What makes a good EHC Plan?

SE19/South East RIIA: SEND Legal Training – Session #2

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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

Key Principle (i) – 'Voice of the child'

- Section 19, Children and Families Act 2014
  - the local authority must have regard to the voice of the child and also ascertain and listen to the wishes and feelings of parents.
- Where possible the child/young person should participate in decisions and requests on provision.
- In reality it can sometimes be challenging to hear from the child directly.
- When dealing with SEN professionals should seek to empower the child/young person and seek to increase their agency.
- Co-operation and collaboration between public bodies – Courts take a dim view on squabbling public bodies.

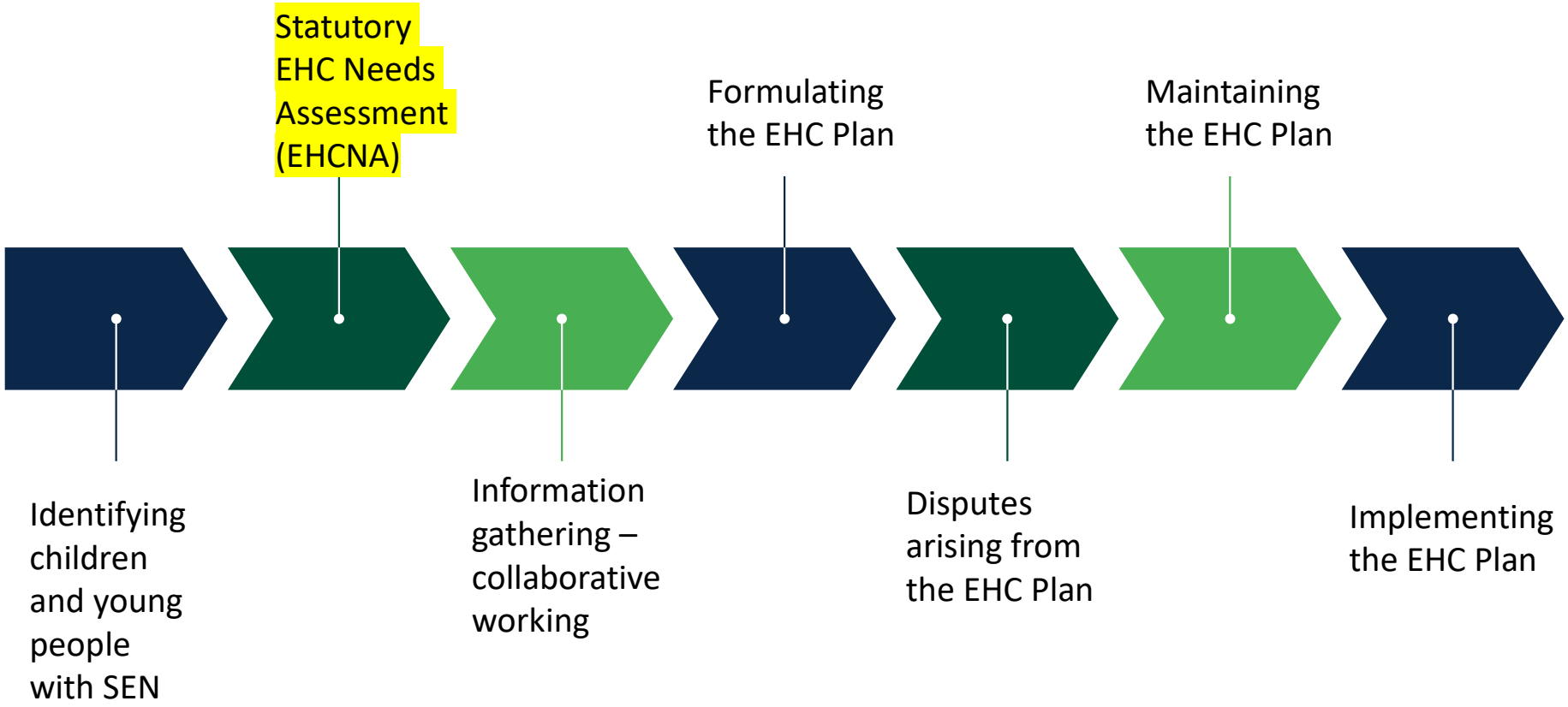
Key Principle (ii) – Mainstream Provision

- The CFA 2014 anticipated that most children and YP with SEN should have their needs met within local mainstream early year settings, schools or colleges without an EHC Plan.
- *If an EHC Plan is issued, specific educational entitlements open up that are not otherwise available to other children or YP.*
- The EHC Plan provides a certain amount of certainty and stability being of statutory status.
- The CFA 2014 changed the SEN landscape but perhaps not in the way intended => more change across the rest of this decade…

Who is eligible for an EHC Plan?

