

# SENlegal

## NEWSLETTER



Professional's Newsletter Edition 11



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The legal right to a mainstream education.

Elective Home Education - but who gets to choose?



# Transition reviews

## - *good preparation is key!*

While 2020 has been a different year in the world of SEN by comparison to its predecessors with the suspension of certain Legislation and Regulations at various points and school closures due to outbreaks, the focus ahead to transition reviews (also known as phase transfer) and the 15th February deadline (31st March for secondary school to post 16 placements) for the amendment of an EHCP is fast approaching!

Parents across the country are searching for placements and we hope that Local Authorities (*especially those subscribed to this newsletter*) are contributing with appropriate suggestions that can not only meet these children's needs but deliver the provision required in the plan. However, every year we see the same situation where a child in a specialist placement suddenly at secondary phase transfer has a large mainstream school named in their EHCP with little regard to the impact this will have on the child. Therefore, the SEND Tribunal exists to deal with issues like this and any amendments to a child's EHCP carries a two month Right of Appeal should the situation occur.



*by Richard Nettleton, Solicitor*

Do not just look at a potentially poorly drafted plan in isolation. LA's notoriously omit needs such as challenging behaviour or provision, such as full time 1:1 support and therefore the document you are reading is not an accurate reflection of need or the provision you will need to provide.

You should also check whether the funding level is correct. Remember, if you are unable to meet the provision in the plan, then per **Section 42** of the **Children and Families Act 2014**, this responsibility belongs to the LA and schools should not be in a situation where the provision provided is not adequately funded either through the deficit in your notional budget or through a lack of top up funding.

If you spot instances of poorly drafted EHCPs or underfunding of a plan, it is always best practice to highlight this to the LA and provide a copy of your consultation response to the parent. Ultimately, they have a right of appeal to the SEND Tribunal to correct issues such as a lack of specificity and quantification in an EHCP which has the knock-on effect of impacting funding. If as a school, you find yourself in a situation where your consultation views have been ignored and you have been named in an EHCP despite your ability to meet need or being provided adequate funding, please get in contact as you have options available to challenge an LA's decision.

### As a school you should be asking yourself:

- 1) Have we held the transition review/annual review?
- 2) If not, when is it booked in?
- 3) If you are being consulted by a Local Authority to offer a place for the child, have you responded?
- 4) In a consultation situation, have you considered the EHCP, is the plan specific and quantified? Have you reviewed any expert reports? Are you confident that you can meet needs and that the needs of the proposed student are going to be compatible with the efficient education of the other students?

While it's not for us as legal professionals to tell schools whether they can meet the needs of a child, it is our advice to schools to consider the EHC plan and other documents in detail.



# Expert Resources to help support children whilst at home.

Thank you to all our experts for their valuable contributions!  
For all resources, visit [senlegal.co.uk/expert-resources](https://senlegal.co.uk/expert-resources).



**Dr Lindsay Peer**  
Educational Psychologist



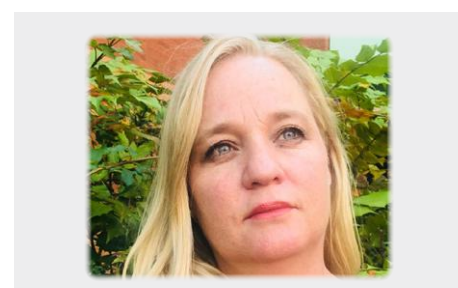
The Emotional side of Dyslexia.



**Jane West**  
Physiotherapist



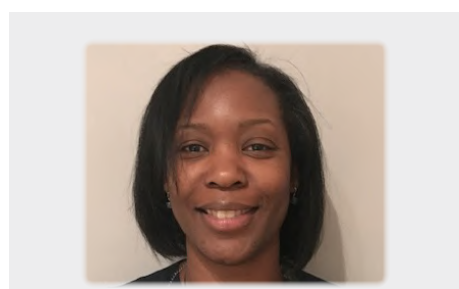
Bike riding tips for children with coordination difficulties.



**Melinda Eriksen**  
Occupational Therapist



Exercises to do with your children at home.



**Juanita Hurley**  
S.A.L.T



Supporting your child's language at home.



**Aniesa Blore**  
Occupational Therapist



Breathing exercise to calm anxiety in children.



**Sharon Horswell**  
S.A.L.T



Building social skills at home with LEGO.



The time is approaching when all schools, academies and independent settings will be receiving consultation requests from LAs in relation to pupils at the point of secondary transfer.

