SENlegal NEWSLETTER

Professional's Newsletter Edition 12

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So, the LA have missed the transition deadline or named an inappropriate placement in child or young person EHCP for them to start at in September 2021. As catch phrased by fictional TV president Josiah Bartlet, “what’s next”?

Every year this topic comes up and judging from our own experience last year, the year before that and the year before that, the pattern is consistent that parents contact us with LA’s having missed the transition deadlines. Sometimes this can be as late as June/July, despite repeated (broken) promises from LA’s that the plan will be issued.

If the LA has not provided the parent with a final EHCP by the 15th February, (31st March 2021 deadline for post 16), the LA are in breach of Regulation 18 of the Special Educational Needs and Disability Regulations 2014. Furthermore, the Local Authority is also frustrating the parental Right of Appeal to the SEND Tribunal. The final EHC Plan provides the parents with their Right of Appeal, if there is no final EHC Plan, they cannot lodge an Appeal.

Such a situation requires **immediate action.** The delays parents can experience due to the inability of caseworkers to respond to e-mails and telephone calls, can be substantial. If an appeal is required, any length of delay may risk this being resolved before the new academic year in September 2021 starts.

Parents often see the LA complaints procedure as the route to correcting this problem.

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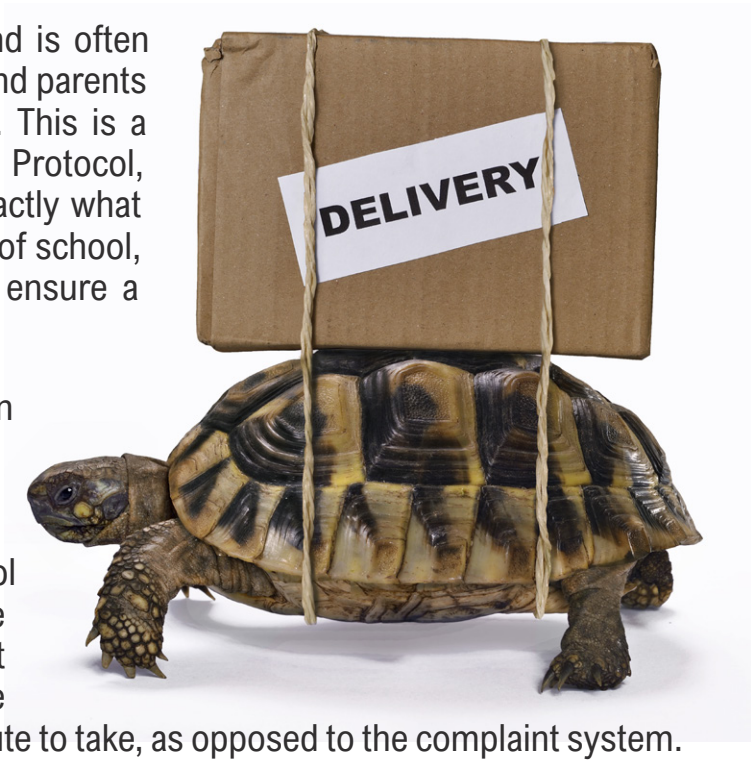
Top Tip - *Never tell parents to use the LA's compliant procedure until after they have received the final EHCP!*



The LA's complaint procedure is time consuming and is often designed to delay matters further, it can take weeks and parents may still not get a sensible answer at the end of it. This is a situation that needs to be resolved by a Pre-Action Protocol, to ensure a final plan is issued, so parents know exactly what placement is being proposed. If the LA names a type of school, an appeal to the SEND Tribunal will be required to ensure a placement is named.

A Pre-Action Protocol letter sets out the LA's breach in respect of **Regulation 18** and reminds the LA that if not corrected proceedings in the High Court will be issued (what is known as 'Judicial Review'). It is a very real threat to Local Authorities and invaluable tool to parents and schools, to ensure LA's consider these issues properly. Case law is clear on the point that educational cases require expediency and therefore Pre-Action Protocol correspondence is the correct route to take, as opposed to the complaint system.

