SENlegal NEWSLETTER

Issue 4 - April 2018

In this Newsletter:

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By Nicole Lee - Specialist Solicitor, SEN Legal.

One of the key changes made by the Children and Families Act 2014, was the extension of education services to the age of 25. The Section 139A Learning difficulty assessment which related to the assessment of and duty to provide for young people of over 16 was repealed, and if appropriate, EHC Plans and the special educational provision within can now continue to the age of 25.

In conjunction with this, Section 21(5) of the Children and Families Act 2014 changed the definition of Special Educational provision, which is now;

"Health care provision or social care provision that educates or trains a child or young person is to be treated as special educational provision (instead of health care or social care)."

This enshrines into statute the decades old case law principle that special educational provision is anything called for by a child's learning difficulty.

In principle, this seems simple. EHC Plans can be maintained up to the age of 25 where appropriate, and any provision that educates or trains that young person is educational provision and should be contained in Section F of the EHC Plan. In practice however, this is a concept which Local Authorities seem to struggle with, particularly when the parents or young person's choice of post-19 placement, is not a registered educational provision.

Recently, we have received numerous calls from further education providers who are not Section 41 approved, stating that Local Authorities are refusing to name their placement in Section I of an EHC Plan, under the false belief that it is only registered educational placements which can be named in Section I of an EHC Plan. We have even experienced this in cases where the placement being requested by the parents/young person can both meet the young person's needs, and do this at a lesser cost than the placement proposed by the Local Authority.

This position is legally incorrect. In fact, there is specific provision in the Children and Families Act for this to happen. Section 61(1) of the Children and Families Act 2014 states that;

"A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided."

This is subject to the sole proviso that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place, and that the parent or young person must be consulted.

Therefore, if your placement is being rejected as a placement within Section I of an EHC Plan, on the basis that it is not a registered educational placement, then the parents or young person can exercise their Right of Appeal to the SEND Tribunal. If the Tribunal are satisfied that the placement proposed by the Local Authority cannot meet the young person's needs (which many social care placements combined with a further education college cannot), then the Tribunal can name a placement which is not a registered educational placement in Section I. In some situations, the involvement of legal representation and the assertion of the legal position early on, can in fact avoid the need for an Appeal at all.

We are more than happy to advise both schools and parents on this issue, to ensure that this pivotal transition time in a young person's life is managed carefully and in a timely manner.

BDA International Conference & EXPO 2018

12th - 14th April 2018, Telford

Did you read SEN Legal Senior Solicitor, Hayley Mason's latest blog post on the Special Needs Jungle Website?

To find out more about the National SEND Tribunal Trial and what it means for families...

Click here!

SPECIAL NEEDS JUNGLE

SPECIAL EDUCATIONAL NEEDS ✦ DISABILITY ✦ HEALTH CONDITIONS ✦ RARE DISEASE

Protecting yourself and others against making a wrong diagnosis.

By Karen McAtamney - Senior Solicitor.

It can be very difficult to identify what's going on for a child, particularly when your own expertise is leading you to analyse the problem in a way that might be perpendicular to the child's needs.

It is important to keep an open mind and remember that children's difficulties may sometimes better fit a diagnosis outside the range of needs you usually teach and to seek support from colleagues when you are uncertain. Sometimes once you have started to remediate one difficulty another difficulty that was previously masked or not noticed will emerge which will also need attention.

Nobody can be an expert in all areas of SEN. It is important for specialist independent schools to have a good understanding of the range of needs they can cater for within their own provision and to have known professionals (Educational Psychologists, Speech and Language Therapists, Occupational Therapists, Physiotherapists, Psychiatrists, Teachers of the Deaf, Teachers of the Visually Impaired and so on) from whom advice can be sought. This can help you and families find good ways forward, even if in some cases, it means the school reaching the view that they are no longer the right setting for a particular child.

