

SEND myths

Myth: *A pupil will only be eligible for an EHCP Assessment if they have an EP Report/a diagnosis/been through 2 cycles of plan/do/review at SEN support/are 2 years behind/school have spent £6000.*

Fact: The legal test for statutory assessment under the Children and Family Act (CaFA) is whether the child/YP **has or may have SEN** and it **may be necessary** for special educational provision to be made for the child or young person in an EHCP. All LAs will have criteria for making decisions on assessment, but these must not impose a higher threshold than the legal test or apply a blanket policy which would prevent the consideration of an individual's needs. The LA can reasonably expect the school to be able to evidence that they have taken '**relevant and purposeful action**' (although a lack of this will not necessarily be enough to prove that an EHCP is not necessary), but the LA cannot insist on an EP or any other report as part of any eligibility criteria. It remains the duty of the LA to secure an EP assessment – not the school. (**SEND Regulations**)

References:

1) CaFA Part 3 Section 36(8) Legal test: *The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority 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.*

<https://preview.tinyurl.com/yxt8l8mh>

2) SEND Regulations 6 (1) (d) Requirement for LA to seek advice and information from an EP. *Where the local authority secures an EHC needs assessment for a child or young person, it must seek the following advice and information, on the needs of the child: psychological advice and information from an educational psychologist;* <https://preview.tinyurl.com/y666v4nt>

3) Other sources:

Garry Freeman Busting Common SEND myths. SecEd

<https://preview.tinyurl.com/yxu6qhr7>

Council for Disabled Children (CDC) <https://preview.tinyurl.com/y7fdt8o7>

Starlight Mackensie <https://preview.tinyurl.com/yafsbw3o>

Requesting a needs assessment: a model letter (IPSEA)

<https://preview.tinyurl.com/y2qavgjy>

Case: A boy was excluded from primary school. His family and experts - including the council's own social worker, autism needs advisor, and educational psychologist - asked the council to carry out an Education, Health and Care (EHC) needs assessment, but the council's educational panel decided there was not enough evidence that the boy met the threshold. It took more than a year, and two further requests for assessment, for the council to decide the boy needed to be assessed. When the final EHC Plan was issued it set out a significant amount of help was needed to allow the boy to receive an education and manage his emotions and behaviour. The Ombudsmen stated "The council applied too high a threshold for deciding whether or not to assess the boy for an EHC Plan. The threshold for

deciding an assessment is low – a council only needs to be satisfied a child may have special educational needs and may require provision. In this case there was ample evidence the boy met this.”

Reference

Local Government and Social Care Ombudsman decision (March 2019)

<https://preview.tinyurl.com/y4lz2kgx>

Myth: Schools need to obtain a parent’s permission before submitting an ECH needs assessment request.

Fact: No. A school or setting **must inform** a parent if their child has been identified as having SEND, they **must identify the needs to the best of their ability** and they **must put the right support in place** to ensure that the child progresses and achieves to attain the best outcomes.

Reference: CaFA Section 36. Assessment of education, health and care needs

(1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child’s parent, the young person or a person acting on behalf of a school or post-16 institution.

(4) In making a determination under subsection (3), the local authority must consult the child’s parent or the young person.

Myth: A LA will not undertake an EHC assessment if the pupil has only health needs.

Fact: Usually the case but not always.

Case: In **RB v Calderdale MBC**, a pupil had a medical condition which caused him to miss a significant amount of school. Parents requested an EHC needs assessment which the LA refused. The parents then went to SEND tribunal who agreed with the LA that the child’s needs were medical not eligible for SEND statutory assessment. However, the Upper Tribunal disagreed. It said the child had a disability which potentially hindered him from making use of facilities provided for others of the same age in mainstream schools and as such, the LA did have to undertake an EHC needs assessment to consider whether an EHC plan might be appropriate.

Reference: Council for Disabled Children <https://preview.tinyurl.com/yd94oyqk>

Myth: Maintained mainstream schools can refuse to admit a child with an EHCP

Fact: No they can’t, unless admission would be **incompatible with the efficient education of other children** AND there are **no reasonable steps** that can be taken to overcome that incompatibility. Indeed, a school should be careful before refusing to admit a child or young person on the basis it was not consulted by the LA. Where a school is named in a statement, the refusal to admit due to a failure to consult can be challenged by judicial review and costs ordered against the school, even if the Secretary of State has agreed with the school in a determination that the authority has unreasonably named the school: *N v Governing Body of a School* [2014] EWHC 1238 (Admin).

Reference: The Noddy Guide Page 28 <https://preview.tinyurl.com/y4sgmmrq>

Case: Placement of pupil with an EHC plan Jess Staufenberg.

