## New SEN Regime: Education, Health and Care Plans — Special Education Law Conference

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Education Law Blog – www.education11kbw.com

## 11KBW

# The New SEN Regime: Overview and the General Duties

Jonathan Moffett

#### Introduction

- Part 3 came into force on 1<sup>st</sup> September
- Most significant legislative intervention in field of SEN for nearly two decades
- Part 3 supported by:
  - Special Educational Needs and Disability Regulations 2014
  - Special Educational Needs (Personal Budgets) Regulations 2014
  - Special Educational Needs Code of Practice: 0 to 25 Years

#### Overview

- Part 3 imposes two main types of duty:
  - general duties
  - specific duties
- General duties fall into three categories:
  - (1) duties to promote integration and to cooperate
  - (2) duties in relation to joint commissioning
  - (3) duties in relation to "local offer"

#### Overview

- Part 3 underpinned by s 19 duty on local authorities to have regard in particular to:
  - views, wishes and feelings of the child and his/her parents or the young person
  - importance of child, parents, young person participating as fully as possible in decisions relating to the exercise of the relevant function
  - importance of child, parents, young person being provided with the information and support necessary to enable such participation
  - need to support child, parents, young person in order to facilitate his/her development and to help him/her achieve best possible educational outcomes

## (1) Duties to promote integration and to cooperate

- s 25: duty to promote integration
- Local authority must exercise its functions with a view to ensuring integration of educational and training provision with health care and social care provision
- Cf duties on health and social care bodies to promote integration:
  - National Health Service Act 2006, s 14ZI(2)
  - Care Act 2014, s 3

## (1) Duties to promote integration and to cooperate

- s 28: general duty on local authority to co-operate with local partners in the exercise of its functions, and vice versa
- s 28(3): duty of internal co-operation on local authority officers
- Code, paras 3.40-3.41: examples of co-operation
- s 31: duty on local authority to co-operate in specific cases
  - n.b. s 31(2) exception

- s 26: duty on local authority and partner commissioning bodies to make "joint commissioning arrangements"
- Joint commissioning arrangements concern education, health and care provision to be secured for:
  - children and young people for whom authority is responsible and who have SEN
  - children and young people in authority's area who have a disability
- Parties to joint commissioning arrangements must have regard to them in the exercise of their functions

- joint commissioning arrangements must include:
- arrangements for considering and agreeing:EHC provision required by children and young people
  - what provision is to be securedby whom it is to be secured

  - what advice and information is to be provided about the provision
  - by whom, to whom, and how such advice and information is to be provided
  - how complaints are to be dealt with
  - dispute resolution procedures
  - arrangements for:
    - securing needs assessments
    - securing provision specified in EHC plans
    - agreeing personal budgets

- Examples of services to be covered:
  - services reasonably required by local children with SEN or disabilities (Code, para 3.10)
  - SLT, physiotherapy, OT, equipment such as wheelchairs (Code, para 3.9)
  - specialist services (Code, para 3.9)
    - n.b. NHS Commissioning Board is a partner commissioning body
  - emergency provision (Code, para 3.10)
    - e.g. emergency mental health services

- Joint strategic needs assessments should inform joint commissioning arrangements (Code, paras 3.20-3.24)
- N.B. public sector equality duty will apply

## (3) Local offer

- s 30: duty on local authority to publish information about its "local offer"
- Local offer is:
  - provision available within authority's area that it expects to be available for children/young people with SEN or a disability
  - provision available outside authority's area it expects to be available for children/young people for whom it is responsible and children and young people in its area who have a disability

#### (3) Local offer

- Provision to which local offer relates:
  - education, health and care provision
  - other educational provision
  - other training provision
  - school travel arrangements
  - provision to assist prepare children and young people for adulthood and independent living
- Information to be published set out in Schedule 2 to SEND Regulations

## (3) Local offer

- Duty to enable participation in relation to local offer:
  - duty to consult when preparing local offer: regs 54 & 55
  - duty to publish comments on local offer and respond to them: s 30(6) and reg 56
- To what extent will "local offer" be enforceable?
- Local offer important for funding purposes
- N.B. public sector equality duty will apply

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#### EHC Plans – Children at School

Katherine Eddy

#### Overview

Focus of this talk on **children of compulsory school age** (see Joanne Clement's talk for other children and young people)

#### Structure:

- 1. SEN and special educational provision
- 2. Integrated assessment
- 3. EHC plans (including transitional provisions)
- 4. Health care provision and duties
- 5. Social care provision and duties
- 6. Personal budgets and direct payments

## Statutory framework and guidance

Children and Families Act 2014 ("CFA")

The Special Educational Needs and Disability Regulations 2014 (the "2014 Regulations")

The Special Educational Needs and Disability (Personal Budget) Regulations 2014 (the "Personal Budget Regulations")

Special educational needs and disability code of practice: 0 to 25 years ("the **Code of Practice**")

## SEN and special educational provision

#### Special educational needs defined under s. 20 CFA:

A child has **SEN** if the child has a learning difficulty or disability which calls for special educational provision

A compulsory school age child has SEN if he/she has:

