

SEND & EHCPs – Know Your Rights

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Introduction to presenter



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Esther is an Associate Solicitor specialising in Education Law. Esther has experience representing parents, students and Local Authorities in all types of SEND First Tier Tribunal appeals with particular expertise in complex residential and extended appeals with health and social care issues. In addition to SEN work, Esther practices across all areas of education law, including exclusions, admissions, education negligence/breach of contract cases, School/ Local Authority and Local Government Ombudsmen complaints, as well as discrimination cases and Judicial Reviews. Esther has 13 years' litigation and dispute resolution experience having qualified in 2010.

What we will cover

- The difficulties faced in securing an EHCP- the request to decision to issue
- The content of an EHCP including school placement
- Annual Reviews
- When an EHCP will 'cease'
- SEND Tribunal
- The rights of the young person with an EHCP
- Questions & Answers

Legislation & Resources

- Children and Families Act 2014
- Special Educational Needs and Disability Regulations 2014
- SEND Code of Practice 0-25 years 2015
- Equality Act 2010

USEFUL WEBSITES

IPSEA - <https://www.ipsea.org.uk/>

SOS!SEN - <https://www.sossen.org.uk/>

SEN Noddy Guide - [Noddy-No-nonsense-Guide-to-SEN-law-2023-March-02032023.pdf \(landmarkchambers.co.uk\)](#)

Section 19 Children and Families Act

In carrying out all their functions under the Act LAs must have regard to:

- The views, wishes and feelings of the child, young person or parent
- The importance of their full participation in decisions
- The importance of their being provided with the necessary information and support to participate
- The need to support the child or young person to achieve the best educational or other outcomes

What are our children entitled to?

All children and young people are entitled to an appropriate education, one that is appropriate to their needs, promotes high standards and the fulfilment of potential. This should enable them to:

- Achieve their best
- Become confident individuals living fulfilling lives, and
- Make a successful transition into adulthood, whether into employment, further or higher education or training

However.....

That the LA must provide what is "*reasonably required*" per **A v Hertfordshire [2006] EWHC 3428;**

(2007) ELR 95 applies to the CFA 2014 - "*Achiev[ing] the best possible educational and other outcomes*" is **not** a duty on the LA (or even directly a mandatory consideration): **Devon CC v OH [2016] UKUT 0292 (AAC), [2016] ELR 377 COP2015 6.1**

EHCP – Myth or Fact?

'It is an LA document and whatever we say as parents doesn't matter'

FALSE

Requesting an EHCP: The Law

The test for an EHC Needs Assessment (s.36(8) of the Children and Families Act 2014):

- whether the child or young person has or may have special educational needs (“SEN”);
- and
- whether they may need special educational provision to be made through an EHC plan
- This is the **only appropriate** test the Local Authority can apply when deciding whether to **conduct** an Education, Health and Care **Needs Assessment**.

SEND Code of Practice (CoP) Para 9.14

*In considering whether an EHC needs assessment is necessary, the LA should consider **whether there is evidence that despite the early years provider, school or post-16 institution having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress.***

Note that COP2015 identifies additional considerations and factors which bear little resemblance to the statutory test – see thus COP2015 9.14 (with its focus on progress made and related matters). These include:

- evidence of the child or young person's **academic attainment** (or developmental milestones in younger children) and rate of progress;
- information about the **nature, extent and context** of the child or young person's **SEN**;
- evidence of the **action already being taken** by the early years provider, school or post-16 institution to meet the child or young person's SEN
- evidence that **where progress has been made**, it has only been as the result of much additional intervention and support over and above that which is usually provided [...]"
- evidence of the child or young person's **physical, emotional and social development and health needs**, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies; and
- for YP over 18, whether they require **additional time, in comparison** to the **majority of other the same age**, who do not have SEN, to complete education or training....."

Conclusion

There are many examples of the EHC Needs Assessment requests having had the wrong legal test applied by the local authority and certainly incorrectly communicated by them in their decision letters.

Remember, the legal test **threshold is pretty low** and these appeals are extremely hard for local authorities to successfully defend.

Tips

- Provide data with the EHCNA to evidence progress (or lack of), attendance, exclusions etc.
- Ask schools to ensure they support parents to make the commissioned NHS referrals.
- Get EP support/ observations in.
- Don't accept refusal to assess decisions-they are usually wrong!