The EHC Plan Road Map

From needs assessment to finalising the Plan



36 Assessment of education, health and care needs

(1)A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.

(2)An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person.

(3)When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

[….]

(8)The local authority must secure an EHC needs assessment for the child or young person if […] the authority is of the opinion that—

(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.

37Education, health and care plans

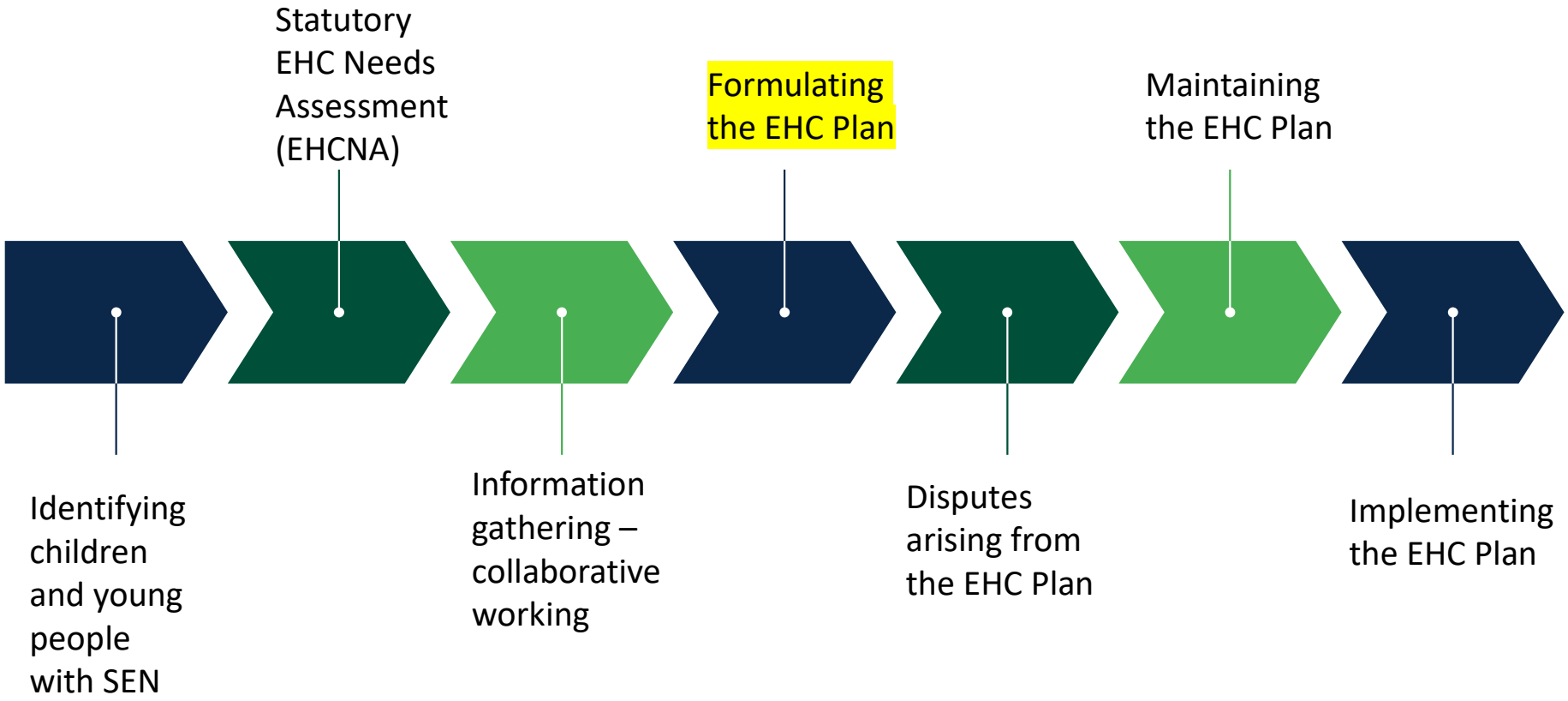
(1)Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—
(a)the local authority must secure that an EHC plan is prepared for the child or young person, and
(b)once an EHC plan has been prepared, it must maintain the plan.