- a significantly greater difficulty in learning than the majority of others of the same age; or
- 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

## SEN and special educational provision

Special educational provision defined under s. 21 CFA:

Educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream settings

Also includes health care provision or social care provision which educates or trains a child (**s. 21(5) CFA**)

#### Integrated assessment

#### An EHC needs assessment defined under s. 36 CFA:

An assessment of the educational, health care and social care needs of a child

Triggers for an assessment:

- Request from parent, young person or school
- Child otherwise identified or brought to the attention of the LA as someone who has or may have special educational needs (s. 24 CFA and s. 36(3) CFA)

#### Integrated assessment - timelines

The 2014 Regulations contain the specific provisions about timelines for assessments and drawing up EHC plans (see Regulations 4, 5, 10, and 13) and there is a helpful flowchart on p. 154 of the Code of Practice

#### Integrated assessment - timelines

#### Broadly:

- Must consult the parent as soon as practicable after receiving a request for an EHC assessment (Reg 3)
- Also have to notify the responsible commissioning body, social services, and the head teacher of the school (Reg 4(2))
- Within six weeks of receiving request: Have to notify parents + others of decision as to whether or not it is necessary to secure an EHC assessment (unless there are exceptional circumstances defined in the 2014 Regulations making it impractical to do so within the time limit Reg 5(4))
- Within sixteen weeks of receiving request: Have to notify parents of a decision following an EHC assessment that it is not necessary for special educational provision to be made (Reg 10)
- Within twenty weeks of receiving request: Have issued an EHC plan (Reg 13)

## EHC plans – transitional arrangements

#### Details of the transitional arrangements are in:

The Children and Families Act 2014 (Transitional and Saving Provisions) (No. 2) Order 2014 made (just in time!) on 26 August 2014, comes into force on 1 September 2014

Along with the final version of the <u>Transition to the</u> new 0 to 25 special educational needs and <u>disability system guidance</u>

## EHC plans – transitional arrangements

- Longstop date is 1 April 2018, by which time LAs must have transferred all children with existing statements to EHC plans following a transfer review
- Local authorities should publish the first version of their transition plan in September 2014, setting out how and when children and young people will be transferred to the new system and the order in which they will be transferred
- Transfer reviews should occur at a time at which a significant review of the statement would otherwise have taken place (specific rules about this in the transition rules and guidance)

## EHC plans – transitional arrangements

- If request for assessment/re-assessment was received before 1 September 2014 and is in progress as at 1 September 2014 then it needs to be considered under the old law, unless the LA decides to treat it as a request under the CFA and the parent agrees
- Any request for an assessment received on or after 1
  September 2014 must be considered under the new regime
- But if a request for a re-assessment of a child with an existing statement is received on or after 1 September 2014, it falls to be considered under the old law unless the LA use the opportunity to initiate a transfer review with an EHC assessment instead. Parental permission is required to proceed in those circumstances.

#### EHC plan – structure and form

This is governed by Regulation 12 of the 2014 Regulations, and p. 164 of the Code of Practice has a detailed table of what should go where

## EHC plan – what does it need to do?

s. 37 CFA – LA has the duty to prepare and maintain the EHC plan

Plan <u>needs</u> to specify:

- Child's SEN;
- The outcomes sought for the child;
- Special educational provision required by the child....

## EHC plan – what does it need to do?

Also needs to specify (cont'd)....

- Any health care provision reasonably required by the child's learning difficulties and disabilities which result in SEN;
- Any social care provision reasonably required by the child's learning difficulties and disabilities which result in SEN;
- For under 18s any social care provision that must be made by the LA under s. 2 of the CSDPA 1970.

The plan <u>may also</u> specify other health care and social care provision reasonably required by the child [**note** – suggestion in Code of Practice that these other needs could go in **Sections C** and **D** of an EHC plan]

#### EHC plan – structure and form

**Section A:** views, interests and aspirations of the child and his parents;

Section B: child's SEN;

**Section C:** child's healthcare needs which relate to their SEN;

**Section D:** child's social care needs which relate to their SEN;

**Section E:** the outcomes sought for the child;

**Section F:** the SEN provision required by the child;

Section G: any health care provision reasonably required by the learning difficulties or disabilities which result in the child having SEN;

Section H1: any social care provision which must be made for the child

under s. 2 of the CSDPA 1970;

Section H2: any other social care provision reasonably required by the learning difficulties or disabilities which result in the child having SEN;

Section I: name of school and/or type of school or institution;

Section J: where provision to be secured by direct payment, the SEN and outcomes to be met by the direct payment;

Section K: advice and information in appendices

**Also** – where the child is in or beyond year 9, the EHC plan needs to include provision to assist the child or young person in preparation for adulthood and independent living

## Health care provision

Health care provision defined under s. 21 (3) CFA ("provision of health care services as part of the comprehensive health service")

At least three kinds of health care provision in the CFA:

- Health care provision that educates or trains a child (which is really special educational provision s. 21(5) CFA) [needs to go in Section F]
- Health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs (s. 37(2)(d) CFA) [would go in **Section G**, but doesn't include everything, e.g. provision to meet routine medical needs, unrelated to SEN]
- Other health care provision reasonably required by the child (s. 37(3) CFA) [e.g., provision for "a long-term condition which might need management in a special educational setting", also Section G]

#### Health care duties

#### Section 42(3) CFA

"If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person."