EHCP – Myth or Fact?

'I can only get an EHCP for my child if they require more than £6,000 equivalent of support in school'

FALSE

Getting an EHCP issued: The Law

The test for an EHCP to be issued (s.37(1) of the Children and Families Act 2014):

*“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.”*

SEND Code of Practice 2014

Paragraph 9.55 states:-

“Where despite appropriate assessment and provision, the child or young person is **not progressing** or **not progressing sufficiently well**, the local authority shall consider **what further provision may be needed**. The local authority should take into account:-

Whether the special educational provision required to meet the child or young person’s needs **can reasonably be provided from within the resources normally available to mainstream** Early Year providers, schools, and post 16 institutions

or

Whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan.”

Conclusion

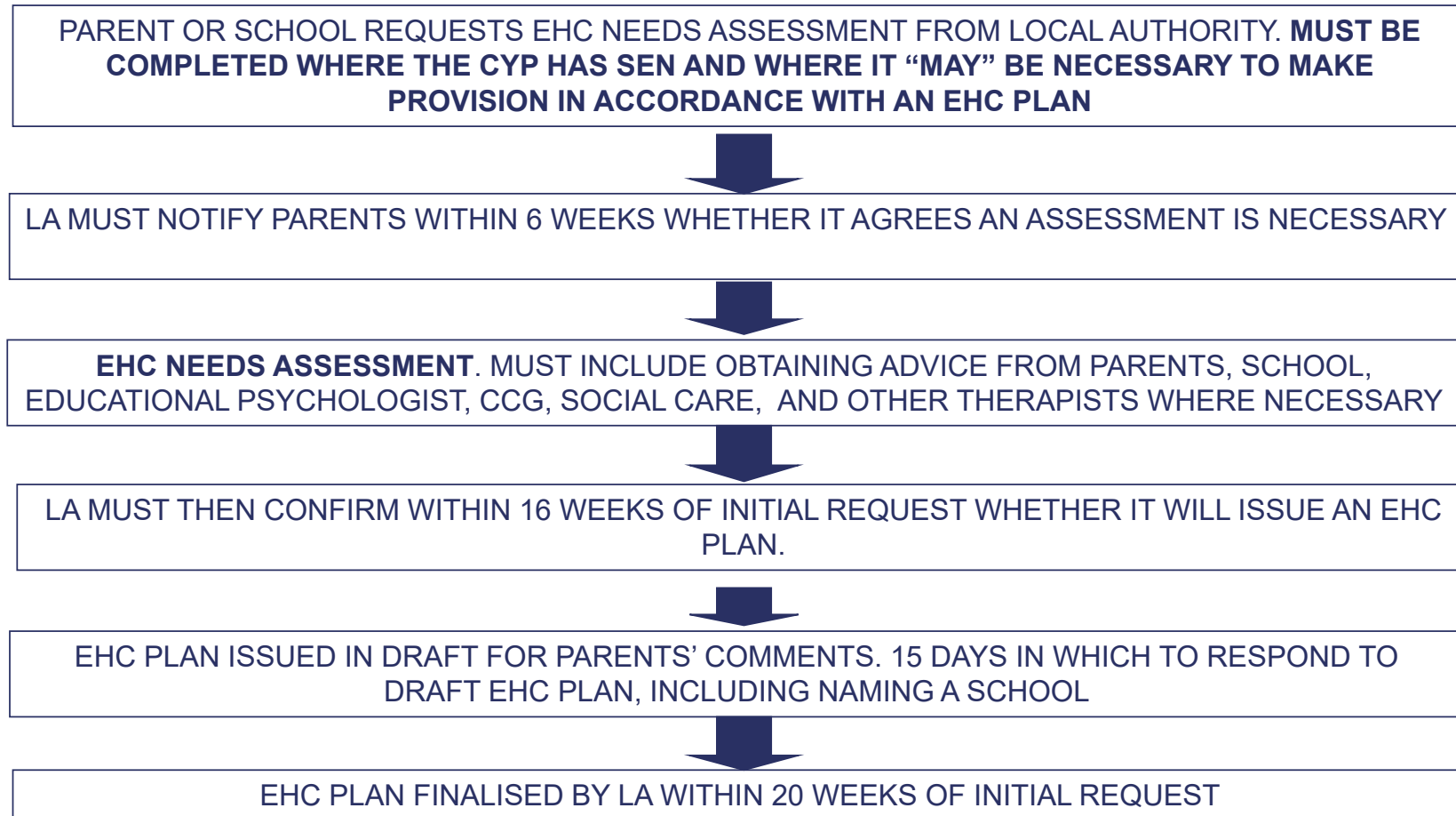
The LA should generally consider whether, without an EHC Plan, “can the child/ young person’s special educational needs be met through provision from the resources normally available to a mainstream school and will they actually be met?”: **Consideration must also be given to whether not only “can” it be delivered but also “will” it be delivered from the resources normally available within a mainstream educational setting, in this case a mainstream primary school.**

