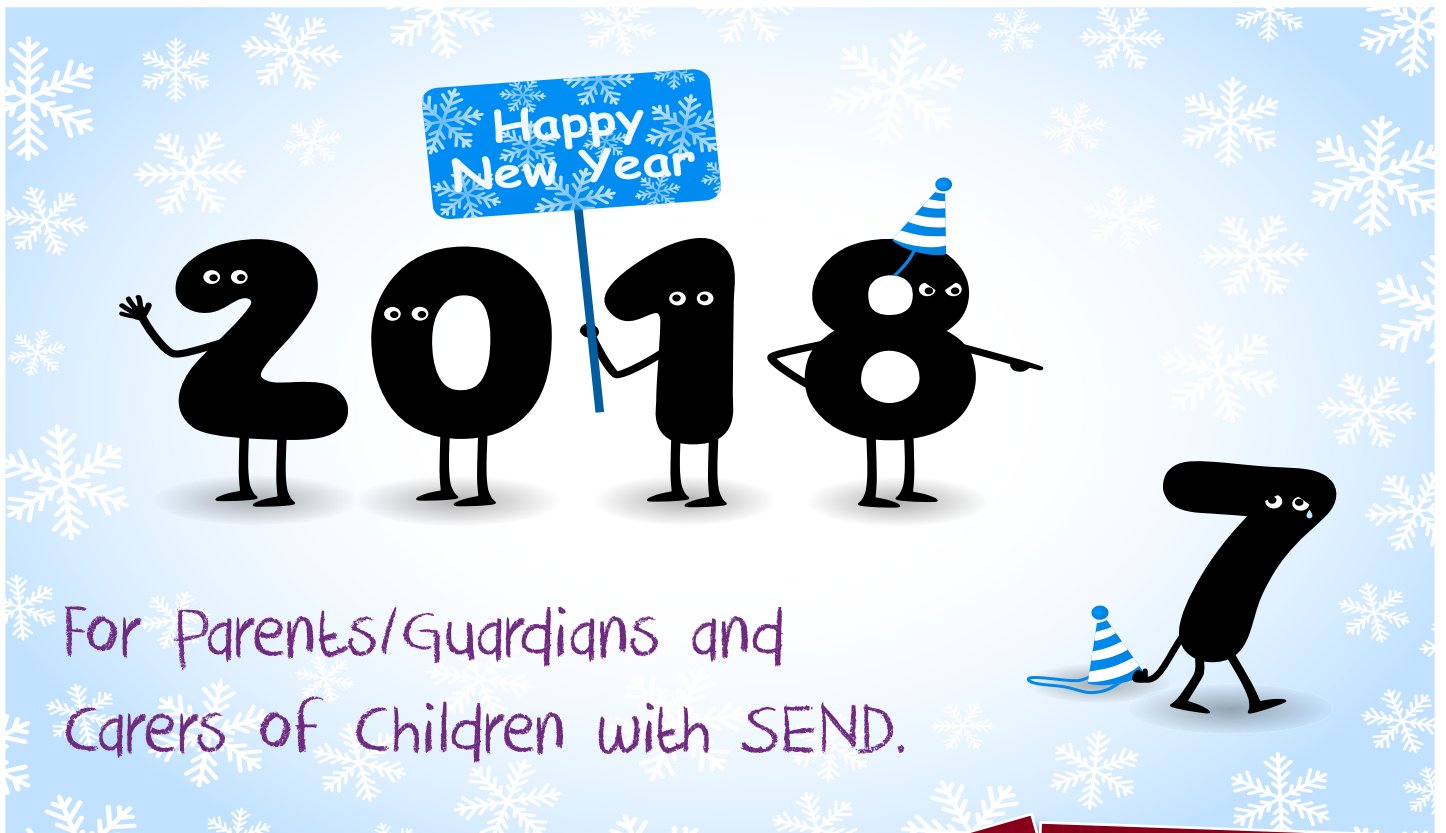


SENlegal

NEWSLETTER

Issue 3 - January 2018



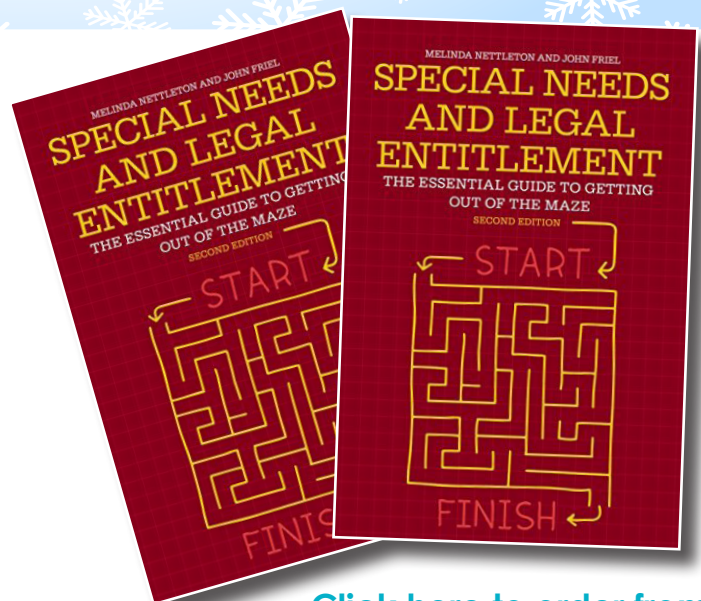
In this Newsletter:

The Funding Fudge

Direct Payments. What are they and do I really want one?

Dates for your diary - HACS workshops & upcoming exhibitions

Annual reviews and avoiding the pitfalls.



Click here to order from [amazon.co.uk](https://www.amazon.co.uk)



By Melinda Nettleton - Principal Solicitor, SEN Legal.

The 2017 School Survey by The Key, found that SEN funding was inadequate and Local Authority referral systems for top up funding are too difficult.

Parents and Schools are not powerless where there is an EHC Plan, because the Local Authority (not school) has ultimate responsibility for funding all of the Special Educational Provision in Sections F and I of an EHC Plan. This is due to Section 42 of the Children and Families Act 2014 which requires the Local Authority to secure the Special Educational Provision specified in the Plan.

There is no get out clause. The Court of Appeal has held that:

“there is no best endeavours defence in the legislation”.

See R v North Tyneside Borough Council [2010] EWCA Civ 135, [2010] ELR 312.

Whilst an EHC Plan can make reference to arrangements for funding the provision (e.g. banding) such arrangements have no legal effect and the Local Authority remain ultimately responsible for making the provision in full if the school or NHS fail to do so, *R v Cumbria County Council ex parte P [1995] ELR 377 & R v Oxfordshire ex parte C [1996] ELR 135 & R v Hillingdon ex parte Queensmead School [1997] ELR 331.*