*by Rebecca De Winter, Trainee Solicitor*

Many placements do not realise that a child with special educational needs has a lawfully enforceable right to attend a mainstream school, this includes settings such as Further Education Colleges. This is the case whether the child has an EHC Plan or does not have an EHC Plan. The legal starting point is that a child should be educated within a mainstream setting. However, there are exceptions to this right which all settings should be aware of. This article focuses on children with EHC Plans.

The legal right to a mainstream education is set out within the **Children and Families Act 2014** at **Sections 33 and 39**.

**Section 39** must be considered first. Under s.39 of the CFA, when a Local Authority receives a request for a particular school or other setting to be named in an EHC plan, they must consult the school or other setting and secure that the school is named. However, the Local Authority or any placement have grounds by which they can oppose naming (despite being the parental preference) under **Section 39**. These grounds are either due to it being an inefficient use of resources, or the institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned.

*If the Local Authority refuses your request for a mainstream placement under **Section 39**, then **Section 33** must then be considered.*

Click sections below to read the **Children & Families Act 2014**.

Section  
**33**

Section  
**39**

continued on next page...



**Section 33** makes it clear that children will be educated within a mainstream setting, unless it is incompatible with:

- 1. The wishes of the child's parent or young person; or*
- 2. The provision of efficient education for others.*

If the Local Authority asserts the incompatibility applies and the child's attendance will be incompatible with the efficient education of others, the Local Authority must be able to show that there are no reasonable steps that they can take to prevent the incompatibility. Local Authorities are under a duty to spend money to overcome that incompatibility up to a reasonable level. **Section 33** does not permit a Local Authority to refuse to name a mainstream school or setting in Section I of an EHC Plan on cost grounds.

It is therefore important that when consultations are received, the EHC Plans are considered carefully by school settings. It should be established whether the setting can deliver the provision set out within the EHC Plans, and whether there is adequate funding to allow them to meet those needs.

If you believe you cannot meet the need, or there is not sufficient funding in place to meet the needs, the consultation response needs to set out clearly why this is the case. The consultation response is a tool for any setting to raise concerns they have, and for them to be addressed. A well written consultation response can often lead to an increase in funding for the setting to ensure the provision within the plans can be delivered, or the correct alternative school placement being found.

Settings need to also be wary of Local Authorities stripping provision out of EHC Plans prior to consultation. This is done to prevent settings stating they cannot meet need or require further funding to do so. This situation has been challenged in the High Court and is unlawful. Therefore, the EHC Plan should not be read in isolation and a school setting needs to see all of the professional reports which make up the EHC Plan and any documentation from the previous school.

Often parents are not informed of their right to look at alternative schools to mainstream settings and they are shoehorned towards mainstream settings, when it is inappropriate to the child's needs. Therefore, it is worth speaking to parents to ensure they are aware of their options and you are indeed their parental preference.

If you are confronted with this situation, you should make the Local Authority aware that you are familiar with the relevant legislation and how this applies to your situation. If you need assistance with consultation responses or any part of the process outlined about please do not hesitate to contact us at [customerservices@senlegal.co.uk](mailto:customerservices@senlegal.co.uk) – we can help.



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**Nicole Lee**  
Senior Solicitor