Duty on commissioning bodies to arrange for the health care provision specified in the plan for the child

Enforceable right to specific health care provision? (compare with the duty under s. 3 of the NHS Act 2006)

But what counts as specified in the plan? (e.g. *only* that reasonably required by the learning difficulties and disabilities which result in SEN, or any other health care provision reasonably required by the child that is included in the statement?)

#### Health care duties

Regulation 12(2) of the 2014 Regulations provides that any health care provision specified in Section G of the plan needs to be agreed by the responsible commissioning body (but – again – this applies to health care specified because it is reasonably required to meet SEN)

## Social care provision

New Guidance out 1 September 2014

Social Care: guide to the 0 to 25 Code of Practice

(Only 19 pages!)

## Social care provision

**Social care provision is defined under s. 21(4) CFA** ("provision made by the local authority in the exercise of its social services functions")

Three (and possibly four) different kinds of social care provision:

- Social care provision which educates or trains a child (s. 21(4) CFA), which
  is really special educational provision [needs to go in Section F];
- For under 18s, any social care provision that must be made for the child under s. 2 of the Chronically Sick and Disabled Persons Act 1970 (s. 37(2)(e) CFA) [see next slide, would go in **Section H1**];
- Any social care provision reasonably required by the learning difficulties and disabilities which result in the child having SEN (s. 37(2)(f) CFA) [would go in **Section H2**, e.g. provision identified through early help and children in need assessments and safeguarding assessments];
- Any other social care provision reasonably required by the child (s. 37(3) CFA) [also goes into Section H2, e.g. child in need or child protection plans]

#### Social care duties

Section H1 of the EHC plan **must** specify all services assessed as being needed for a disabled child under section 2 of the CSDPA.

#### These services include:

- practical assistance in the home
- provision or assistance in obtaining recreational and educational facilities at home and outside the home
- assistance in traveling to facilities
- adaptations to the home
- facilitating the taking of holidays
- provision of meals at home or elsewhere
- provision or assistance in obtaining a telephone and any special equipment necessary
- non-residential short breaks

#### But no counterpart to the s. 42 CFA health care duty

## Personal budgets and direct payments

#### **Personal budgets:**

LA under a duty where it maintains an EHC plan to prepare a personal budget for the child if asked by the parent

What is a personal budget in this context?

 Where the LA "identifies an amount as available to secure particular provision that is specified, or proposed to be specified, in the EHC plan, with a view to the child's parent or young person being involved in securing the provision."

**New Regulation 4A:** Doesn't include provision in an EHC plan where arrangements are made between the LA and a third party for special educational provision, and where the aggregate amount paid under the arrangement includes a notional amount for the specified provision, and the notional amount cannot be disaggregated from the aggregate sum because disaggregation would have an adverse impact on other services provided by the LA to children with EHC plan or would not be an efficient use of the local authority's resources

### Personal budgets and direct payments

#### **Direct payments:**

No duty to allow for direct payments, but there is a duty **to consider** a request for direct payments (see Regulation 4(2))

A number of conditions on direct payments in the Personal Budget Regulations 2014

### Personal budgets and direct payments

#### **Conditions on direct payments:**

**Regulation 6(1):** LA can only make direct payments where a request has been made and the LA is satisfied that:

- The recipient will use the direct payments to secure the agreed provision in an appropriate way;
- Where the recipient is the child's parent or a nominee, that that
  person will act in the best interests of the child when securing the
  proposed agreed provision;
- The direct payments will not have an adverse impact on other services which the LA provides or arranges for children with an EHC plan which the authority maintains;
- Securing the proposed agreed provision by direct payments is an efficient use of the authority's resources.

### Personal budgets and direct payments

#### (Even) more conditions on direct payments:

**Regulation 6(2):** Direct payments are not for the purpose of funding a school place

Regulation 9: If the direct payment is in respect of a good or service which is to be used or provided in a school, then the head teacher's written permission is required

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# Other groups of children and young people

Joanne Clement

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SEN for other groups of children and young people

Children below age of two

Children over two, but below compulsory school age

Young people over compulsory school age

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Capacity issues and deprivation of liberty

### 1. Children below the age of 2

- ➤ Child under compulsory school age has learning difficulty or disability if likely to meet test applicable for those of compulsory school age when of compulsory school age (or would be likely, if no special educational provision were made) (s. 20(3))
- ➤ Special educational provision for a child under two means educational provision of any kind (s. 21(2))

### 1. Children below the age of 2

- > Early identification is key
- ➤ Health body of opinion young child has, or probably has SEN, *must* inform parents, give parents opportunity to discuss the opinion *AND* bring child to attention of local authority (s. 23)
- Decision on whether to assess as per compulsory school age child
- Same factors when considering whether EHC plan is necessary