Formulating the EHC Plan

The EHC Plan Road Map

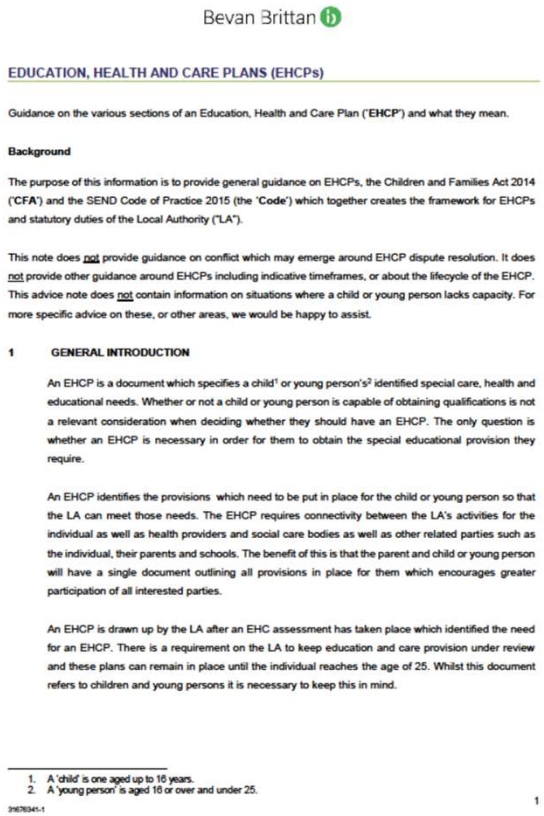
From needs assessment to finalising the Plan



Parameters of the EHCP

- These are plans that can continue to 25 if special needs persist and the young person remains in education and/or training.
- Local Authority leads* the process (social care and education are separate functions for the LA).
- Typical EHC Plan pathway takes 20 weeks.
  - Important it captures all needs and it must be comprehensive.
  - This is a tight timetable.
- Premise that education, social care and health all have a part to play – duty to cooperate - each have sections of the EHCP where needs and provision documented accurately and fully.
- Problems can arise when LA/health do not engage well; provision ‘falls between’.
- Do not assume that things such as occupational therapy/physiotherapy and speech and language therapy at school are health provision– usually education (see next slide).

What is an Education, Health and Care (EHC) Plan? (Supplementary Handout – please click image below)



Bevan Brittan

EDUCATION, HEALTH AND CARE PLANS (EHCPs)

Guidance on the various sections of an Education, Health and Care Plan ('**EHCP**') and what they mean.

Background

The purpose of this information is to provide general guidance on EHCPs, the Children and Families Act 2014 ('**CFA**') and the SEND Code of Practice 2015 (the '**Code**') which together creates the framework for EHCPs and statutory duties of the Local Authority ("LA").

This note does not provide guidance on conflict which may emerge around EHCP dispute resolution. It does not provide other guidance around EHCPs including indicative timeframes, or about the lifecycle of the EHCP. This advice note does not contain information on situations where a child or young person lacks capacity. For more specific advice on these, or other areas, we would be happy to assist.

1 GENERAL INTRODUCTION

An EHCP is a document which specifies a child[1] or young person's[2] identified special care, health and educational needs. Whether or not a child or young person is capable of obtaining qualifications is not a relevant consideration when deciding whether they should have an EHCP. The only question is whether an EHCP is necessary in order for them to obtain the special educational provision they require.

An EHCP identifies the provisions which need to be put in place for the child or young person so that the LA can meet those needs. The EHCP requires connectivity between the LA's activities for the individual as well as health providers and social care bodies as well as other related parties such as the individual, their parents and schools. The benefit of this is that the parent and child or young person will have a single document outlining all provisions in place for them which encourages greater participation of all interested parties.

An EHCP is drawn up by the LA after an EHC assessment has taken place which identified the need for an EHCP. There is a requirement on the LA to keep education and care provision under review and these plans can remain in place until the individual reaches the age of 25. Whilst this document refers to children and young persons it is necessary to keep this in mind.

