SENlegal NEWSLETTER

Issue 20 for Parents and Carers

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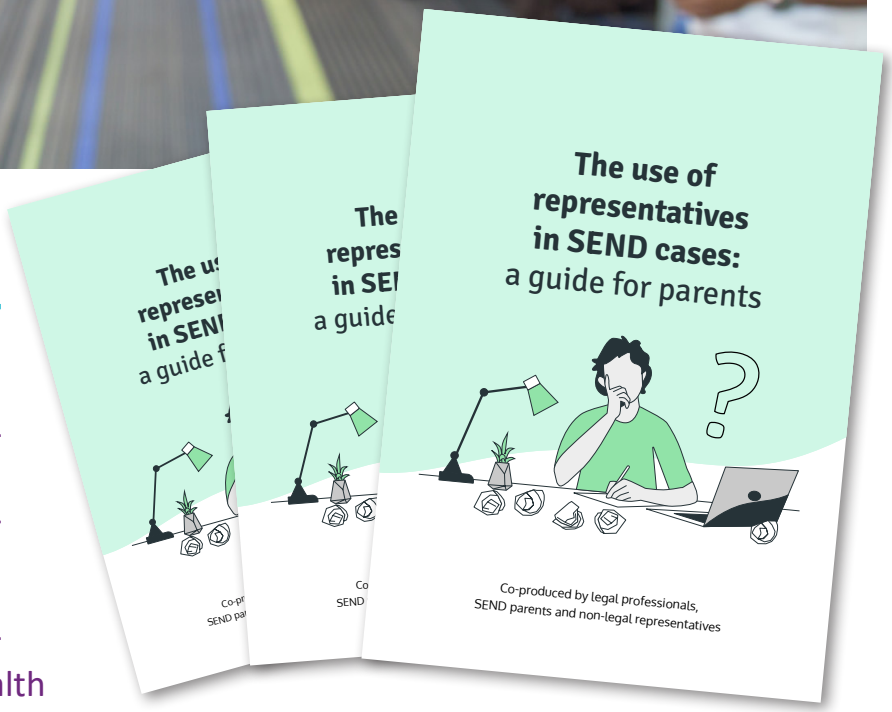

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Disability Living Allowance

What could you be entitled to?

By Bethan Hone, Senior Paralegal

There is a great deal of support available for the families of children with disabilities & special needs, although accessing it can sometimes seem like a minefield!

One of the more well-known types of assistance the government offers is Disability Living Allowance. This is for children under 16 years of age (Personal Independence Payment is the parallel scheme for those over the age of 16) and their families, who provide their care.

If your child has additional needs or a disability that means they need a level of extra help from you as their family, that is not typical of their chronological age group, you may be entitled to Disability Living Allowance in order to support your family and help you access provision / help for your child.

Baseline Eligibility

The basic criteria for an application is that your child:

- Is under 16 years of age and have lived in Great Britain for six of the last 12 months, if over the age of three;
- Has difficulties that have been present for more than three months and that are expected to be present for at least the next six, or have less than twelve months to live on the advice of a medical professional;
- Needs extra looking after than a child of their age typically would.

If your child meets the basic eligibility criteria, you may be entitled to claim DLA. The application is divided into two components: **care and mobility**. You can receive different levels of payment for one or both of these components, depending on the severity of your child's needs in each area.

The Care Component and Mobility Component Payments

For the Care Component, the rate of payment depends on the level of extra help your child needs. It is split into the following levels:

Lowest rate - your child needs help for some of the day.

Middle rate - frequent help or constant supervision during the day is required, and supervision at night or someone to help while they're on dialysis.

Highest rate - help or supervision is needed throughout both day and night, or a medical professional has said they might have 12 months or less to live.

For the Mobility Component, the level of payment depends on how much help your child needs to get around physically:

Lowest rate – your child can walk but need help and or supervision when outdoors.

Highest rate - they cannot walk, can only walk a short distance without severe discomfort, could become very ill if they try to walk or they're blind or severely sight impaired.

There are also age limits to receiving the mobility component:

Lowest rate - the child must be 5yrs or over

Highest rate - the child must be 3yrs or over.

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How to apply for Disability Living Allowance

1 - The DLA application form can be found on the government website; a quick Google will take you straight there. The form is long, and asks questions about your child's difficulties, their schooling, what help you get already, input by therapists and health professionals, and a number of other background questions. You'll also be asked some in-depth questions about how much input from parents/caregivers your child needs, with examples and frequency.