The Education Funding Agency (EFA) is only an executive agency of the Department for Education. An executive agency is part of a government department, but is treated as managerially and budgetarily separate. This means that the Education Funding Agency can legally have no greater power than the Department for Education. Legally the Department for Education and EFA cannot override Section 42 of the Children and Families Act 2014 and decisions of the courts on this issue.

This means no school is bound by the notional SEN budget (i.e. the £6,000) and the Local Authority's top-up funding arrangements. Interestingly, implicit acknowledgement of this point appears in the DFE newsletter to all Local Authorities October 2014 which concludes “£6K is not a threshold for access to EHC needs assessments or to EHC plans”.

In summary, the cost of provision in Sections F and I is legally recoverable.

Legal action is successfully being taken if monies are unlawfully withheld or delayed due to labyrinthine Local Authority process by courageous parents and schools.

Need advice or more information?

Call our friendly team on **01284 723952** to speak with one of our specialist Solicitors.



96%
**success rate in cases
throughout 2017.**



HACS

Hillingdon Autistic Care & Support

Upcoming 2018 workshops for parents, carers and professionals

**3rd
February**

**'Secondary and
post-16 Transfer'**

10am - 1pm

**17th
March**

**'Transferring
to an EHCP'**

10am - 1pm

**21st
April**

**'Obtaining an
EHCP'**

10am - 1pm

**12th
May**

'Exclusions'

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

Direct Payments.