### 1. Children below the age of 2

- ➤ Most children under 2, needs likely to be best met from locally available services health or social care services under section 17 Children Act 1989 (Code, §9.143)
- Local Offer should set out how agencies will work together to provide integrated support
- ➤ LA should consider commissioning home based programmes or peripatetic services for children with hearing or vision impairment (Code, §9.144)
- ➤ Children under 2 are likely to need an EHC plan where they have "particularly complex needs affecting learning, development and health" are are likely to require a "high level of special educational provision which would not normally be available in mainstream settings" (Code, §9.145)

### 2. Children aged 2 to 5

- > Same definition of SEN as child under 2 (s.20(3))
- ➤ Special educational provision educational or training provision that is additional to, or different from, that made generally for others of the same age in places in England at which relevant early years education is provided (s.21(1)(d))
- Early years provision
- > Assess, Plan, Do, Review
- > Involving specialists
- Requesting an EHC needs assessment same test for those of school age

#### 2. Children over 2 but under 5

- Same test whether make an EHC plan for those of school age
- ➤ Consider whether child's current early years setting can support child's SEN, or whether they need to offer additional support through EHC plan, including placement in alternative early years setting (Code, §9.146)
- For children within one to two years of starting compulsory education who are likely to need EHC plan in primary school, "often appropriate" to prepare EHC plan so in place to support transition (Code, §9.148)

#### 2. Children over 2 but under 5

- ➤ Parent can express preference for maintained nursery school under s. 38
- ➤ Give effect to request *unless* 
  - ➤ Unsuitable
  - > Incompatible with efficient education for others
  - ➤ Incompatible with efficient use of resources (s.39)
- > Must be mainstream nursery school, unless
  - > Incompatible with wishes of parents
  - ➤ Incompatible with efficient education of others (s.33)

#### 2. Children over 2 but under 5

- ➤ If parent expresses preference for independent, private or voluntary early years setting no duty to name. LA entitled to name if thinks "appropriate"
- > Any role for s.9 of 1996 Act?
- ➤ Maintained nursery school must admit the child (s. 43).
- ➤ If independent, private or voluntary nursery setting named, LA must fund. No duty on these settings to admit the child they must agree (s. 43; Code, §9.149)

### 3. Young People

- ➤ Duties owed to "young person" over compulsory school age but under 25
- Compulsory school age ends on last Friday in June in academic year in which individual becomes 16
- > Act does not apply to those in higher education
- ➤ Educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream post-16 institutions in England (s. 21(1)(c))

### 3. Young People

- ➤ Post 16 provision very diverse
- School sixth forms (mainstream and special school)
- ➤ Sixth form colleges
- General further education colleges
- > 16-19 academies
- Special post-16 institutions, including residential
- Vocational learning and training providers in private

### 3. Young People

- After reach compulsory school age, right to make requests and decisions under the Act applies to young people directly, rather than to their parents.
  - > Right to request an EHC assessment
  - Right to make representations about content of EHC plan
  - Right to request particular institution is named in plan
  - Right to request personal budget
  - Right to appeal to FTT
- Subject to issues under Mental Capacity Act see section (4)
- Continue to involve parents/family

### 3. Young People: Assessment

- In principle, test for carrying out assessment for young people as for those of compulsory school age
- ➤ BUT when over 18 consider whether student requires additional time, in comparison to the majority of others of the same age who do not have SEN, to complete education / training (s.36(10)).
- School/FE college transition planning, providing support, reviewing, EHC assessment

### 3. Young People: EHC Plans

- Young person can request school or institution. Broader than 1996 Act, as applies to post 16 and independent sector
- Give effect to request unless
  - > Unsuitable
  - Incompatible with efficient education for others
  - Incompatible with efficient use of resources
- If no duty to give effect to young person's request, name an "appropriate" school or type of school
- Must be mainstream, unless
  - > Incompatible with wishes of young person
  - > Incompatible with efficient education of others
  - Replaces s. 316A 1996 Act, extends to post-16 (s.33)

### 3. Young People: Social Care over 18s

- LA has power to continue providing services to those over 18 under s.17 of Children Act 1989 where EHC plan maintained (s.50; new s17ZG)
- Treated in same way as those of compulsory school age in section H2 of EHC plan
- Over 18: adult social services.
- No duty to provide under Children and Families Act. Have to look to adult community care legislation
- Care Act 2014 Adult care transition assessments; no gap in provision
- Will be duty to meet eligible needs in care and support plan under Care Act 2014
- Adult care and support plan should form the "care" element of EHC Plan (Code, §8.71). Section H2 of EHC Plan must contain the elements of care and support plan directly related to learning difficulties or disabilities. *May* include other care and support
- Code focuses on Care Act 2014 but not in force yet

### 3. Young People: Health Care over 18s

- > Transition to adult health services (Code, §8.56 to 8.58)
- Health service work with young person to develop transition plan, identifying who takes lead in coordinating care and referrals to other services
- LA and health must co-operate to ensure EHC plan and care plan are aligned
- Transition from CAMHS to adult mental health services important
- Duty on CCG to arrange the health care provision specified in the EHC plan continues into adulthood (s. 42(3))