1. A 'child' is one aged up to 16 years.
2. A 'young person' is aged 16 or over and under 25.

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Formulating the EHC Plan

- Specified.
- Quantified – for how long?
- Child/young person – centred.
- Detailed but not verbose.
  - (NB//don't forget about Section K – oft-overlooked section of the Plan.)

Formulating and issuing an EHC Plan

- Responsibility of the Local Authority – once finalised all agreed provisions across the sections have a statutory basis so must be met.
- Has the parent/young person adduced private evidence?
- Has the LA scrutinised this?
- Rights to mediation and/or appeal become exercisable upon the Plan being finalised.
- Not the end of the matter – duty on the Local Authority to review the EHC Plan.
    - On at least an annual basis.
    - Every 3-6 months for pupils < 5 years.
    - Watch out for 'Phase Transfer' plans – prescribed deadlines.

Formulating an EHC Plan – health considerations

- If health provision included no EHC Plan should be finalised until signed off by health.
- Ensure that sections C and G are agreed as the main sections for health.
- Wording must describe provision to be made accurately.
- There may be some health input into some other sections but this would be minimal.
- The case law around what constitutes health care into schools continues to evolve so seek legal advice if unsure.
- If the matter has been at appeal and a 'Regulation 5 recommendation' is going to be issued by health then LA must not finalise the EHC Plan without first consulting the ICB.

EHC Plan formulation - how should views, wishes and feelings feature in the EHC Plan?

- Regulation 7, Special Educational Needs and Disability Regulations 2014 - when securing an EHC Needs Assessment, a Local Authority must:
  - consult child (and parent) or young person;
  - take into account views, wishes and feelings
- Regulation 11 - when preparing an EHC Plan, a local authority must take into account evidence received during Needs Assessment – as above, by virtue of Reg 7, - should include views, wishes and feelings.
- Regulation 12(1)(a) – when preparing an EHC Plan a local authority must set out— the views, interests and aspirations of the child and his parents or the young person (section A).

- EHC Plan is a living document – views, wishes and feelings should be canvassed during annual review.

Reminder/Recap – core principles

- Special Educational Provision – Section 21(1) - 'direct' S.E.P
  - Where to start: *Clarke v Somerset; DC & DC v Hertfordshire:* education, although it may be very wide ranging in concept, is about instruction, schooling or training, so one or more of these factors is likely to be discernible in provision which is asserted to be educational. => Look for the hall marks.
  - Remember: the provision should be directly related to the pupil's learning difficulty or disability – Special Educational Provision is provision that is 'different from' or 'additional to' provision made generally for others of the same age in a mainstream setting
- Deeming impact of Section 21(5) Section G or Section H => Section F
  - SaLT – start on assumption that will be educational.
  - Other 'therapies' – more nuanced.

Don’t forget about the dividing line between SEP and health/social care provision…

“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)

- Effect: provision which might ordinarily be included in Section G of an EHC Plan – with responsibility for securing the provision resting with the ICB – is included in Section F, and it becomes the responsibility of the Local Authority to secure.
- There is no clear dividing line between education and health provisions; each provision is assessed on its own facts.
- Speech & Language Therapy and Occupational Therapy are the ‘textbook examples’ of deemed special educational provision.
- Equine-assisted learning and weekend trips are two examples of provision which (generally) are not special educational provision, but which a parent might seek to include in Section F.

Discussion point

- Questions?
- How effective is communication between partners when EHC Plans are being formulated?
- How is collaboration achieved in your area?



What helps to make a good EHC Plan?

What makes a good EHC Plan?

- Specified.
- Quantified – for how long?
- Child/young person – centred.
- Detailed but not verbose.
  - (NB//don't forget about Section K – oft-overlooked section of the Plan.)

What is the importance of specificity when considering special educational provision?

- Regulation 12, Special Educational Needs and Disability Regulations 2014

12.—(1) When preparing an EHC plan a local authority must set out—

[…]

(f) the special educational provision required by the child or young person (section F)

[…]

- 2015 SEND Code of Practice

"The purpose of an EHC plan is to make special educational provision to meet the special educational needs of the child or young person, to secure the best possible outcomes for them across education, health and social care and, as they get older, prepare them for adulthood. To achieve this, local authorities use the information from the assessment to:

• […]

• **specify the provision required** and how education, health and care services will work together to meet the child or young person's needs and support the achievement of the agreed outcomes." (Paragraph 9.2, **emphasis** added.)