A child had moved from a different authority and a new school was named on their EHCP by Medway Council. **Schools are required by law to accept pupils if they are the “named” school on a child’s EHCP**, although it is expected that consultation takes place first. The new school provided Medway Council with reasons it felt it could not offer an appropriate education to the pupil who has severe communication and sensory difficulties. **The school said it would require £40,000 in additional funding a year to meet the requirements in the EHCP.** A Judicial Review instigated by the school then followed. The High Court judgment ruled that following the response from the named school, Medway Council then “eviscerated” the SEN provision set out in the EHC plan and offered £3,000 a year. The Court stated: “*Whilst a new local authority could lawfully form a different view of the provision required, without some change in evidence such a wholesale and fundamental revision would be irrational.*” The case made it clear that a local authority has a “*heavy financial duty*” to make mainstream schools available to all pupils and **should not ignore the advice of schools and experts** in how much funding a school will need to achieve this.

Reference: Schoolsweek <https://preview.tinyurl.com/y7dpxj7q>

Myth: *An ECHP always needs to identify a school*

Fact: Not always – the views of the pupil and experts are important when making a decision.

Case: In *M & M v West Sussex County Council*, expert advice was that a child should be home-schooled until an appropriate school placement was found. The child wanted this arrangement, but the LA believed that education at home could not be specified in an EHC plan. The Upper Tribunal judged that Section I of an EHC Plan must always identify a school but an EHC Plan could include education outside school and this could be listed in Section F, if:

- The ultimate aim is for the child to be educated in school; or
- Some education is provided in a school and some outside of school.

It also said that the **First Tier Tribunal must expressly deal with the child’s views, wishes and feelings.**

Reference

Irwin Mitchell LLP <https://preview.tinyurl.com/yd94oyqk>

Myth: *The school needs to fund the first £6000 before requesting/receiving support from the Local Authority to meet a pupil’s special educational provision identified in an EHCP.*

Fact: CaFA Part 3 Section 42 (2) The legal duty on the LA to secure the SEP in an EHCP. Where a child or a young person has an EHCP, it is the duty of the Local Authority to ensure that what is in the Plan is actually delivered. They can delegate the daily delivery of most or all of this to the school/setting – but it remains THEIR legal duty to ensure it happens – including funding it if necessary. If a school’s resources (funding, staffing or materials) mean that they cannot provide what is in the Plan, then the LA MUST provide it. Also note that although schools are expected to fund the first £6k of support from their notional SEN budget, **if the notional SEN budget isn’t enough** to meet SEN needs, schools can ask the LA for an additional payment.

Case: Local authorities can refer to local arrangements for funding provision but whatever the effect of such arrangements on the relationship between the LA and the school, **they have no legal effect in terms of the child's entitlement and the LA remains ultimately responsible for making the provision if the school fails to do so:** R v Oxfordshire ex parte C [1996] ELR 153; R v Hillingdon ex parte Queensmead School [1997] ELR 331. The Noddy Guide Page 24
<https://preview.tinyurl.com/y4sgmmrq>

Reference: The Noddy Guide Page 20. <https://preview.tinyurl.com/y4sgmmrq>
CaFA Part 3 Section 42 (2) The legal duty on the LA to secure the SEP in an EHCP: "The local authority must secure the specified special educational provision for the child or young person." <https://preview.tinyurl.com/yxul9jbf>

Myth: *Can the LA refuse to provide additional funding to meet a pupil's needs because it has a policy of delegating all SEN funds to schools?*

Fact: No. If the child's SEN is such that the provision needs to be determined by the LA then funding follows that; not the other way round. An appeal to the SEND First Tier tribunal will not be bound by LA policy.

Reference: *DfE High Needs Funding Arrangements: 2019 to 2020 Feb 2019 (99).*
"Local authorities can provide additional funding outside the main funding formula for mainstream schools and academies on a consistent and fair basis where the number of their pupils with SEND and/or high needs cannot be reflected adequately in the funding they receive through the local funding formula."
<https://preview.tinyurl.com/ycmdjc8b>

Myth: *The LA can place responsibility for delivery for a part of Special Educational Provision (SEP) e.g. speech or occupational therapy on the NHS*

Fact: No. The EHCP must make provision in its Part 3 for all the SEP in question and cannot leave it to bodies other than the LA (such as the social services department or the NHS) to make such provision (whether identified in Part 5 or not).

Case: A requirement for "an Occupational Therapy programme [to be] devised and implemented by Children's Integrated Therapies, South Tyneside NHS Foundation Trust" was found unlawful by the Upper Tribunal **as the obligation to arrange SEP is on the LA not the NHS:** JD v South Tyneside [2016] UKUT 9 (AAC), [2016] ELR 118.