If a parent has been issued the final EHCP on or before the deadline and the LA did not agree to their choice of placement, whether they are able to instruct solicitors or not, their best approach is to appeal the decision. They have nothing to lose and the statistics year on year are in the parent's favour. Local Authorities will often name placements in EHCP's that cannot meet the child or young person's needs and this will usually be drawn out within the Tribunal with a well-prepared case.

However, unless the child's EHCP is watertight in respect of **Section B** and **F**, i.e., properly quantified and specified, which is rare given the way LA's draft EHCP's, no appeal is just about Section I. Ensuring a parent appeals **Sections B, F & I** is key.

Appealing **Sections B, F & I** enables the SEND Tribunal to look at **Section F**, which normally contains the main breaches of legislation, regulations and case law, i.e. lack of specificity and quantification. However, as professionals you will all be aware that the SEND Tribunal is an evidence based system and ensuring that a parent has recent and up to date evidence, which is properly quantified and specified, enables the SEND Tribunal to see what is missing and order corrections to the child or young person's plan.

These changes ultimately impact the placement being named in **Section I**, with a lot of cases highlighting the inappropriateness of naming a mainstream secondary school, as the cost of providing the provision required to meet need and the frequency required is often more expensive than the specialist placement being sought by the parents.

Acting now is essential, the time in which parents have to ensure any issues are resolved before September is limited and they need to act quickly. Likewise, if schools are being named inappropriately in EHC Plans, this needs to be challenged as soon as possible. If you require any further advice in relation to these points, please don't hesitate to get in touch.

When is enough, enough? Specificity within **Section F** of an EHC Plan.

You will have seen many articles and posts from ourselves and others (our previous newsletter of October 2018 looked at specificity in detail), all advising on the need for a high degree of specificity within an EHC Plan being required. This is because a lack of specificity comprises the legal enforceability of the provision within the plan. A lack of specificity leaves parents at risk of provision not being provided and quite often school short of the necessary level of funding or unclear as to what they are required to provide, which all leads to enforcement issues **under Section 42(2) of the Children and Families Act 2014.**

The existing case law and Code of Practice all support that EHC Plan's are required to be quantified and specific. L v Clarke and Somerset and Somerset [1998] ELR 129 – 'so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case.'

The issue of specificity and what this looks like in an EHC Plan has been discussed and decided through caselaw for a considerable time, the cases now span four decades. The interpretation of specificity is still being looked at and applied daily within the Tribunal. The Upper Tribunal have recently looked at the existing caselaw in detail and a recent decision (January 2021) has been issued which suggests a shift in the approach the Tribunal should take.

The case of **London Borough of Redbridge v H O (SEN): [2020] UKUT 323 (AAC)** looked at specificity in detail and considered - when is enough, enough? The issue in this case was whether the wording inserted within the EHC Plan by the Tribunal was specific enough for an EHC Plan, the Local Authority brought the Appeal on the basis it wasn't. The specific provision in question was;

'X' requires extracurricular support for one hour a week at home from a trusted and familiar adult.'

This decision follows on from the decision of **Worcestershire County Council v SE [2020] UKUT 217 (AAC),** which was issued last year, and Judge West went through specificity in detail and provided principles to consider.

At paragraph 20 of the Redbridge decision, Judge Lane states that principle (x) is a good summary of the position for deciding how much detail is 'enough':

> *"(x) The contents of an EHCP have to be specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case, but the emphasis is on the EHCP being a realistic and practical document which in its nature must allow for a balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides."*

The rationale for this Judge Lane states is at principle (ix), which states:

"(xi) in distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision which is appropriate for a child."