2 - The easiest way to start an application is simply to download the interactive form from the government website, and fill it out with as much detail as possible. You'll also need to ask someone else who knows the child well, such as a teacher, to contribute for one of the questions.

It's important to read the guidance while filling in your DLA application form, as this provides some really helpful tips on how to go about the form to make the application as smooth as possible.

3 - Then, simply post the form back to The Department for Work and Pensions (the address is given on the form). You should receive an acknowledgement in **three weeks** setting out an update on when you can expect a full response.

What you will be eligible for can never be guaranteed, and for that reason we usually recommend that parents fill out the DLA application themselves, rather than instruct a Solicitor to do so for you. Sometimes the costs of legal fees to fill out the form can be greater than the financial input you receive back.

By James Brown, Solicitor

The SEND Tribunal held their User Group meeting on the 24th April 2024. As helpful as always to hear the latest updates from the Tribunal, I have set out some key updates from this below that everyone engaged in the Tribunal process should be aware of.

The key point to be aware of at this time, particularly for those concerning phase transfer and children out of school, is that all dates being held back before the end of this academic year and September dates have now gone. The Tribunal are now listing into the first 3 weeks of October. This applies to all phase transfer cases, including secondary, post-16 and post-19. Therefore, if there are parents still without their right of appeals, or have not yet submitted appeals, time is very much of the essence to get the appeals submitted.

This coincides with the continuing increase in the amount of appeals the Tribunal are receiving. The Tribunal confirmed they registered over 17,000 appeals in the last year, representing a 30% increase from last year. Timetables for appeals that are not phase transfer, are being listed on a 45/46 week timetable. The target for the Tribunal for timetables are 22 weeks and therefore they are considerably behind on this.

Contributing to this rise is a rise in EOTIS appeals being submitted, which we have also seen. The Tribunal have usefully confirmed EOTIS cases will be brought in-line with phase transfer listing wherever possible, but this does require a request to the Tribunal to do so.

Some other useful practical updates to note are as follows:

The Tribunal introduced Case Review forms (SEND 45 form) to be completed in recent years. It is a requirement that these are completed by the deadline given, as the Tribunal are actively reviewing cases and using the forms as the basis to do so. For those cases without a completed SEND 45, there is a risk the hearing will be delisted as a result. Do therefore make sure you complete these by the deadline.

The appeal application form (SEND 35) will be moving to an online platform and will follow a similar format to completing a passport/driving licence application where they can be completed on the website. It is our understanding, the paper form to complete will still remain in place.

The Tribunal is also aiming to introduce a web chat function soon, instead of only being contactable by phone and email. A welcome move from all of us in the office who have spent endless hours waiting to get through!

Right to Parental Preference

By Annabel Moore, Paralegal

Many parents, when receiving final EHC Plans from their Local Authority, will be left with their requested school refused and wondering how this decision has been reached. The next question, naturally, is what can be done about this?

With this in mind we have set out a brief summary of the relevant legislation which applies when requesting placements to be named in Section I of EHC Plans and how this should be applied by the Local Authority.

The sections of law surrounding this are as follows:

Section 38 of the Children and Families Act 2014 sets out the list of "types" of school which parents are entitled to request to be named in their child's EHC Plan. This section also confirms that parents are entitled to request a school, ranging from maintained mainstream schools, non-maintained special schools and including schools that are Section 41 approved, to be named in Section I of their child's EHC Plan.

Section 41 approved schools are independent special schools which have been approved by the Secretary of State under Section 41 of the Children and Families Act 2014 as schools which a parent or young person can request to be named in an EHC Plan.

Section 39 of the Children and Families Act 2014 requires that the Local Authority must secure that the parents' preference of placement be named in their child's EHC Plan, unless one of the following below applies:

a) it is unsuitable for their age, aptitude, ability, or special educational needs

b) that the child's attendance at the school would be incompatible with the efficient education for others, or the efficient use of resources.

Section 9 of the Education Act 1996, which remains in force, states:

"In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

N.B. A parental request for an entirely independent school or college which is not referred to within **Section 38** will be considered under **Section 9** of the Education Act 1996.

Therefore, in summarising this, what must be considered is:

1 - Is the placement you requested suitable for your child's needs? Is the Local Authority's placement suitable?

2 - Is there any impact on the efficient education for other children if your child is placed at that school? Is there any impact at the Local Authority's school?

3 - Does the school represent an inefficient use of resources; how does this compare to the Local Authority's placement?

These are all points that need to be considered when in receipt of the final EHC Plan and determining how to challenge the plan.