It can be very difficult to disappoint a potential parent who is excited about the possibility of a place at your school for their child and sometimes even harder to start difficult conversations with parents of existing pupils who are no longer well placed, but it is important you do so, primarily because it is the right thing to do for the children. Where a child is potentially suitable for your school, but you are unsure, extending the length of your usual assessment visit and/or seeking additional documentation about the child can be useful in helping you reach the right conclusion.

Getting this wrong can lead to adverse consequences for the school as a whole; firstly in terms of one child taking up a wholly disproportionate amount of staff time over an extended period of time, secondly, in terms of your reputation amongst parents and professionals (if you are known to take children with a particular difficulty, more will be referred to you and this can lead to your pupil population becoming generally more complex than you are structured to cater for) and thirdly, if you are particularly unfortunate or get this very wrong you can find yourself facing proceedings under the Equality Act for disability discrimination. It is no answer to such proceedings for professional staff to simply say they did their best (which will almost always be true) when the consequences for the child are potentially very serious (ie. spending an extended period of time in the wrong placement, with adverse effects on their mental health).

HACS
Hillingdon Autistic Care & Support

Upcoming 2018 workshops for parents, carers and professionals

Saturday 21st April

Legal Advice - Obtaining an EHC Plan Workshop

10am - 1pm

Saturday 12th May

Legal Advice - Schools Exclusions Workshop

10am - 1pm

Speaker: Melinda Nettleton, Principal Solicitor at SEN Legal

All sessions will be held at HACS Resource Centre, Dudley Place, Hayes UB3 1PB.
For more information or to book, contact **catherine@hacs.org.uk**

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the autism show

in association with The National Autistic Society

The National Event for Autism

SENlegal

Come and meet team **SEN Legal** at the Autism show 2018 in London and Manchester.

