

# SEN and Disability - Decision Making and the Law



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Department  
for Education



**IPSEA**

## Aims:

- To assist LAs 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 LA colleagues.

## Plan for the day:

- Session 1      Decision to assess
- Session 2a    The EHC needs assessment process
- Session 2b    Issuing a plan
- Section 3      Format and content of a plan
- Section 4      Naming an education provider



# 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](#)



# Section 19 principles – LA 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.



# Session 1

## Decision to Assess



# Starting off the process to an EHC needs assessment

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

- (1) Request for assessment; or
- (2) LA becomes responsible.

Request 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.

(Section 36 (1) Children and Families Act 2014)



# 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.*(Section 36 (8) Children & Families Act 2014 (see also 36(10) for those over 18))

**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.

(Section 20 (1) of 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).

(Section 20 of Children and Families Act 2014)



# Special educational provision

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.

(Section 21 of Children and Families Act 2014)



# Therapies

- 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) of Children and Families Act 2014)



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

- Acknowledged that the question of how tribunals are to decide 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**”.
- Gave helpful examples of what can be deemed to be special education provision, e.g.:
  - Mindfulness training for a pupil with an anxiety disorder to enable the pupil to remain calm, keep focused in class and relate to other children at playtime.
  - Cognitive behavioural therapy to teach him how to deal with anxiety that pops up suddenly.



# Decision not to assess

- Right to make an appeal to the Special Educational Needs and Disability Tribunal (SEND) – two months or one month from issue of mediation certificate if later.
- Compulsory consideration of mediation certificate will be required.
- Hearing will be held on the papers.



# Decision to assess



- In 2015, 73% of all new requests for EHC needs assessments were agreed.

(DfE, SEN2, 2015)



## 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 *refusal to assess case study*.

Consider:

- Would we agree to start an EHC needs assessment?
- What 2 or 3 points support your decision?



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

- Judge Jacobs agreed with the reasoning in *NM v Lambeth* [2011] UKUT 499 (AAC) that the reference in para 7.34 of the (2001) Code of Practice to the need for **convincing** evidence was going beyond the statutory test and that it is the statutory test which must be applied.
- Note that in the 2015 Code, the term ‘convincing’ does not appear in relation to evidence about whether an EHC needs assessment is necessary (e.g. 9:14).



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

- Refusal to assess case.
- UT noted that statement of SEN (or EHC plan) / the statutory assessment for one might be needed where a child needed it “*to access the relevant provision or open the door to the enforceability of rights via s.324(5)*”.
- In this case, local funding arrangements meant that provision was protected until end of academic year (and beyond by time of appeal hearing) and was not under threat, so child didn’t need statement to access provision.



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

- Refusal to assess case under 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.*”





# 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 LA 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.
  - 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) of The Special Educational Needs and Disability Regulations 2014)



# 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.

(Reg. 8(1) of The Special Educational Needs and Disability Regulations 2014)





# Session 2b

## Issuing a Plan



# After the assessment

When the assessment is completed either:

- The LA will issue a draft EHC plan; or
- The LA will 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.

(Section 37 (1) of Children and Families Act 2014)



# Case study 2

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

Consider:

- Would we agree to 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.



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

- UT rejected LA's argument that since the young person 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.



# Decision not to issue a plan

- Right to make an appeal to the SEND Tribunal – two months or one month from issue of mediation certificate if later.
- Compulsory consideration of mediation certificate will be required.





# Session 3

## 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.



# Think about the 'Golden Thread' throughout

There should be a golden thread directly from the aspirations to the provision - this is achieved by thinking about outcomes as steps on the journey towards the aspirations.



# 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 or H2.
- Using an additional section on Resources/ Funding as a substitute for specified and quantified provision in Section F.



# Section A: views, interests and aspirations

- May use a single page summary introducing child or YP.
- Includes a brief history of the child or YP.
- Has clearly marked sub-sections.
- Must be clear about the child / YP's views and aspirations.
- Must show every effort has been made to enable the child or YP to express aspirations whatever their age.
- Should enable parental aspirations and goals to include those which are longer term and go beyond provision.
- Should also include details about: play; health; schools; independence and friendships; how to communicate; child/ YP's history; FE and future plans inc. employment.



## 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 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.



## Section D: social care needs relating to SEN

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



# Section E: outcomes

- Must be SMART: Specific, Measurable, Achievable, Realistic and Time limited.
- Range of outcomes e.g. expected by end of a key stage or phase.
- Should be forward thinking.
- Include straightforward steps to achieving the outcomes.
- Monitoring and review arrangements in this section.
- Not expected to amend when shorter outcomes are achieved - the longer term outcomes are still valid. New shorter term outcomes can be identified as part of the annual review.
- Beware of confusing outcomes with provision.



# Section F: special educational provision

- Provision must be:
  - Specific - say exactly what the provision is.
  - Quantified - how much of it, who will deliver it.
  - Detailed 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).
- Expected outcomes should be shown in this section where there is a Personal Budget that contributes to it.



# Specificity and Quantification

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
- 1 On a scale of 0-10, how
    - (a) specific, and
    - (b) quantifiedis this extract from a Section F?
  - 2 How could it be improved?



# Sections G, H1 and H2: health and social care provision – general points

Health and social care provision must be:

- Made for each health and/or social care need that appears in Sections C and D of the plan.
- Specific – say exactly what the provision is.
- Quantified – how much of it, who will deliver it.
- Detailed – but not to teaching strategy level.
- Linked to outcomes (E).



# Section G: health provision

- This section should be as detailed as Section F.
- If it educates or trains it should usually be in Section F e.g. speech and language therapy.
- If health needs are identified in Section C, there should usually be provision to match.
- May include other health care provision not linked to learning difficulties or disabilities for co-ordination purposes.
- Should be clear how any health provision secured through a personal health budget will support achievement of the outcomes.



# 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.
- 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).



# 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.



## Section J: personal budgets

- Should say if a personal budget is not requested.
- Shows the allocation.
- Sets out arrangements for direct payments as required by education, health and social care regulations.
- Must specify the SEN and outcomes to be met by any direct payment.
- Gives details of monitoring and reviewing arrangements.



# Section K: advice and information

- List the advice and information gathered during the EHC needs assessment.
- The advice and information must be included as appendices to the EHC plan.
- Must be clearly labelled – can be placed at the beginning or the end of the plan.



# 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 good specification and quantification

- Greg will have short and frequent touch typing sessions. He will receive 3x10 min sessions at school per week.
- Katya will work with a HLTA for 15 mins 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 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.



# JD v South Tyneside [2016] UKUT 9 (AAC)

- This judgment confirms that the Somerset judgement remains applicable under C&FA 2014.
- In L v Clarke & Somerset County Council [1998] ELR 129 Laws J held “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”.



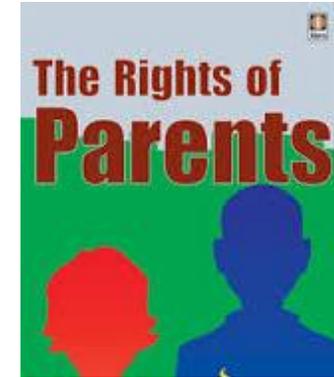
## Timing of issue of draft plan

# 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 days (Code).



# 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.





# Session 4

## Naming an Education Provider



# 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 S41
  
- 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.



# 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.



# 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 of the 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 of the 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”.



# 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.



# 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