## 3. Young People – Ceasing to Maintain EHC Plan

- EHC plan up to age of 25
- Must not cease to maintain just because young person is 19 or over.
   Young people may need longer in education or training in order to achieve their objectives and make effective transition into adulthood.
- BUT no automatic entitlement or expectation of education up to 25
- Cease to maintain if "no longer necessary for plan to be maintained" (s. 45)
- No longer requires the support in the plan (s.45(2))
- MUST have regard to whether educational or training outcomes in plan been achieved (s.45(3))
- Consider whether remaining in education/training would enable the young person to progress and achieve outcomes, and whether young person wants to continue to complete/consolidate learning. Will it help them to prepare for adulthood? (Code, §9.152)

## 3. Young People – Ceasing to Maintain EHC Plan under 18s

- Special Educational Needs and Disability Regulations 2014, reg. 29-31
- ➤ May not cease to maintain an EHC plan for child or young person under age of 18 *unless* determines "it is no longer necessary" for special educational provision to be made in accordance with an EHC plan
- ➤ If under 18 and not receiving education or training, must review EHC plan and amend it where appropriate to ensure that young person continues to receive education or training

## 3. Young People – Ceasing to Maintain EHC Plan over 18s

- Over 18 ceases to attend the educational institution in EHC plan, so is no longer receiving education or training, LA may not cease to maintain that EHC plan unless it has reviewed it and:-
  - Ascertained that young person does not wish to return to education or training; or
  - Determined that returning to education or training would not be "appropriate" for the young person
- ➤ If young person wishes to return to education or training, and LA determines appropriate to do so, must amend the EHC plan as it thinks necessary

### 3. Young People – Ceasing to Maintain EHC Plan

- Procedure for determining whether to cease to maintain in reg. 31
- Inform child's parent / young person considering ceasing to maintain
- Consult parent or young person, HT or equivalent person at educational institution named in EHC plan
- ➤ If determine to cease to maintain, notify parent/young person, institution and responsible CCG
- ➤ Must notify parent/young person of right to appeal, time limits, information re mediation and availability dispute resolution services / advice and information

### 4. Young People – Capacity and the MCA

- Mental Capacity Act applies to those over 16 who lack capacity
- ➤ Section 2(1) of MCA a person lacks capacity in relation to a matter if at the material time he is 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

## 4. Young People – Capacity and the MCA

#### Section 3 MCA: When is a person unable to make a decision?

(1) If he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.

## 4. Young people – Capacity and the MCA

#### **Section 1: General principles**

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

### 4. Young people – Capacity and the MCA

- ➤ If young person lacks capacity, decision taken by representative on their behalf
- ➤ Annex 1 of Code
  - deputy appointed by Court of Protection likely to be parent
  - Lasting or enduring power of attorney
  - No representative, decision taken by parent
- ➤ Part 6 of Regulations and Schedule 3
  - Circumstances in which LA consider views of young person and representative; representative instead of young person

### 4. Young People: Deprivation of Liberty

- Cheshire West and Chester Council v P [2014] AC 896
- > "Acid test"
  - Under continuous supervision and control AND
  - > Not free to leave
- ➤ Likely to mean many young people in residential placements are being deprived of liberty

### 4. Young People - Deprivation of Liberty

- Unlawful to deprive young person of liberty in a children's home or residential special school without court order
- ➤ Ofted / President Guidance suggests cannot deprive anyone of liberty in these settings and applications should not be made to Court of Protection to authorise placements
- Turns on interpretation of Children's Homes Regulations, regulations governing residential special schools
- National Minimum Standards for Children's Homes and Residential Special Schools

### 4. Young People - Deprivation of Liberty

- ➤ Children's Homes Regulations reg. 17A limitations on the use of restraint
- National Minimum Standards may not restrict liberty as a matter of routine
- SG v Liverpool accepted concession that restrictions don't apply to adults living in children's homes
- ➤ Further case pending before High Court SoS granted permission to intervene. Argue nothing to prevent CoP authorising deprivation of liberty if complies with Article 5

### Coffee Break

"depth of knowledge and experience of the sector that is not matched by any other chambers" Chambers & Partners

## 11KBW

# Reviewing, ceasing to maintain and challenging EHC Plans

Rachel Kamm

#### Reviews

#### Section 44(1)

A local authority must review an EHC plan that it maintains

- (a) in the period of 12 months starting with the date on which the plan was first made, and
- (b) in each subsequent period of 12 months starting with the date on which the plan was last reviewed under this section.

### Also see the Special Educational Needs and Disability Regulations 2014 ("the Regs").

### When else to carry out a review

Reg 18: If a child / young person is within 12 months of a transfer between phases of education, the LA must review (and amend if necessary) the EHC Plan before:

- 31 May 2015 for transfer from secondary school to a post-16 institution on 1 September 2015;
- 31 March in the calendar year of transfer from secondary school to a post-16 institution after 1 September 2015;
- 15 February in the calendar year of any other transfer; and
- For transfer between post-16 institutions, the review (and any necessary amendments) must take place at least 5 months before the transfer.

