to be firm in consultation process (and indeed naming a reluctant placement) but it will of course want to maintain the relationship with the setting.
- Trend: increasingly difficult to place children/young people who need a more secure learning environment/residential setting.

Summary – consultations with a potential setting/naming in Section I

- Evidence is key. Track decision making and rationale.
- Whilst it is the Local Authority's responsibility to collate and adduce evidence – support of setting consulted is key.
- Except for wholly independent placements, presumption that parental preference setting will be named in EHC Plan.
- Three statutory exceptions.
- When analysing issues of cost of respective placements, not enough to reject the parental/young person's preference on the basis that it is more expensive - especially when relying on 'efficient use of resources'.

Any **questions?**

What is Education Otherwise Than In School/College (EOTIS/C)?

Section 61 Children and Families Act 2014

61 Special educational provision otherwise than in schools, post-16 institutions etc

(1) A local authority in England ***may*** arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.

(3) Before doing so, **the authority must consult the child's parent or the young person.**

EOTIS

- Education Otherwise Than In School (EOTIS) – sometimes referred to as Education Otherwise Than At School (EOTAS).
  - What's the difference?
  - There is no difference – although the Tribunal is seemingly making a concerted effort to use EOTIS. *London Borough of Camden v KT* [2023] UKUT 225 (AAC)
  - *KT* decision also helpful confirmation that Section F provision **can** be provided in the child/young person's home
    - NB//remember Section 42(2) – non-delegable duty; must not be an expectation that parents will deliver provision unless voluntarily agreed to do so AND LA can be satisfied these are suitable arrangements.
    - Not the same as 'Elective Home Education' .

- Common myth: parents have right to request EOTIS in the same way they can request particular setting is named.
  - No such statutory right exists.
  - Presumption in favour of school-based provision – *AA & BB v Bristol City Council* [2023] UKUT 52 (AAC)

NN v Cheshire East Council (SEN) [2021]

- Judge Rowley affirmed the approach taken in *Derbyshire CC v EM and DM*, and went on to clarify that the school or institution should be named in Section I only if the child is going to 'attend' it for at least part of the provision; otherwise, Section I must be left blank and the provision required simply described in Section F.

- At [47] Judge Rowley *give*[s] *the following guidance to tribunals considering cases such as this where bespoke provision of education outside a conventional classroom setting and education otherwise than at school are proposed by the parties.*

NN v Cheshire East Council (SEN) [2021] - Guiding Principles

- (a) – Consider whether inappropriate for any SEP necessary to be made, to be made in any school; any *part* of the provision to be made in any school.
- (b) – In doing so, must consider unsuitability w.r.t all circumstances of the case.
- (c) – Confirms Section I must be left blank where answer to (a) is Yes, inappropriate.
- (d) – Conversely, if answer to (a) is No then FtT must consider Section I and what should be set out w/in (Reg 12, *Derbyshire CC v EM and DM (SEN)* etc).

NN v Cheshire East Council (SEN) [2021] - Guiding Principles

- (e) – does the particular educational institution proposed meet the definition of a school (potentially relevant for online provision).
- (f) – 'part-time' attendance.
- (g) – limits on what can be named in Section I.
- (h) - education in a child's home cannot **be named in Section I** (*East Sussex County Council v TW*)
- (i) - Any special educational provision which will be made otherwise than in a school or type of school will be set out in section F.

Has *AM and SP v Wokingham Borough Council* (SEN) : [2026] UKUT 327 (AAC) changed anything?

- Section 61 EOTAS arrangements may apply where **part** of the required special educational provision would be inappropriate to deliver in school. => Not 'all or nothing' test.

- Section F may specify a location for provision where that location is integral to the educational nature of the provision.

- A tribunal cannot specify a special school placement without properly addressing the mainstream presumption in section 33 CFA 2014 and any relevant exceptions.

- The decision reinforces the distinction between whether provision **could** be delivered in school and whether it would be **appropriate** for it to be delivered there.

EOTIS – Impact on the EHC Plan

- Section I of a finalised EHC Plan must set out the name and/or type of setting. **Regulation 12(1)(i) Special Educational Needs and Disability Regulations 2014.**

- But with EOTIS – Section I must be left blank (case law including *Derbyshire CC v EM and DM* [2019]; *NN v Cheshire East Council (SEN)* [2021]).

- Section F – mixed views on to what extent EOTIS should feature in Section F.

- Long(er) transition from EOTIS or EHE into a setting-based provision?

EOTIS – Common misconceptions/issues

- EOTIS = Elective Home Education.
- Section 19 Education Act 1996 duty = Section 61 CFA 2014.
- Transport between different providers as part of EOTIS package.
- Personal Budgets/Direct Payments.

EOTIS - Summary

- Whilst there is a presumption of school-based provision, Local Authorities should carefully consider representations for EOTIS when made by parents.

- Importance of robust and thorough consultations with a range of settings.

- Our experience: often a lack of firm/robust evidence – adduced in a timely manner – results in EOTIS being decided by Tribunal as 'there is no viable alternative'.

- Consultations around phase-transfer years/over summer holidays can be particularly tricky.

What happens if a school says it cannot meet need/refuses to admit a child?

What happens if a school says it cannot meet need?

- Starting point: is the school under a duty to admit?
- Section 43, Children and Families Act 2014 sets out that a setting named in an EHC Plan must admit the child or young person for whom the EHC Plan is maintained.
  - Same list of settings as relates to parental/young person preference.
  - Includes academies but note the terms of any funding agreements – the academy might have ability to seek determination of the Secretary of State.
  - This determination remains subject to a decision of the Tribunal.
  - An academy may not refuse to admit pending the determination.