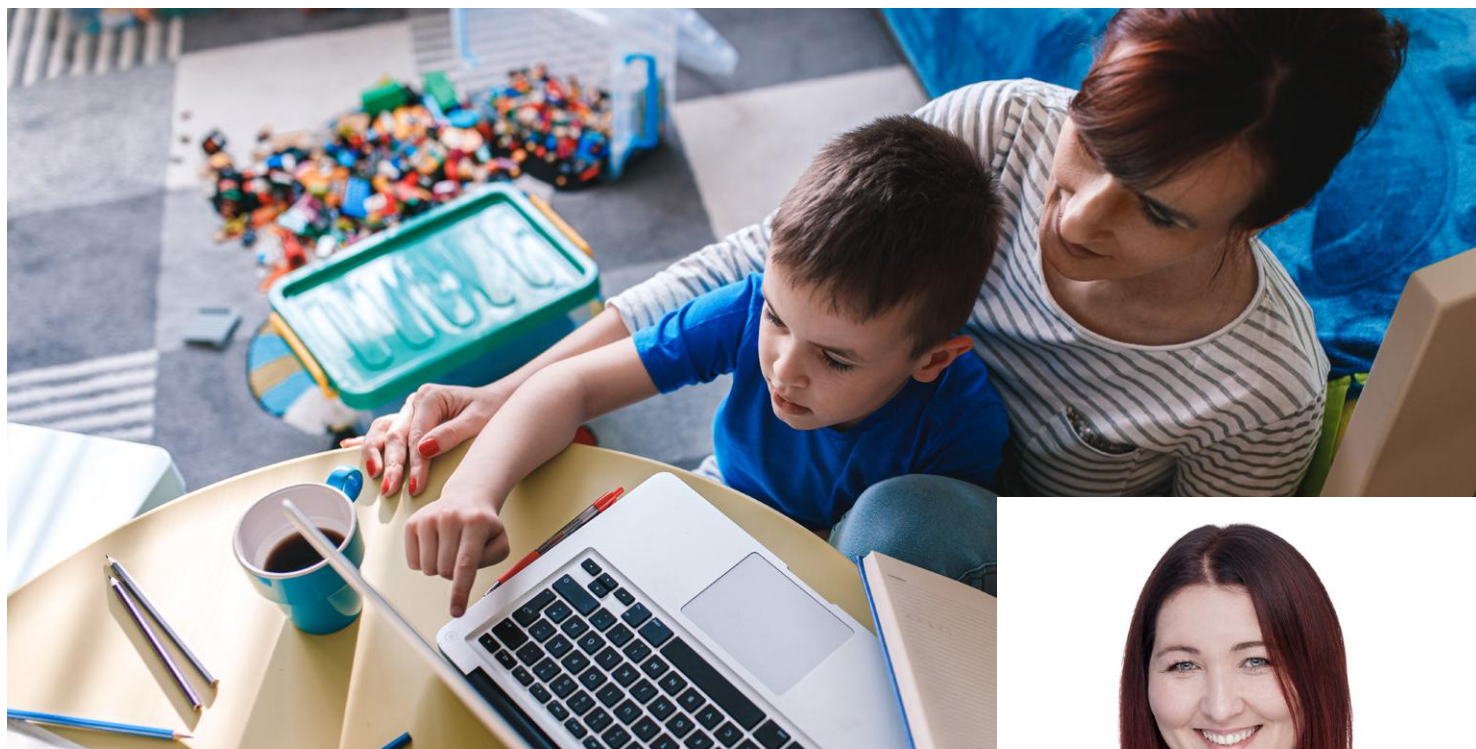


**Melinda Nettleton**  
Principal Solicitor



**Hayley Mason**  
Senior Solicitor





by Nicole Lee, Senior Solicitor

## Elective Home Education But who gets to choose?

As a practice, since the start of the COVID-19 pandemic, we have experienced an increase in the number of enquiries relating to parents who feel that a change in their child's needs mean they have no choice but to “electively” home educate their child.

When it comes to Elective Home Education, the clue is in the name. It must be “Elective”, meaning that the parent has chosen to educate their child at home.

No parent should be forced into educating their child, not least because making the decision to electively home educate can have an extremely detrimental legal impact on the legal rights of children with EHC Plans.

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***Threatening exclusion because a school cannot meet a child's needs is never an option. Exclusions on the basis of special educational needs are automatically unfair and would also constitute disability discrimination.***

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Directing or forcing a family to electively home educate would also be a potential ground for a disability discrimination claim.

If a child's needs have changed, or perhaps if a school was never really able to meet the needs of that child, then what is needed is respectful, open and honest conversation about how best to move matters forwards for that child.

You can consider calling an interim review at which the child's changed needs can be discussed, as well as requests made for additional provision. If a change of school is sought, then this too can be discussed at the review, with information being provided about both why the current school cannot meet needs, and why the alternative school can meet needs.

If the child's needs are currently such that it would be inappropriate for special educational provision to be made in any setting, then a formal 'Education Otherwise than at a School' arrangement can be considered, where a child would be formally educated at home in accordance with the provision specified in their EHC Plan. Education at home under an EOTAS arrangement, as opposed to an Elective Home Education arrangement, means that children continue to receive the protection of **Section 42** of the **Children and Families Act 2014**, and the Local Authority remain responsible for the education of that child. In an Elective Home Education arrangement, it is the parent who is responsible for ensuring their child receiving an appropriate education, including the funding of any examinations.

Where a formal EOTAS arrangement, or Elective Home Education, the outcome for a child's education setting is likely to be the same – that is, the child will be removed from the school roll. However, for the child, the way in which their home education comes about could make all the difference. Working together in the child's best interests is of the upmost importance. If you are all unsure as to your obligations as an education provider, please do not hesitate to get in touch.



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*SEND Law right now. And why you mustn't confuse EOTAS with home education.*

*To listen back, click here!*

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