Refusal to issue challenges are significantly harder for parents to win at tribunal and expert evidence and costings are the key to success.

Tips

- Poorly assessed needs lead to unquantifiable provision
- Seek school's views on whether it can provide the level of provision required within their usual resources.
- Can commissioned NHS OT/SLT actually deliver the therapy proposed, if not it will need to be outsourced and costed to reflect this
- Ensure full costings in a provision map are provided to LAs and parents.
- The provision required must be based on the child's needs, not whether the school can deliver it. If they cannot, it must be bought in and costed for.

EHCP Process – An overview



Myth or Fact?

The maximum funding that a CYP can get from an EHCP is:

A. £25,000

B. Unlimited

C. £12,500

What is an EHCP?

- A legally enforceable document detailing education, health and social care provision for the child/ young person from the time of issue up to being ceased
- Can be in place from birth – age 25
- The provision should be bespoke to the child/ young person
- Local authority departments and clinical commissioning groups are responsible for delivering and arranging the provision specified

Why is an EHCP important?

- Provision is protected
- Provision specified is legally enforceable against public bodies
- Local Education Authorities are responsible for delivering and arranging special educational provision AND placement
- There is no limit to the special educational provision specified
- It is no defense that there are budget/ NHS/service cuts

Format of an EHCP

- A. The views, interests and aspirations of CYP and parents
- B. The CYPs special educational needs;
- C. The CYPs health needs which relate to their SEN;
- D. The CYP's social care needs which relate to their SEN;
- E. The outcomes sought for the CYP
- F. the special educational provision required by him or her;
- G. any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs
- H. Social care provision
- I. Educational Placement
- J. Personal Budget (including arrangements for direct payments)
- K. Advice and Information

Examples of provision:

Up to 5 hours of SLT provision to be assessed and monitored.

5 hours of direct speech and language therapy to be delivered by a qualified speech and language therapist per term. To be reviewed yearly with an additional 5 hours of therapist time allocated to upskill school staff working with Beth.

Myth or Fact?

“Provision in Section F can only relate to curriculum subjects”

FALSE

Section F can include provision if it “educates and trains”

GL v West Sussex County Council (SEN) [2017] UKUT 414 (AAC)

- The Upper Tribunal gave guidance on the meaning of the expression ‘educates or trains’ in relation to the dividing line between educational and social care provision in the context of Education, Health and Care plans (EHCPs).
- Lawful EHC plans need to distinguish between provision which ‘educates or trains’ (education) and provision which ‘merely supports or assists’ the child / young person (social care).
- FTT had concluded that although G needed support to help her generalise skills this did not amount to education or training.

Some Examples of EHCP Content & Provision

- Specialist and residential placements, including independent
- Therapies (SALT, OT, Physio)
- Alternative Therapies (Counselling, CBT, Music)
- Adult support (1:1) including 'non-contact time'
- Equipment – specialist seating, laptop, magnifiers, writing support, AAC Devices
- Software – Grid, Clicker
- Curriculum differentiation

Myth or Fact?

You can't ask for a placement outside your Local Authority area or an independent school, anywhere.

FALSE

Placement in an EHCP (Section I)

- Name and type of the school, maintained nursery school, post 16 institution or other institution to be attended by the child or young person (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).