### When else to carry out a review (2)

### What counts as a transfer between phases of education (reg 2)?

- (a) relevant early years education to school;
- (b) infant school to junior school;
- (c) primary school to middle school;
- (d) primary school to secondary school;
- (e) middle school to secondary school; or
- (f) secondary school to a post-16 institution;

### When else to carry out a review (3)

### Reg 29(2):

"Where a child or young person under the age of 18 is not receiving education or training, the local authority must review the EHC plan in accordance with regulations 18 and 19 and amend it in accordance with regulation 22 where appropriate, to ensure that the young person continues to receive education or training."

## When else to carry out a review (4)

### **Code of Practice para 9.178:**

Local authorities should consider reviewing an EHC plan for a child under five at least every three to six months to ensure that the provision continues to be appropriate. Such reviews would complement the duty to carry out a review at least annually but may be streamlined and not necessarily require the attendance of the full range of professionals, depending on the needs of the child. The child's parent must be fully consulted on any proposed changes to the EHC plan and made aware of their right to appeal to the Tribunal.

## The process for any review

#### **Reg 19:**

When undertaking a review of an EHC plan, a local authority must—

- (a) consult the child and the child's parent or the young person, and take account of their views, wishes and feelings;
- (b) consider the child or young person's progress towards achieving the outcomes specified in the EHC plan and whether these outcomes remain appropriate for the child or young person;
- (c) consult the school or other institution attended by the child or young person.

Then see reg 20 for children / young persons attending a school / institution, and reg 21 otherwise.

## The review meeting

## Reg 20 – children / young persons who attend school or other institution:

- the local authority must ensure that a meeting to review that EHC plan is held;
- specified persons who must be invited and who provide advice and information;
- minimum two weeks' notice; and
- progress towards achieving the outcomes specified in the EHC plan must be considered at the meeting.

## After the review meeting

## Reg 20 – children / young persons who attend school or other institution:

- written report with recommendations;
- LA decision to <u>propose to</u> (a) continue to maintain the Plan in its current form; (b) amend it; or (c) cease to maintain it;
- notification of parents including right to make representations if the LA proposes to amend the Plan; and rights of appeal etc. if the LA proposes to continue to maintain the Plan or to cease to maintain it. See reg 22.

### Reviews should:

- gather and assess information to support progress and their access to teaching and learning;
- review the special educational provision to ensure it is being effective in ensuring access to teaching and learning and good progress;
- review the health and social care provision to ensure it is being effective in ensuring good progress towards outcomes;
- consider progress and any changed circumstances and whether changes are required;
- review and set interim targets and outcomes; and
- include the review of any existing Personal Budget arrangements and direct payments.

#### (Code of Practice paras 9.167-9.168)

### When to re-assess

### Re-assess = same process as the first assessment.

### **Section 44(2) and (3)**

- (2) A local authority must secure a re-assessment of the educational, health care and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by—
  - (a) the child's parent or the young person, or
  - (b) the governing body, proprietor or principal of the school, post-16 institution or other institution which the child or young person attends.
- (3) A local authority may also secure a re-assessment of those needs at any other time if it thinks it necessary.

### No need to re-assess if:

### **Reg 24**

Where a local authority receives a request to re-assess a child or young person in accordance with section 44(2) of the Act it does not need to do so where—

- (a) it has carried out an assessment or re-assessment within the period of six months prior to that request, or
- (b) it is not necessary for the authority to make a further assessment.

### Also re-assess when:

### **Reg 23**

A local authority must secure a re-assessment of a child or young person's EHC Plan where it receives a request to do so from the responsible commissioning body for that child or young person.

# Amending a Plan without review/re-assessment

### Reg. 28:

If, at any time, a local authority proposes to amend an EHC plan, it shall proceed as if the proposed amendment were an amendment proposed after a review.

## Ceasing to maintain a Plan

## Section 45 – LA has a power to cease to maintain if:

- (a) the authority is no longer responsible for the child or young person, or
- (b) the authority determines that it is no longer necessary for the plan to be maintained.

Reg 29 – for a child or young person under 18, the Plan is not necessary only if it is no longer necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

See **Reg 30** for a young person 18+.

## The process for ceasing to maintain

### Reg 31:

#### Consultation:

- (a) inform the child's parent or the young person that it is considering ceasing to maintain the child or young person's EHC plan; and
- (b) consult the child's parent or the young person;
- (c) consult the head teacher, principal or equivalent person at the educational institution that is named in the EHC plan.

Notification.

## Overview of challenging decisions

- Is it a change in circumstances and should there be a review / re-assessment?
- What decision / omission is challenged?
- Is it about education, health and/or social care?
- Is the decision / omission enforceable?
- Is it an appealable decision?
- Who has a right to appeal?
- Is there a power or duty to mediate?
- What other options are available?

## Enforceable decisions - examples

### Special educational provision – s.42(2)

The local authority must secure the special educational provision for the child or young person that is specified in the Plan (if the child's parent or the young person has made suitable alternative arrangements).