Reference: The Noddy Guide Page 23/4 <https://preview.tinyurl.com/y4sgmmrq>

Myth: *A school is responsible for providing reasonable adjustments for pupils with a disability and this includes most pupils with a SEN. This includes the provision of auxiliary aids and services.*

Fact: Yes to some degree. The school has a duty under the Equality Act 2010 towards disabled pupils to make reasonable adjustments that includes the provision of auxiliary aids in order to prevent disabled pupils being put at a substantial disadvantage. The crux of the reasonable adjustments duty is whether it is something that is **reasonable** for the school to have to do. Page 7 of the EHRC guidance provides the following list of factors that could be taken into account when deciding what adjustment it is reasonable for a school to have to make:

- *The resources of the school and the availability of financial or other assistance*
- *The financial and other costs of making the adjustment*
- *The practicability of the adjustment*
- *The effect of the disability on the individual*
- *The interests of other pupils and prospective pupils*

It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost than for a school with fewer resources.

References

The Equality Act 2010 <https://preview.tinyurl.com/yyq8gpsy>

Reasonable adjustments for disabled pupils. Equality and Human Rights Commission (2015) <http://preview.tinyurl.com/lfwcq6v>

Myth: *A pupil with a disability can be excluded from school if the disability results in a “a tendency to physical abuse”?*

Fact: In some circumstances, but schools are required to evidence reasonable adjustments they have made where a recognised condition leads to a ‘tendency to physical abuse’ and justify the exclusion of all ‘disabled’ children in proportionality terms if a claim of ‘discrimination arising from disability’ is to be avoided under section 15 of the Equality Act 2010.

Case: L is a pupil with autism, anxiety and Pathological Demand Avoidance. He received a fixed term exclusion from school due to a number of violent incidents over a ten-month period. His parents appealed to the First-Tier Tribunal (FTT) on the grounds that L had been discriminated against as a result of his disability in respect of the exclusion. The FTT considered that L generally met the definition of a ‘disabled’ person for the purposes of the Equality Act 2010, but dismissed the part of the claim that related to the fixed-term exclusion on the basis that L had been excluded as a result of his ‘tendency to physical abuse’, and so, due to Regulation 4(1)(c) of the Equality Act 2010 (Disability), Regulations 2010 was to be treated as not falling within the definition of ‘disability’. However, the Upper Tribunal (UT) held the interpretation of regulation 4(1)(c) by FTT was incompatible with Article 14 of the European Convention on Human Rights as it discriminated against certain groups of disabled children without justification. The UT recorded that having allowed the appeal, the dispute between L’s parents and his former school had been resolved between the parties by a confidential agreement.

Reference: Council for Disabled Children C & C v The Governing Body of a School, the Secretary of State for Education (First Interested Party) and the National Autistic Society (Second Interested Party) (SEN) [2018] UKUT 269 (AAC) “a tendency to physical abuse” <https://preview.tinyurl.com/y3wln1pc>

References

The Equality Act 2010 <https://preview.tinyurl.com/yyq8gpsy>

The Children and Families Act 2014 <https://preview.tinyurl.com/pkuaeqk>

The SEND Regulations 2014 <https://preview.tinyurl.com/o49m6ps>

The SEND Code of Practice 2015 <https://preview.tinyurl.com/ycofvegj>

Statements of Special Educational Needs, Education, Health and Care Plans and a bit more. “The Noddy Guide” March 2019. Wolfe and Glenister

This document is intended to support parents, schools and local authorities in England and Wales in applying the law when it comes to decision-making around SEN provision. It identifies legal cases that have set precedents for others to refer to, mostly in relation to EHC assessments and plans. Contents:

- The Education Act and the Children and Families Act 2014,
- The SEND Code of Practice,
- The general duty of the LA when it comes to special educational provision,
- Assessments and issuing of an EHCP,
- Statements of SEN and EHC Plans,
- Placement request,
- Ceasing to maintain a Statement/EHCP,
- Transport 48,

<https://preview.tinyurl.com/y4sgmmrq>

Case law on SEND

This is a section on the Council for Disabled Children's (CDC) website that lists case law on issues that relate to pupils with SEND. Areas include:

- Deprivation of liberty
- Education
- EHC plans
- Equality
- Health
- Housing
- Local Authority duties
- Social care

The website also allows free access to *Disabled children: a legal handbook*. This is a guide to the legal rights of disabled children and their families in England and Wales.

<https://preview.tinyurl.com/y6un36p4>

Steve Broach

Council for Disabled Children's case law digest service provides an update on the latest decisions affecting young people and children with SEND and are compiled by barrister Steve Broach from Monckton Chambers. The digests provide a description of the case, the implications for children young people and their families, and how professionals might need to change their practice as a result of the judgement.

<https://preview.tinyurl.com/y6un36p4>

SEN and the law

Although there is an element of promoting their legal services to schools and to parents, these downloadable newsletters do give an overview of recent legal cases relating to SEND that are useful for all SENCos to be aware of.

<https://preview.tinyurl.com/yycr7pfq>

Complaints factsheet

LA complaints and appeals procedures as well as the Local Government Ombudsman should be used where they are available and where they can provide a realistic remedy Information on how schools, pupils and parents can instigate a Judicial Review of a LA decision

<https://www.sossen.org.uk/admin/resources/jr-2019.pdf>

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