

SEN/Education: 0-21 – How do you get an EHC plan done properly?

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Summary

- LAs are obliged to identify children and young people with SEN
- LAs are required to provide the special educational provision required to meet a child's SEN
- The special educational provision must be set out in part F of an Education Health and Care Plan ("EHCP")
- Expert evidence on needs and provision is vital
- Right of appeal to the SEND Tribunal

PART I: Key concepts





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Introduction

- Children and Families Act 2014
- Education Act 1996
- Special Educational Needs and Disability Regulations 2014
- SEN and Disability Code of Practice 2015



To whom are the obligations owed?

- Definition of a “child”: “a person who is not over compulsory school age” (broadly up to age 16 – compulsory school age starts at 5 and ends on last Friday in June in the academic year when child turns 16) (s.579 EA; s.8 EA)
- Definition of “young person”: “a person over compulsory school age but under 25” (broadly from 16 up to 25) (s.83(2) CFA)

What are SEN?

- “A child or young person has special educational needs if he or she has a learning difficulty or a disability which calls for special educational provision to be made for him or her.” (s.20(1) CFA)
- Learning difficulty AND/OR disability + need for special educational provision = SEN

What are SEN (cont)?

- Child/YP has learning difficulty or disability if he/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 (s.20(2) CFA)

What is special educational provision?

- SEP means “educational or training provision that is additional to, or different from, that made generally for others of the same age” in schools (s.21(1) CFA)
- “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)” (s.21(5) CFA)

Other key definitions

- “Health care provision”: “the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006” (s.21(3) CFA)
- “Social care provision”: “the provision made by a local authority in the exercise of its social services functions” (s.21(4) CFA)
- NB No duty on LA to secure this provision (BUT pilot scheme could help)



PART II: The LA's duties



LA's duties under CFA

- (1) Identify all children and YP who have or may have SEN (s.22). LA then becomes “responsible”
- (2) Secure EHC needs assessment – if LA thinks child/YP has or may have SEN, and that it may be necessary for SEP to be made in accordance with an EHCP, LA must secure EHC needs assessment (s.36(8))
- (3) Duty to secure EHCP prepared and maintained – if (based on evidence from assessment) it is necessary for special educational provision to be made, LA has duty to secure EHCP (s.37(1))

EHC Needs Assessment

- How do I get one? Make a request
- Duty to consult parent/young person
- Low threshold – whether SEP “may be necessary”. If so, has LA has to do assessment. Can appeal refusal to do assessment.
- If LA agrees to do assessment, must collect information from various professionals (SEN Reg 6). Must also seek advice from any person the child’s parent or young person reasonably requests that the local authority seek advice from. Parents can submit private reports

Issuing an EHCP

- LA must issue plan if in light of EHC assessment, it is necessary for SEP to be made
- LA must notify refusal to issue plan. This decision can be appealed to the tribunal
- If draft plan issue, parent/YP has right to respond to draft. LA must consult with school re placement
- If EHCP to be issued, must be finalised by 20 weeks from initial request (s.36(1))

Considering the contents of the EHCP

- Special educational provision must in be part F and it must be clearly identified. For example, problems with “access to speech and language therapy”. How often, how long, by whom, direct or indirect etc?
- Need expert evidence to justify special educational provision
- Make sure provision which educates or trains is in part F so that it is enforceable
- If unhappy with contents of EHCP (including placement) can appeal to tribunal



Guidance: 19-25 year olds' entitlement to EHCPs

- Can cease to maintain EHCP if “no longer necessary” (s.45 CFA). “When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved”
- Guidance:
“In line with preparing young people for adulthood, a local authority must not cease an EHC plan simply because a young person is aged 19 or over. Young people with EHC plans may need longer in education or training to achieve their outcomes and make an effective transition into adulthood.”

PART III: Appealing to the SEND Tribunal



Who brings the appeal?

- Right to appeal lies with YP (not parent)
- Where YP lacks mental capacity, “alternative person” (normally parent) can bring appeal on their behalf
- YP will lack capacity if “unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain” (s. 2 MCA)
- Unable to make decision if unable to: (a) understand the info relevant to the decision (b) retain that info (c) use or weight that info or (d) communicate his decision

Appeal against section I (placement)

- 3 main scenarios:
- 1. Parent/YP want another state school
- 2. Parent/YP want a private school
- 3. Parent/YP want mainstream

Scenario 1 – YP wants another state school

- If YP's preferred school in s.38(3) (broadly speaking a state school) it must be named unless any of the exceptions in s.39(4) apply:
 - (a) the school or other institution requested is unsuitable for the age, ability, aptitude or SEN of the YP concerned
 - (b) the attendance of the YP at the requested school or other institution would be incompatible with –
 - (i) the provision of the efficient education for others, or
 - (ii) the efficient use of resources



Scenario 1 – Key concepts

- (1) Suitability – ability to meet the child's needs
- (2) Incompatibility with the education of others – focus on other children. Used when school full (NB must show allowing only 1 extra child is prejudicial)
- (3) Incompatibility with the efficient use of resources – cost (weigh benefits against additional cost)

Scenario 2 – YP wants a private school

- Section 9 EA 1996: “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”
- BUT also key principle that cannot name a school which is “inappropriate”

Scenario 2 – Key concepts

- Appropriateness – as per “suitability”
- Incompatibility with provision of efficient training and training
- Unreasonable public expenditure

Scenario 3 – YP wants mainstream

- Section 316 EA – right to mainstream education (private schools not included) now applies to schools and post 16 institutions
- LA must secure mainstream education unless incompatible with:
 - (a) wishes of YP
 - (b) the provision of efficient education for others
- NB. No suitability or cost exception
- NB. A generic right, not to a particular school. So must show no mainstream school could be named.



Scenario 3 – YP wants mainstream cont

- To rely on (b), “provision of efficient education for others” LA must show there are no reasonable steps that could be taken to avoid the incompatibility
- Examples of reasonable steps given by Code at 9.92. At 9.91 some factors to be considered:
 - Effectiveness of step
 - Practicability of the step
 - Extent to which step already taken
 - Financial implications of the step
 - Extent of any disruption caused by the step

Tribunal hearing

- Probably not as bad you were expecting!
- Video of the hearing:
<https://www.youtube.com/watch?v=ExNEpi-E4XI&index=3&list=PLsRD7hsOEXBsOz6IRIIYZ5jiUNNQq8Y7X> (1.40-6.22)

Top Tips

- Probably not as bad you were expecting!
- Get the right evidence base – must get relevant expert reports
- Don't put up with vague, unenforceable SEP
- Don't be scared of appealing to the tribunal. An appeal is often what is required for the LA to make real concessions
- Grit your teeth and prepare to be patient. It'll be worth it in the end



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