How this will apply appears to be very much dictated by the facts of the case, particularly whether parents are appealing for provision within a mainstream setting or a specialist setting. Judge Lane at **paragraph 21(f)** states:

> *"if a pupil is to attend a mainstream school the Tribunal is likely to need more detail then if the pupil were at a special school…Where a pupil is to attend a special school, the school will have experience with implementing provision for complex educational, social and health care needs."*

The decision therefore suggests there is to be much more flexibility and adjustment to be made to the levels of specificity within an EHC Plan, to provide a greater degree of flexibility. Where it is necessary to specify and is suggested, parents will need to evidence, that the levels of specificity are in fact necessary. This appears to be a move away from the starting point that a high degree of specificity is necessary by previous caselaw, such as **L v Clarke.**

What is clear however, is that the recent decisions do not state that everything we have considered on specificity should now change. The decision states at paragraph 21(C) that none of the cases endorse the abandonment of detail. Whilst there is a need for flexibility, it should not be used as an excuse for a lack of specificity where detail could reasonably have been provided. Therefore, professionals preparing reports for Tribunals should continue to be as clear and specific with their recommendations.

Equally, for mainstream schools, the recent cases support that in all cases where children with EHC Plans are placed within mainstream settings, there is a very high level of specificity required within the plans. We know from our work with schools that Local Authorities across the country are not doing this. The plans produced for children within mainstream settings are not specific and are entirely ambiguous. As stated above, this is leading to confusion on provision being delivered and the necessary levels of funding not being in place. Schools budgets are being short-changed by Local Authorities based on ambiguous EHC Plans, which is contrary to the legal position on specificity. Schools should be aware of this and their options to challenge the EHC Plans produced by their placing Local Authorities.

We understand that this case will be appealed to the Court of Appeal, and once this matter is heard, we will provide an update on any changes or confirmation of the position described above.

SENlegal WEBINARS

Free Legal Advice Webinars for Parents, Schools & Professionals.

Preparing for Annual Reviews

Answering common questions about annual reviews, how they should be run, what paperwork should you have? what are the time frames? What happens after the meeting? Useful for parents and schools alike (Webinar recorded on 06/01/2021).

Ceasing to maintain an EHC Plan

Answering common questions like 'when can a Local Authority lawfully cease to maintain an EHC Plan?' How do you prepare? What happens if your Local Authority try to cease to maintain? (Webinar recorded on 13/01/2021).

EHCPs and everything in between

Setting out the process right from requesting an EHC Needs Assessment, to what a 'good' EHCP looks like, how to challenge it at Tribunal, key evidence you will need and everything in between (Webinar recorded on 20/01/2021).

Recovering funding for Schools

Do you have children with EHCP's attending your school but you can't deliver the support they need due to lack of budget? Are the children/ young persons EHCP's properly costed? Are you owed money from the Local Authority? (Webinar recorded on 27/01/2021).

Disability Discrimination Claims

SEN Legal's Principal Solicitor Melinda Nettleton explains all you need to know about Disability and Discrimination Claims in Education (Webinar recorded on 02/02/2021).

Find them all at senlegal.co.uk/legal-webinars

Special Needs at University.

Although EHCPs can continue to 25, if a young person goes to university, their EHCP ends. There is lots of fluffy information out there suggesting that it will all go swimmingly. Look very carefully when choosing a university and ask questions for example what mentoring / what 1:1 support / what study skills are there. Raise questions based on your EHC Plan, even though it is ceasing.

Student loans are available also Disabled Students' Allowance which is non-repayable. Its availability is limited to cases where specific learning difficulties are complex. Your EHC Plan gives you reasons to argue complexity. Apply 6 months in advance for the Disabled Students' Allowance.

Useful to know:

When students start at university, they feel very grown up, and often don't want to draw attention to their special educational needs. Be alert. Do not assume that you will be told if there is a problem.

Some universities don't provide parents with information, because of the Data Protection Act 2018 (i.e. the student is now an adult). Get a Data Protection Act consent from your young person on the university file, and have a copy of it, so that this doesn't happen.

Legally, the university course is a contract between the university and the student. The contractual documents are the student handbook and university policies. They should all be on the university website. Download a copy of the whole thing and keep it in a file just in case. Then you can easily prove what the information was at the time, and therefore the contractual terms.

