

Brief outline of SEN LAW in England and Wales

Relevant legal framework

The relevant legislation and guides that parents should be aware of are:

- The Children and Families Act 2014 – Part 3 (CFA)
- The Special Educational Needs and Disability Regulations 2014 (amended twice in September 2014 and March 2015) - the main set of Regulations underpinning the Act)
- The SEN Code of Practice 2015
- The Equality Act 2010

What are Special educational needs (SEN)?

Special educational needs (“**SEN**”) can affect a child or young person’s ability to learn. For example, someone’s SEN might affect their:

- reading and writing, for example because they have dyslexia
- ability to understand things
- behaviour or ability to socialise, for example they struggle to make friends
- concentration levels, for example because they have ADHD
- physical ability to do things such as writing.

In order for a child or young person to benefit from the SEN regime operating in schools and LAs, typically they must have a learning difficulty, but this is very broad.

Under Section 20 Children and Families Act 2014, a child is considered to have SEN if he or she *“has a learning difficulty or disability which calls for special education provision to be made for him or her”*.

A child has a learning difficulty if she or he:

- Has a significantly greater difficulty in learning than the majority of others of the same age; or
- Has a disability which prevents or hinders them from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post 16 institutions.

A disability is defined in the Equality Act 2010. A person is disabled if they have a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

What legal duties does a school have to support a child with learning difficulties?

The CFA 2014 Places schools and post-16 institutions including pupil referral units under a general duty to use their best endeavours to secure SEN provision to meet the needs of any child or young person with SEN. Schools should assess each pupil’s current skills and levels of attainment on entry

and regular further assessments should take place. These should seek to identify pupils making less than expected progress. The Code refers to four broad areas of need:

- Communication and interaction
- Cognition and learning;
- Social, emotional and mental health;
- Sensory and/or physical needs.

The school should use a graduated approach following the cycle of Assess, Plan, Do and Review. The school should use its internal resources to provide extra support to the child or modify their learning strategies. Under the Equality Act, they should also make reasonable adjustments where possible.

What is a child continues to struggle in school and/ or is not making progress?

The first step a school should consider is writing to the Local Authority to seek advice from specialist such as an Educational Psychologist. Many schools do not take this step, although it can be a good way to establish if additional support is necessary.

It is established by the school or external agencies brought in to assess the child, that the level of support required is beyond that available within the school's resources or that the child might require a specialist school, steps might be taken to secure an Education Health and Care Plan (EHC plan) for the child/ young person.

What is an EHC plan?

An EHC plan is a legally binding document which sets out all of the child's identified needs and detail about the specialist support they will require. Based on this, the document will set out the type of school the child should attend (i.e. mainstream or specialist school). An EHC plan can result in funding being allocated to a child or young person with special educational needs. This may pay the costs of one to one teaching support or therapies such as speech and language therapy or occupational therapy.

An EHC plan will also set out any medical needs a child has or support being received from the social services. The aim of an EHC plan is to bring together all of the child's needs in one document to ensure needs are being met across the board.

How to secure an EHC plan?

Stage 1

The first stage in the process of obtaining an EHC Plan is an Education Health and Care needs assessment. This is an assessment of the educational, healthcare and social care needs of a child or young person. A young person is defined as being aged between 16 and 25.

The appropriate test for an EHC needs assessment is found in s. 36(8) of the Children and Families Act 2014. Having considered the necessary evidence, the LA must secure an EHC needs assessment if it 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.

It is enough to establish that a child or young person has SEN and may require a EHC plan. The threshold is very low, however many LAs will refuse to undertake this which gives rights to legal challenges (will be discussed below).

Stage 2

Once an LA agrees to carry out an EHC needs assessment they must by law seek advice and information from a number of key professionals as part of the process. During this process, they will decide whether or not to issue a EHC plan.

The test for an EHC Plan is set out in section 37 Children and Families Act 2014. This states that “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.*

The question of whether a EHC plan should be issued for a child or young person is highly contentious and many challenges are made to the First Tier Tribunal (Special Educational Needs and Disability). Recent cases have suggested the following guidelines:

- a. If the support the child requires can be reasonably provided within the resources normally available, then it will not be necessary to require a EHC plan (NC and DH v Leicestershire CC (SEN) [2012] UKUT 85 (AAC)).
- b. However, an EHC Plan may be required to provide a reasonable degree of certainty, that the required educational provision the child/ YP requires will in fact be delivered (SC & MS v Worcestershire County Council [2016] UKUT 0267 (AAC)).
- c. It is not necessary that the child or young person will be aided to gain qualifications. This is not a deciding factor. The question to ask is, will they gain some benefit from special educational provisions (i.e. in later life, such as more independence) – (Buckinghamshire County Council v SJ [2016] UKUT 254 (AAC) and Hillingdon LBC v WW [2016] UKUT 253 (AAC)).

What if the LA issues an EHC plan but a parent is not happy about the content?

Many LAs issues EHC plan which do not meet minimum legal requirement, for example the fail to detail all of the child’s difficulties or the level of support set out is limited, vague and unquantified. The law says:

- Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise;
- Provision must be specified for each and every need identified
- The plan should specify any appropriate facilities and equipment, staffing arrangements and curriculum;
- Health or social care provision which educates or trains a child or young person must be treated as special educational provision. This includes things like speech and language therapy and occupational therapy.

The EHC Plan must set out the “type of school” which is considered appropriate (e.g. mainstream, special). Many parents disagree with the LA in respect of the school named in the plan. The law says: *If a child’s parent or a young person makes a request for a placement the local authority must comply with that preference and name that placement in the EHC plan unless: it would be unsuitable for the age, ability, aptitude or SEN of the child or young person, or the attendance of the child or young person there would be incompatible with:*

- the efficient education of others, or
- the efficient use of resources

In other words, the school names must be suitable for child and be able to deliver all provisions in the EHC plan. A parent can request a school of their choice and if it is suitable, the LA should name it unless the child attending will cause a negative impact on the school’s current pupils. This is a complex area and attracts a lot of litigation.

How can a parent challenge LA decision?

If the LA refuses to undertake an EHC needs assessment, issue an EHC plan or a parent is not happy with the content of the plan (including the school named), they can lodge an appeal to the First Tier Tribunal. This must be done generally within 2 months from the date of the LA’s decision or 1 month from the date of a mediation certificate, whichever is later.

As part of this appeal parents may instruct solicitors. The work we will often carry out includes:

- Obtaining and review school records or SEN file, supporting letters.
- Secure independent assessments from experts such as an Educational Psychologist, Psychiatrist, Speech and Language Therapist and so on.
- Assess the LA’s response and evidence.
- Prepare written submissions and provide legal representation at hearings.

We will now discuss a case study to illustrate how appeals work in practice.

Q & As