Types of placements that can be named:

- Maintained mainstream or special
- Independent mainstream or special
- Academies
- Sixth Form Colleges
- General FE Colleges
- Vocational Learning and Training providers
- Elective Home Education

Requests for a particular school

- The LA must name the school in the EHC plan unless
- the school is unsuitable for the age, ability, aptitude or SEN of the child or young person concerned, or
- 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, or
 - the efficient use of resources.
- The LA must then name the school or type of school the LA thinks would be appropriate
- Note: Section 43 – duty on schools and other institutions to admit child or young person named in plan

Requests for a particular school

- Parents/YPs do not have a specific legal right to request a wholly independent schools/college (which has not been approved by the Secretary of State under s41); however, they can ask for a place and:
 - LEAs must have regard to the 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.
 - If the YP is requesting an independent school, the LA's duty to consider the YP's views, wishes and feelings applies.
 - The onus is on the parents/YP to prove that the schools offered by the LEA cannot meet needs OR the cost of the independent placement would not constitute unreasonable public expenditure (taking into account all costs to the public purse, including the costs of social care, healthcare etc.)

Myth or Fact?

'Once the EHCP is finalised, that's the end of the process. Nothing will be changed in it unless the school say so'

FALSE

Annual Reviews of an EHCP

EHCPs must be reviewed at least once a year by the local authority so the Plan is accurate in providing for the CYP needs.

At the end of the review (within 4 weeks) the LA must make 1 of 3 decisions :

1. To maintain the EHC plan in its current format (not make any changes);
2. To amend the EHC plan;
3. To cease the EHC plan if they think it is no longer necessary for it to be in place

Every decision above triggers a right of [appeal to the First-tier Tribunal](#) (Special Educational Needs and Disability) to get changes made to the EHCP.

After the Annual Review

After the meeting:

Within 2 weeks school or LA must prepare written report with recommendations

Within 4 weeks Local Authority must decide if it is going to continue, amend or cease to maintain EHC plan and inform child's parents, young person and head of any institution

If LA decides to amend:

- it must send to child's parents or young person, informing of changes and give them 15 days to make representations
- If plan amended following representations, the finalised version must be sent to parents/governing body/responsible commissioning body within 8 weeks of draft plan being sent

If these deadlines are not met, you have a right to judicial review.

Myth or Fact?

Young People can only have an EHCP after age 19 if they are working on a formal education qualification.

FALSE

Maintaining the EHCP

- The test for ceasing to maintain an EHCP(s 45 of the Children and Families Act 2014):
 - If the LA is **no longer responsible** for the child or young person; or
 - If it is **no longer necessary** to maintain it.

An LA would **no longer be responsible** if:

- the young person has taken up paid employment (excluding apprenticeships);
- the young person has started higher education (university);
- a young person aged 18 or over has left education and no longer wishes to engage in further learning;
- the young person has turned 25; or
- the child or young person has moved to a different LA.

Situations in which an EHCP would **no longer be necessary** could be because the CYP no longer needs the provision set out in the EHCP

SEND CoP paragraph 9.151

FTT: SEND Tribunal

- ✓ Available on all 'refusal' decisions and amended final EHCP issue
- ✓ Separate to LAs
- ✓ Binding decision on LAs
- ✓ Powers:
 - ✓ order LA to carry out an EHC Needs Assessment;
 - ✓ order LA to make and maintain an EHCP
 - ✓ order LA on the content of the EHCP including placement

Myth or Fact?

‘Once my child turns 16, all the rights around the EHCP automatically transfer to them directly ’

TRUE*

*(subject to the YP having mental capacity)

Young People & EHCP Rights: The Law

- A child will become a young person once they reach the end of compulsory school age i.e. the last Friday of June in the year the child turns 16.
- Parental rights under the law in relation to the young person's education will automatically pass to the young person themselves.
- SEND CoP: Once 16, local authorities and others should normally engage directly with the young person rather than their parents. However, young person's family and parents should continue to be involved in discussions about the young person's future.

Young People & Mental Capacity

Mental Capacity Act 2005

[Mental Capacity Act Code of Practice](#), which is statutory guidance.

A person must be assumed to have capacity unless there is evidence that they are not able to make the relevant decision. Someone is treated as being unable to make a decision if they are not able:

- to understand the information relevant to the decision,
- to retain that information,
- to use or weigh that information as part of the process of making the decision, or
- to communicate their decision (whether by talking, using sign language or any other means).

Any Questions?

All future enquiries:

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