Given the size of these university loans, pay for legal expenses insurance in your young person's name. Make sure that the insurance includes consumer rights/ contracts. The Financial Services Ombudsman states that customers who buy legal expenses insurance cover may choose their own solicitor in exceptional circumstances (e.g. no one on their Panel who knows anything about disability discrimination/consumer rights at universities). Insurers prefer to use solicitors from their own Panel if possible.

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Complaints Procedure

Use the University internal Complaints Procedure first. You can go on and submit a complaint to the Office of the Independent Adjudicator within 12 months of the Universities final decision on your complaint. (usually completion of Procedures letter).

Equality Act 2010

Mention your special educational needs on the UCAS form. It won't affect acceptance on a course, however failure to mention it may mean that the Equality Act doesn't apply. The Act applies to known disabilities. Put in your file a copy of the UCAS application form just in case it all goes pear shaped. Remember, if you are taking out student loans, and there is no degree at the end, you may want to recover the cost of the loan from the university. Be prepared.

The Equality Act covers admissions, exclusions, conferring of qualifications, teaching and access. Direct and indirect discrimination, and there is a legal obligation to make reasonable adjustments. This means that there is a statutory obligation to make courses accessible under the Equality Act. You can negotiate with the university.

Claims against universities are in the County Court and must be started within six months of the last incident of disability discrimination. If you are intending to argue a continuing course of conduct, be aware this can be a difficult argument and you will need a good explanation. A County Court Judge sits on disability discrimination cases with a trained Assessor. The Assessor is there to advise the Judge, not you. Compensation awards in the County Court include injury to feelings as well as financial loss.

Consumer Rights Act 2015

The Consumer Rights Act, **Section 49** requires services to be performed with reasonable care and skill. Education is a service. Further, **Section 51** provides that the contract for services includes anything that is said or written to the consumer by or on behalf of the service provider (that's why you make the file). **Section 50(4)** makes it plain that any subsequent change in the information is not effective unless expressly agreed.

What to expect when you are instructed.

When it comes to provision in an EHC Plan expert evidence is key to the needs and provision placed in Section B and F of any EHC Plan. Therefore, the first step for any parent wishing to have a quantified and enforceable EHC Plan is normally to instruct independent experts, as they are not bound by LA or NHS policies about the level of provision that will recommend to meet the needs of a child/young person.

However, parents can be unaware when instructing independent experts, that experts have a duty to the court to assist in making fair and just decisions and that all reports must be produced with this in mind. Although, parents are requesting experts' services, they are not able to influence or request anything to be put into the report.

Part 35.3 of the Civil Procedure Rules states that an expert's duty is to the court and that this duty overrides any obligation from the person instructing or paying the expert for their services. As such, all experts are required under the **Civil Procedure Rules, Part 35, Practice Direction 2** to provide objective, unbiased opinions on matters within their expertise to assist the court with their decision without influence from litigation.

This does not mean that parents cannot ask questions or seek clarification on any points in a report produced by an expert, such as *'what are the number of pupils required for small group work mentioned at paragraph x in your report'?* or *'can you clarify what you mean by the wording for indirect support in your report?* However, any request that experts change, remove facts or alter their opinion for the betterment of the case is not allowed.

In the case of ***B-M and B-M v Oxfordshire County Council*** Judge A.Rowley's decision provides detailed guidance of what the Tribunal would expect in an expert report submitted to support an Appeal in terms of specificity and to determine changes to the provision to be provided for a child/young person in an EHC Plan.

This builds upon the Practice Direction issued by His Honour Judge John Aitken in 2010 which all expert reports must comply with. The Tribunal requires specified evidence in order to make fair and just decisions, which is why an expert's report cannot be vague or influenced by litigation.

An expert's duty to the court is paramount, as such they are required at the end of every report to state that they have produced their report based on facts and their opinion within their expertise. They must also include in this statement that they can have proceedings brought against them if they have not fulfilled their duty to the court, which highlights the importance that such a role plays in the Court and Tribunal system.

Once a report is served to the Court or Tribunal, any changes of opinion or fact required to be made by the expert must be done so in the form of an addendum report, as soon as possible, with explanations for these changes.