What do we mean by specificity?

- Section F must be so specific and so clear that there is 'no room for doubt as to what has been decided is necessary in the individual case'.
  - *L v Clarke and Somerset County Council* [1998] ELR 129

- The contents of an EHC Plan have to be specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case.
- But…the Plan needs to be a realistic and practical document – a living document that cannot be fixed in time.
  - *London Borough of Redbridge v HO* (SEN) [2020] UKUT 323 (AAC)

- When devising/revising all provision, can be helpful to think:
  - Who?
  - What?
  - Where?
  - When?

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

- 77 page judgment

- Analysis of c.25 years of case-law (authorities to which UT was referred) –

L v Clarke and Somerset [1998] ELR 129 – 'the classic formulation': 'whether [a statement] is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case' [27].

BB v. Barnet London Borough Council [2019] UKUT 285 (AAC)

'In distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision that is appropriate for a child. The plan has to provide not just for the moment it is made but for the future as well.'

11 x principles at [74] of the *Worcestershire CC v SE decision*

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

I. 'Classic formulation' under *L v Clarke and Somerset* test still applies BUT

II. Specificity depends on what is appropriate in the particular case; and

III. Can't be reviewed in the abstract.

'A lack of particularity may allow less specific provision; a more detailed case may require more detailed provision.'

IV. Specification in terms of hours per week 'not an absolute and universal precondition of the legality of any statement'

V. Duty to specify =/= a requirement to 'specify (in the sense of identify or particularise) every last detail of the special educational provision to be made.'

VI. A failure to specify a level of support after a particular date may lack the required degree of specificity.

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

VII. provision cast in the form of **recommendations as opposed to requirements *may* lack the requisite degree of specificity** – 'programmes tailored to need'; 'opportunities' (also).

However

VIII. **Some cases where flexibility should be retained** - degree of flexibility which is appropriate in specifying [SEP] is essentially a matter for the tribunal, considering all relevant factors.

And

IX.EHCP has to **provide 'not just for the moment it is made, but for the future as well'**.

X. EHCP contents have to be **as specific and quantified as is necessary and appropriate** in any particular (aspect of) a case => emphasis on **the EHCP** being realistic and practical 'which in its nature **must allow for a balancing out and adjustment**'.

XI. **Section I naming a special school/college is a relevant factor** - may in an appropriate case permit more flexibility than when a mainstream school is involved… 'Greater specificity might well be appropriate in the case of a mainstream school where staff have to be brought in, whereas in the context of a special school such staff may well in principle be available.'

What makes a good EHC Plan?

- Specified – think 'Who/What/Where/When'.
- Quantified – frequency/duration.
- Child/young person – centered.
- Detailed but not verbose.
- Importance of the Annual Review process – not a mere 'tick box' exercise.

How might this be improved?

AK should have intervention once a week for at least 1 hour or as advised by CAMHS with suggested strategies implemented across the school day by school staff for at least 10 minutes a day.

London Borough of Redbridge v HO (SEN) [2020] UKUT 323 (AAC)

[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties.

-and-

[C] shall have 1 x 1 hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment. This shall be subject to termly review.

Worcestershire County Council v SE [2020] UKUT 217 (AAC)



Finalising the EHC Plan

Finalising the EHC Plan

- This is the duty of the LA – once finalised all provisions across the sections have a statutory basis so must be secured.
- Wording must describe provision to be made accurately.
- If health provision included no EHC Plan should be finalised until approved by health.
- NB//if the matter has been at appeal and a Regulation 6 response is going to issued by health then LA must not finalise the EHCP.
  - More on appeals in due course…

- Issuing a finalised EHCP =/= the end of the journey; delivery of provision; the annual review cycle and/or legal challenge (appeals)

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 (next slide).
- 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.

What is the suitability exception?

‘Suitability Exception’

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’)

- In all cases where there is disagreement as to which setting should be named, the Tribunal’s first assessment will be of the suitability of each of the settings proposed.
- Is each of the settings proposed appropriate to meet needs?
- As with Section F, no requirement for optimum available provision – threshold is appropriateness.

Assessment of appropriateness: evaluate what the child or young person needs (Section F) and what the setting can offer.

Evidence from setting is key – LA should be careful to ensure comprehensive consultation undertaken.