London

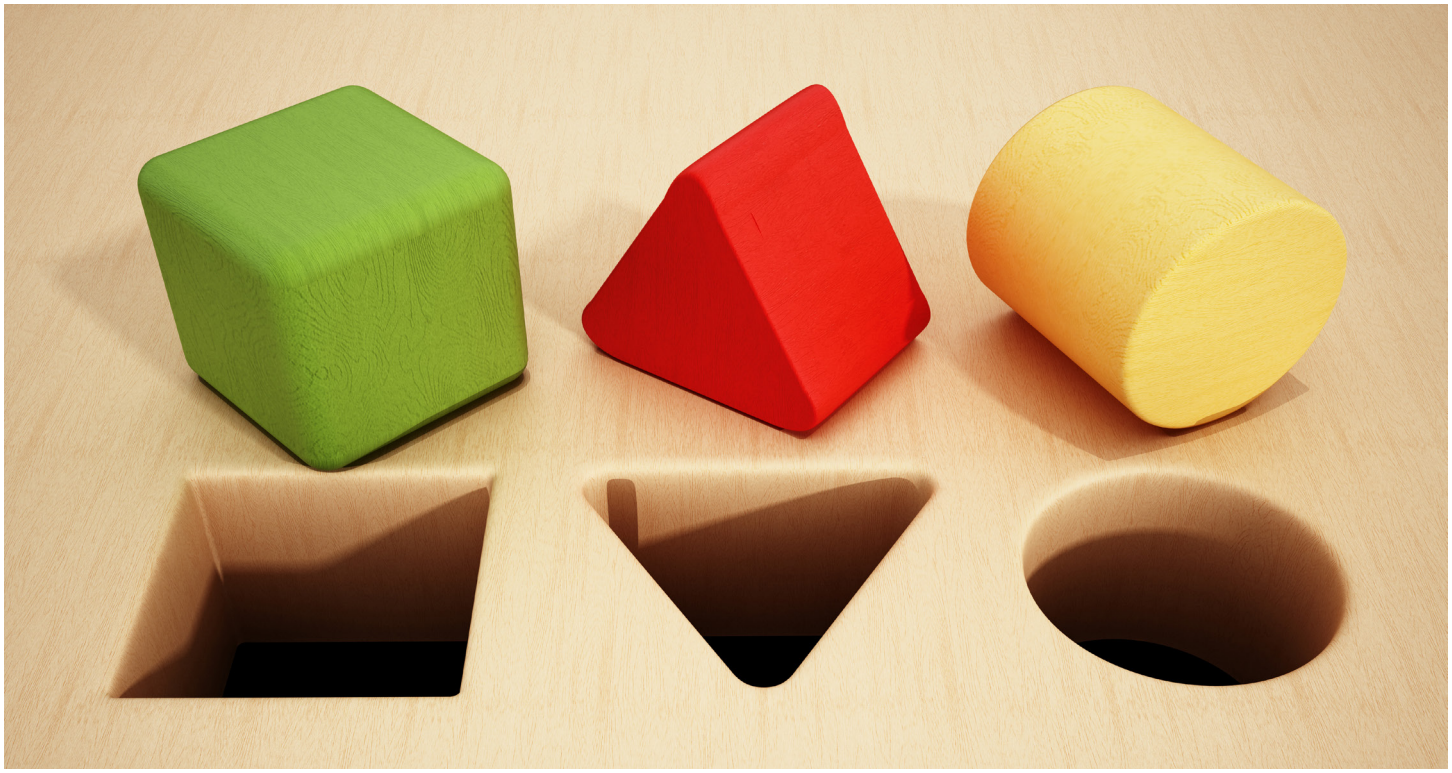
15- 16 June 2018
EXCEL

Click here for more Info

Manchester

29 - 30 June 2018
EVENT CITY

Click here for more Info



By James Brown - Trainee Solicitor, SEN Legal.

It has reached the time of the year where children with EHC Plans will have had their plans amended to name the primary or secondary school that the child will transfer to in September 2018.

Where this is the case, Local Authorities are required to have amended a child's EHC Plan by 15th February 2018. This means Local Authorities should have been consulting with parents preferred choices of school and schools that they believe are appropriate for the child.

Unfortunately, in the rush to meet this deadline Local Authorities are often not carrying out the correct consultation procedure with schools. Equally, Local Authorities are not even consulting with parents preferred choices of school.

This is leading to undue pressure being put on schools to agree to admit children and schools which are entirely unsuitable for the child being named within an EHC Plan. It is of course crucial that this consultation process is carried out with potential schools, as it is this opportunity to ascertain whether the school will be a suitable placement for the child. An unsuitable school being named within an EHCP is not a position that schools, parents or children will want to find themselves in.

It is important to be aware that schools which fall under Section 43 of the Children and Families Act 2014, which includes:

- Academies
- Non-maintained special schools; and
- Section 41 registered independent schools

are under a statutory duty to admit a child if the school is named within Section I of the EHC Plan. This is regardless of whether the school is full or unsuitable to the child, there is still **a** duty to admit that child.

However, the Local Authority must consult with a school which falls under Section 43 of the CFA before it is named within a child's EHC Plan. The legislation is clear on this point.

As part of the consultation the Local Authority must send written notice that they are proposing to name the school within the child's EHC Plan or that the child's parents have expressed a preference for the school to be named.

For Academies, Non-maintained special schools and Section 41 registered schools, the school must consent to being named within the EHC Plan, except where admitting the child will be incompatible with the efficient education of others or the efficient use of resources, and no reasonable steps can be made to secure compatibility.

If the admission is incompatible, the school must inform the Local Authority that they do not consent to being named and set out their reasoning why. The Local Authority must consider these representations and whether they agree. If there is a dispute the Local Authority should not name the school within the child's EHC Plan before the matter is resolved. The Local Authority do not decide on the matter if it is disputed. It is only the Secretary of State or the SEND Tribunal which can direct that the child is admitted, not the Local Authority.
Therefore, if the Local Authority have not followed the correct consultation procedure or have failed to consider a schools representations, they are acting unlawfully.

Additionally, if schools are aware that parents have expressed a preference for the school to be named but have not received any consultation from the Local Authority it is important schools flag this. The Local Authority are acting unlawfully by not complying with their duty to consult.

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