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In respect of placement costs, it is not lawful for the Local Authority to refuse parental placement if there is no alternative placement to compare this to. Equally, when considered and the provision the child requires in two different settings, i.e. specialist and mainstream, the costs may not be too different and not represent an unreasonable cost difference. There is a wide range of case law analysing costs of placements and supporting that placements, even when more expensive, may not be unreasonable when considering the additional benefit they may provide to the child.

The Local Authority may also rely on the exemption of the impact on the education of others. This has recently been considered by the Tribunal in detail, which confirms 'incompatible' is a strong term and it must be shown that the child's placement would reduce the education of other children below the 'efficient education' acceptable standard. It is not therefore sufficient for the Local Authority, or the chosen school, to simply say they are 'full'.

If you suspect that the Local Authority have not considered the legal framework properly, you will need to challenge this. Typically, an Appeal to the SEND Tribunal is the most efficient way of dealing with this. However, if you can identify and evidence the specific areas of unlawfulness of the decision, particularly in relation costs, it may be worthwhile sending a formal letter to the Local Authority advising them of this and setting out in detail the decision that should have been reached if they applied the law correctly. This may save the need for an Appeal and is something we can help with.

NEW CASE LAW

Extended Appeals Health and Social Care Recommendations

Senior Solicitor & CEO Hayley Mason-Seager recently acted for the Claimant, Young Person, in a Judicial Review in relation to social care recommendations following an Extended Appeal in the SEND Tribunal.

In an Extended Appeal, the Tribunal can make non-binding recommendations in respect of the Health and Social Care Sections (C, D, G, H1 and H2), as set out in the SEND (First Tier Tribunal Recommendations Power) Regulations 2017. If the Tribunal does so, the Local Authority isn't required to implement these recommendations, but if it refuses the recommendations, it has five weeks to confirm in writing the reasoning for doing so.

In this case, in the SEND Tribunal, a 52-week 'waking day' placement was sought at an independent specialist school, due to the complex needs of the young person. Following the Tribunal decision however, the Local Authority refused to agree to the Tribunal's recommendations for a 52 week placement, instead deciding upon a 38-week placement with a social care package during the holidays, which was not adequate to meet the young person and their family's needs.

Failure to agree to the SEND Tribunal's recommendations is an issue that can be challenged by way of Pre-Action Protocol and action in the High Court, if necessary. In this case, the Local Authority retained its position on the Social Care recommendations following a Pre-Action Protocol letter, and thus Judicial Review Proceedings were embarked upon.

The Judicial Review Claim was brought on three grounds:

1. That the SEND Tribunal ordered a 52 week placement, which the Local Authority disputed.

2. If that was not so, that the Local Authority's decision not to follow the Tribunal's recommendations was unreasonable, due to their failure to take all relevant matters into account and assess all relevant considerations; and;

3. That there is a requirement for specificity even in the social care sections of an EHC Plan.

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Judicial Review Outcome

The court found in the Claimant's favour on Grounds 2 and 3 and the Claim was successful. As a result, the Local Authority's original decision **not** to follow the recommendations of the SEND Tribunal was quashed, requiring the Local Authority to review their decision, taking all relevant matters into account.

In relation to Ground 1, the court found that the 52 week waking day placement if educational, should be specified within **Section F** of the EHC Plan to be enforceable. Moving forwards, any 52 week residential placement must therefore be specified within **Section F** of an EHC Plan if it is to be on educational grounds. This is very important when you are preparing a Working Document to ensure the residential placement will be ringfenced and protected as educational provision.

Secondly, this case determined that the decision by the Local Authorities not to adopt the recommendations of the Tribunal did not take into account all "relevant considerations". This creates a highly effective argument for proposing that unreasonable LA decisions not to adopt Health and Social Care recommendations may be quashed in future Extended Appeals, should you be able to identify and evidence a failure by the LA to take **all** relevant evidence and issues into account.

It also highlights the need for specificity in an EHC Plan, even in relation to the Social Care sections.

We are very proud to have been part of this important case, achieving not only a positive outcome for our clients and new useful caselaw for future use, but we also hope this will make Local Authorities think twice in future, before simply applying their own policies/criteria when choosing to depart from social care recommendations.

Due to the complexity of Judicial review cases, which can also carry with it the risk of costs, it is vitally important to get both the procedure and arguments 'right.' To protect yourself as much as possible it is always advisable to seek advice from a legal representative before bringing any claim.

Case citation:
The King (on the application of LS) and the London Borough of Merton and the Residential School [2024] EWHC 584 (Admin) - www.bailii.org/ew/cases/EWHC/Admin/2024/584.html