### Health care provision – s.42(3)

If the Plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person (if the child's parent or the young person has made suitable alternative arrangements)..

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## Enforceable decisions – examples (2)

### Social care provision

No duty in the Act to secure or arrange the social care provision that is specified in the Plan. Rely on other legislation (where applicable) to enforce the social care provision.

### Admission to a particular institution

Section 43 – duty to admit (including Academies).

### **Procedural rights**

Don't forget that where the Act or Regulations impose a procedural obligation on the LA or CCG, this is enforceable.

### Appealable decisions

#### These are a sub-set of enforceable decisions:

i.e. decisions made by the local authority and can be enforced by a child's parents / young person by way of an appeal to the First-tier Tribunal – s.51:

- (a) not to secure an EHC needs assessment;
- (b) that it is not necessary for special educational provision to be made in accordance with a Plan;

## Appealable decisions (2)

- (c) where an EHC plan is maintained for the child or young person and it is first finalised, amended or replaced
  - (i) specified special educational needs Section B;
  - (ii) specified special educational provision Section F;
  - (iii) named school / institution / specified type Section I;
  - (iv) the fact that no school / institution is named Section I;
- (d) not to secure a re-assessment following a request;
- (e) not to amend / replace a Plan following review / reassessment;
- (f) to cease to maintain a Plan.

## Appealable decisions (3)

The outcomes in the Plan are not themselves appealable. However, the Code of Practice says at para 11.49:

"In making decisions about whether the special educational provision specified in the EHC plan is appropriate, the Tribunal should take into account the education and training outcomes specified in Section E ... and whether the special educational provision will enable the child or young person to make progress towards their education and training outcomes. The Tribunal can consider whether the education and training outcomes specified are sufficiently ambitious for the child or young person. When the Tribunal orders the local authority to reconsider the special educational provision in an EHC plan, the local authority should also review whether the outcomes remain appropriate."

## Appealable decisions (4)

**Personal budgets -** the Tribunal does not hear appeals about Personal Budgets, but will hear appeals about the special educational provision to which a Personal Budget may apply.

### Equality Act 2010 – appeal to the Tribunal:

- Claims about disability discrimination by schools / LAs re. exclusions, the provision of education and associated services and the making of reasonable adjustments, including the provision of auxiliary aids and services.
- Claims must be made within six months of the alleged instance of discrimination.

### **Detained persons – see s.73**

### Who can appeal

#### Now:

- The parents of a child
- A young person

### Future pilot schemes under s.58:

A child

## The Tribunal's powers (reg 43)

- (a) dismiss the appeal;
- (b) order LA to arrange an assessment or a reassessment;
- (c) order LA to make and maintain a Plan;
- (d) refer the case back to LA to reconsider whether it is necessary to determine special educational provision;
- (e) order LA to continue to maintain the Plan in its existing form;
- (f) order LA to continue to maintain the EHC Plan with amendments to the assessment of special educational needs / provision; or
- (g) order LA to substitute in the Plan the school /institution / type specified.

## Transitional provisions for appeals

## The Children and Families Act 2014 (Transitional and Saving Provisions) (No. 2) Order 2014 and statutory guidance:

Existing statements and appeal rights continue in the usual way, until there is a transfer review to an EHC Plan. In the meantime:

- There are the usual rights of appeal against decisions that the LA makes under EA 1996;
- There is no requirement for parents to consider mediation in advance of registering an appeal with the Tribunal;
- LAs cannot commence an EHC needs assessment if there is a pending appeal.

## Transitional provisions for appeals (2)

## The powers of the Tribunal when hearing an appeal about the 1996 Act from 1 September 2014

See the table on pp16-18 of the statutory guidance which sets out the possible Tribunal outcomes – in summary:

- if the appeal is about the content of a SEN statement, then the Tribunal can uphold the LA's decision or order the LA to amend the statement,
- If the appeal is about a decision not to assess, then the Tribunal can uphold the LA's decision or order the LA to assess. There is then the option of the assessment being for an EHC Plan (instead of a statement), if the parent consents.

### Mediation

## Child's parent / young person has a <u>right</u> to mediation – s.52:

- When an appealable decision is made; and
- When a Plan is made, amended or replaced.

(note that this applies even where the child's parent / young person has concerns about non-educational matters (only) in the Plan and so has no right of appeal)

## Types of mediation

### Where the mediation issues are (solely) health care issues

(i.e. that no health care provision or none of a particular kind is specified in Plan):

CCG arranges mediation between it and the parent / young person by an independent person.

#### Where the mediation issues include health and other issues:

LA arranges mediation between it, the CCG and parent / young person by an independent person.

## Where the mediation issues do not include any health care issues

LA arranges mediation between it and the parent / young person by an independent person

### The mediation

Specified persons may attend.

Where the parent is a party, take reasonable steps to ascertain the views of the child.

Mediators must have sufficient knowledge of the legislation relating to special educational needs, health and social care to be able to conduct the mediation.

Expenses are payable by the body arranging the mediation to the parent / young person.