What does the (in)efficient education of others exception mean?

Incompatibility with the 'Efficient Education of Others'

The attendance of the child or young person at the requested school or other institution would be incompatible with the provision of efficient education for others (S.39(4)(b)(i) Children and Families Act 2014)

- 'Efficient education' not defined in the legislation.

'- *providing for each child or young person a suitable, appropriate education in terms of their age, ability, aptitude and any special educational needs they may have.*' (Paragraph 9.79, 2015 Code of Practice

- 'others': the children and young people with whom the child or young person with an EHC plan will directly come into contact on a regular day-to-day basis (Paragraph 9.79, 2015 Code of Practice).

- Helpful guidance on what this means in practice contained within *NA v London Borough of Barnet* [2010] UKUT 180 (AAC).

Incompatibility with the 'Efficient Education of Others' (ii)

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

- The Local Authority (and on appeal the Tribunal) is entitled to consider the impact on all or any learners at the placement.
- Where a placement is nominally full, admitting pupils over this number might be incompatible with the efficient education of others but not enough on its own.
- Reasons for decision must give a clear identification of just what difference the child or young person's admission would have, and on the efficient education of which others.

- The presumption of placing in line with parental/young person preference under the legislation only displaced by a positive finding of "incompatibility with the efficient education for others".

- Evidence of an impact on other pupils is insufficient : *Hampshire v R & SENDIST* [2009] EWHC 626.

- Again, evidence is key.

What constitutes an inefficient use of resources?

Incompatibility with the 'Efficient Use of Resources'

The attendance of the child or young person at the requested school or other institution would be incompatible with the efficient use of resources (S.39(4)(b)(ii) Children and Families Act 2014)

- Not merely a question of whether the setting of parental/young person's preference is more expensive than the Local Authority's proposed setting.

- Multi-stage test:
  - Is each of the settings proposed appropriate?
  - Is the extra cost 'inefficient'? Local Authority/Tribunal must balance the statutory weight given to parental/young person's preference against the additional cost c.f. cost of Local Authority proposed setting.
  - Even if found to be 'inefficient', the Tribunal must still then as a second stage balance the extra cost against any extra benefit that naming parental/young person's preference setting is said bring.
  - Only if the extra cost is 'significant' that the setting of parental/young person's preference is displaced.

Is the extra cost 'significant'?

- £4,000 (2006): *Essex County Council v SENDIST* [2006] EWHC 1105 (Admin)(28 April 2006) - not inefficient – uplift to allow for inflation?
- £30,000 (2016): *Devon County Council v OH* [2016] UKUT 292 (AAC)
- £70,000+ (2017): *KE v Lancashire County Council (SEN)* [2017] UKUT 468 (AAC)

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 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)*, a 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.

When can an EHC Plan be challenged?

Legal Challenge

- Potential for legal challenge => throughout the EHC Plan journey – different methods at different times/in respect of different decisions.

- Most commonly – this will entail an application for Tribunal appeal and/or mediation => one of a range of 6 decisions relating to an EHC Plan –or- Needs Assessment.

- Judicial Review => different lens; not used for appeals re: EHC Plans themselves – delivery of EHC Plan provision (or failure to deliver) can be challenged through JR.

- JR alongside a Tribunal appeal?

Dispute Resolution – what happens if the EHC Plan is not agreed by the parent/YP?

- Potential for legal challenge
- Most commonly – this will entail an application for Tribunal appeal and/or mediation
- May also be Judicial Review (more on that in future sessions.)

Other factors? (1)

Preparation for Adulthood

- EHC Plans should support progression to:
  - Employment and further education
  - Independent living
  - Community participation
  - Good health and wellbeing

Drafting Effective Outcomes

- Outcomes should be:
  - Person-centred and aspiration-led
  - Specific and measurable
  - Realistic and achievable
  - Linked to provision and preparation for adulthood

Other factors? (2)

Mental Capacity Act 2005

- Young people aged 16+ are presumed to have capacity unless established otherwise.
- Where a young person has capacity, they make decisions about:
  - EHC needs assessments
  - Sharing information
  - Reviews and amendments
  - Appeals and dispute resolution

Consent and Decision-Making

- Parents do not automatically make decisions after age 16.
- Where capacity is lacking, decisions must be made in the young person's best interests and in accordance with MCA principles.

Any **questions?**

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