- Practically: there can be a tension when naming a setting which (appears) unwilling.

What happens if the family refuses to take the child or young person to the school named pending a Tribunal appeal?

- As with any dispute involving SEN, each case will have its own particular facts.
- Guiding principles:
  - Section 7 Education Act 1996: duty of parents to secure education of children of compulsory school age.
    - Often considered in the context of School Attendance Orders.
  - Section 9 Education Act 1996: pupils to be educated in accordance with parents' wishes.
    - Are the parents seeking to exercise their right to electively home educate their child? Even as a temporary measure pending the outcome of the appeal.
  - Stay in touch.
  - Keep the 'door open' – parents/families who withdraw from services may seek to reengage as circumstances change.
  - Are there safeguarding concerns? (There may not be, but the Local Authority should remain curious and investigate where concerns emerge.)

- Is there evidence of a need (SEN or health) which might prevent the pupil from accessing the setting named?

- Section 19 Education Act 1996.

  Each local authority in England shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

- Local Authority will need to explore the underlying rationale for the family's refusal.

When does the local authority have to make alternative arrangements?

- Section 19 Education Act 1996.

  Each local authority in England shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

- Education Act 1996 provision – does not apply just in the context of SEND.

- Failure to 'make arrangements' might also mean LA is failing to secure provision which could lead to legal challenge for breach of Section 42(2) Children and Families Act 2014.

Trigger Event	Deadline/activation event	Source material/guidance	Other factors
Permanent Exclusion	**Day 6 of the exclusion**	**Education Act 2002; Education and Inspections Act 2006; "School Discipline Regulations 2012"; Statutory Guidance (Suspension and permanent exclusion guidance)**	**Governing Body Review; Independent Review Panel (IRP) – 'appeal process'**
Illness	Absence for 15 days (consecutive or spread across an academic year)	Arranging education for children who cannot attend school because of health needs – DfE Stat. Guidance (Dec 2023)	Supporting pupils at school with medical conditions – DfE Stat. Guidance (Dec 2015).
No school place	**Immediately.**	**Education Act 1996 and CFA 2014 frameworks.**	**S.42 CFA 2014 duty; is this truly an EOTIS situation (per S.61(2) CFA 2014)**
'Other reasons'	Immediately.	R. (on the application of Y) v Croydon LBC [2015] EWHC 3033 (Admin); [2016] E.L.R. 138 *R (DS) v Wolverhampton City Council* [2017] EWHC 1660 (Admin)	Would cover placement breakdown - see R(Y) v Croydon [2015]; for those pupils with EHC Plans – also consider S.42 CFA 2014 duty.

R (DS) v Wolverhampton City Council [2017] and the 'acid test'

(i) Section 19 is intended is intended to cover circumstances in which it is not reasonably possible for a child to take advantage of existing suitable schooling.
(ii) The fact that parents have misconceived objections to their child attending a particular school does not mean the authority is obliged to make alternative arrangements.
(iii) There may be exceptional circumstances where there is no physical impediment to the child attending the school, but it is nonetheless not reasonable to expect the child to attend that school.
(iv) Where the latter question arises, it is to be answered objectively, not by reference to the parents' views of the facts.
(v) The acid test is whether educational provision offered by the local authority is available and accessible to the child.

Emotionally Based School Avoidance (EBSA)

What is EBSA?

- Severe anxiety linked to attendance
- Distress associated with school
- Often linked to autism, ADHD, SEMH, bullying or trauma
- Not simply truancy

- No specific EBSA legislation – turn to EA 1996, CFA 2014, EA 2010

- Focus on access to education, not attendance alone

What are the responsibilities of schools?

- Early identification
- Graduated response
- Reasonable adjustments
- Family engagement
- Attendance support planning
- Must not off-roll without agreement

Is unmet SEN the real issue?

- Are needs appropriately identified?
- Is provision sufficient?
- EHC Needs (re)Assessment required?
- Is the placement suitable?

Section 19 EA1996/What is Suitable Education?

- Duty arises where child receives no suitable education
  - "Illness, exclusion or otherwise"

=> EBSA may fall within "otherwise"

- Suitable alternative arrangements?
  - Suitable to age, ability, aptitude and SEN
  - Home tuition
  - Online learning
  - Outreach teaching
  - Alternative provision

EHC Plans and EBSA

- Section F remains binding
  - Section 42 duty continues
- Placement breakdowns require review
- Non-attendance does not remove duties (unless S42(5)).

- What is the relationship between s. 19 of the EA 1996 and the SEN regime under the CFA2014?

Alternative Provision

What is Alternative Provision?

- Alternative Provision (AP) is education arranged outside mainstream school settings for children who cannot attend school or whose needs cannot otherwise be met

- Exclusions and Alternative Provision
  - Schools may direct pupils off-site under section 29A Education Act 2002. Excluded pupils must receive appropriate education from the sixth school day.
  - Pernicious habit in some areas of off-rolling.

- EBSA and Alternative Provision
  - Must meet identified needs
  - Should be anxiety-informed
  - Regular review required
  - Not a default solution

SEND and Alternative Provision

- AP does not remove duties under the Children and Families Act 2014. EHC plans remain legally binding and Section F provision must be secured

- *G v Westminster* [2004] EWCA Civ 45 and *R (DS) v Wolverhampton* [2017] EWCA Civ 1660 emphasise the duty to secure suitable education

- Safeguarding (not exclusive to CYP with SEN, of course): AP providers, schools and local authorities must comply with Keeping Children Safe in Education and Working Together to Safeguard Children guidance.

Any **questions?**

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