## Mediation and appeals

### Before a parent / young person can appeal – s.55:

- Mediation certificate
- No obligation actually to mediate –just that:
  - an independent mediation advisor provided them with information and advice about pursuing mediation; and
  - either they informed the advisor that they did not wish to pursue it or they participated in mediation.

**The exception** – no certificate is required if the appeal is only about the school / type of school that is named.

## Mediation and appeals (2)

### Reg 33:

Where a parent or young person is required to obtain a mediation certificate, he or she must contact the mediation adviser within 2 months after written notice of the local authority's decision was sent, and inform the mediation adviser that he or she wishes to appeal and inform the mediation adviser whether they wish to pursue mediation.

**Reg 34** – can seek leave to appeal without a mediation certificate when out of time.

### Judicial review

#### **Available where:**

- There is an enforceable right (under the Act or other legislation);
- There is no alternative remedy i.e. it is not an appealable decision;
- Issue promptly and in any event within three months of the decision / omission.

## Other remedies / dispute resolution

LA dispute resolution arrangements – s.57

Complaints to the school, LA, CCG etc. (including specific LA Children Act complaints process)

Complaints about FE college to SFA

Complaints about 6<sup>th</sup> form college to EFA

Complaints about maintained school / LA to the Secretary of State—ss.496-7 EA 1996

Complaints about LA to the Local Government Ombudsman about maladministration

Complaints about CCG to Parliamentary and Health Service Ombudsman

# 11KBW

## EHC Plans: Case Study

Paul Greatorex and Rupert Paines

## Case study

- "Anna Castle"
- Draft by a pathfinder authority (Southampton)
- Available on internet at <a href="http://www.sendpathfinder.co.uk/infopacks/ap">http://www.sendpathfinder.co.uk/infopacks/ap</a>
- Treating this as a draft plan sent to parents

## Statutory requirements for EHC plan

## Special Educational Needs and Disability Regulations 2014 (SI 2014/1530), reg 12:

A – Views, interests and aspirations of child and parents or young person

- B Special educational needs
- C Health care needs which relate to SEN
- D Social care needs which relate to SEN or disability
- E Outcomes sought
- F Special educational provision required

# Statutory requirements for EHC plan (cont.)

## Special Educational Needs and Disability Regulations 2014 (SI 2014/1530), reg 12 (cont.):

G – Any health care provision reasonably required by the learning difficulties or disabilities which result in the child/young person having SEN

H1 – Any social care provision which must be made for as a result of s.2 CSDPA 1970

H2 – Any other social care provision reasonably required by the learning difficulties or disabilities which result in the child/young person having SEN

I – Name and type (or just type) of school or institution to be attended

J – Where any special educational provision is to be secured by a direct payment, the SEN and outcomes to be met by the direct payment

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### Most common/relevant issues

- one word/line summary of primary SEN
- home situation (address, parents, siblings etc.)
- educational history, i.e. names and types of schools and periods attended and planned future transitions
- current school year and whether in correct chronological age group
- current placement (name and type and length of school day/week)
- class size, peer group, number and qualifications of adults in room

### Most common/relevant issues (cont.)

- any additional support to be provided and if so type and quantum (e.g. 15 hrs higher level teaching assistant support per week, 1:1 LSA support at all times)
- any therapies and if so quantum, frequency, individual/small group, and by whom delivered
- any equipment needed (e.g.physiotherapy equipment, laptop etc.)
- transport, i.e. how the child/young person gets to/from school

## Things to think about

- Length and detail
- Who will read it?
- Is it clear and helpful?
- Can it be monitored and/or enforced?

# Don't let things that don't really matter obscure those that do.

## What in plan can be appealed to FTT?

### 2014 Act, section 51(2)(c):

- special educational needs
- special educational provision
- school or institution named

Broadly this means sections B, F and I, although these matters may appear in other sections.

## Powers of FTT on such an appeal

### Regulation 43(2):

- (f) to order the local authority to continue to maintain the EHC Plan with amendments where the appeal is made under section 51(2)(c)...so far as that relates to either the assessment of special educational needs or the special educational provision and make any other consequential amendments as the First-tier Tribunal thinks fit;
- (g) order the local authority to substitute in the EHC Plan the school or other institution or the type of school or other institution specified in the EHC plan, where the appeal concerns, the specific school or other institution, or the type of school or other institution named in the EHC Plan

## Powers of FTT on such an appeal

### **Poor drafting:**

- "that" in (f) must relate back to "the appeal"
- power to make consequential amendments does not enlarge scope of appeal or jurisdiction beyond educational matters
- (g) very badly worded, although meaning and effect clear

# Unhappy with health and social care elements?

### **Code of Practice para 11.46:**

- mediation
- health and social care complaints procedures (see also paras 11.101-11.111)

### Code of practice para 11.100:

judicial review

## Case study

#### Parents have considered draft and:

- (1) Want weekly speech and language therapy with a SALT
- (2) Changed minds about personal budget and also want direct payments so they can choose their own:
  - speech and language therapist
  - social worker
  - Emotional Literacy Support Assistant
- (3) Want direct payments to go to father's bank account
- (4) Want to disclose plan to alternative schools

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