What are they?

And do I really want one?



By Nicole Lee - Specialist Solicitor, SEN Legal. (pictured right)

Under Section 49 of the Children and Families Act 2014, parents or young people can now ask for a personal budget, which can be put into place in three ways. The most frequently requested way, is through direct payments.

What are Direct Payments?

Direct payments are funds paid from the Local Authority, to the parent or young person, in order for them to contract and manage provision themselves, for example, choosing and paying for your own Speech and Language therapist.

The Special Educational Needs (Personal Budgets) Regulations 2014, are the specific regulations which deal with direct payments for education. They read rather like a list of reasons Local Authorities can use to refuse to agree a personal budget, and are the reason so many parents find that their request for a Personal Budget is unsuccessful.

On the face of it, Personal Budgets may seem like a promising idea, giving parents and young people the freedom to organise their own provision. However, in practice, direct payments have a series of pitfalls, which must be given serious consideration. The most serious pitfalls, are listed below.



Links you might find useful...

- 1) [Section 49 of CFA2014](#)
- 2) [The Special Educational Needs \(Personal Budgets\) Regulations 2014](#)

1. If you agree a personal budget with your Local Authority, and you then have difficulties organising the provision, you cannot appeal a personal budget to the SEND Tribunal. Instead, you will have to struggle on until the next Annual Review, or request a reassessment.

2. Regulations state that the personal budget must be sufficient to pay for the provision in the EHC Plan. However, in practice, the amount awarded by the Local Authority can fall short of what you can purchase from private practice. E.g. A personal budget may cover the cost of a newly qualified TA, but not a TA with the specialist training and experience a child needs.

3. In addition to personal budgets for education, you can also have personal budgets for health and social care. Each area, is covered by its own regulations. In practice, it is extremely complicated to negotiate a personal budget for each separate Section of the same EHC Plan.

It is understandable that on the face of it, parents will find the idea of direct payments to organise their own provision very attractive. However, the personal budget framework has been ill thought out. Evaluation of the practice of having three separate direct payments, from three separate departments, has shown substantial practical difficulties. In most cases, direct payments appeared to be a non-starter.

However, it is possible to obtain direct payments, and in some cases, it is the most practical way forwards. If you are having difficulties obtaining direct payments, and your circumstances mean that direct payments are the best way forward for you, we will be more than happy to assist.



Annual Reviews - avoiding the pitfalls.



By Hayley Mason - Senior Solicitor, SEN Legal.

As you will already know, where a child/young person is in receipt of an EHC Plan, it must be reviewed annually by the Local Authority. The first review must be held within 12 months of the plan being finalised and subsequent reviews within 12 months of the previous review.

Emergency Annual Reviews can be carried out sooner (where a substantial change in circumstances require).

In preparation for an Annual Review:

1. The relevant Local Authority must consult with you - the child/young person's parent(s) (or young person directly) and the school/institution attended, about the EHC Plan;
2. Information must be gathered from the young person, yourselves and relevant professionals and circulated (ordinarily by the school) two weeks before the Annual Review meeting; and
3. An Annual Review meeting must take place to discuss the EHC Plan.

What always surprises me however, is how many schools (particularly specialist schools) prepare the Annual Review paperwork with great enthusiasm and intent but at a detrimental cost to yourselves as parent(s) of the child/young person in receipt of an EHC Plan.

There are two common errors:

1. The annual review papers are overly positive. For example, *"Johnny has really progressed in his speech and language and has achieved all of his outcomes"* and/or;
2. The annual review papers clearly document progress but fail to explain what provision is actually being put in place to achieve such progress. Further, the papers are silent on what progress the child/young person can go on to achieve.

Point 2 particularly applies if your child attends a specialist school. These specialist settings (often because they are 'specialist') where it is standard practice for teachers to be trained and experienced in autism/dyslexia, or to have on-site speech and language/occupational therapy, or a multi-disciplinary team, fail to adequately set out the provision they provide.

Taking the above sentence as an example, if one of my client's had given me 'Johnny's' paperwork to review' I would expect the above sentence to accurately read:

"As a result of one hour of direct speech and language therapy delivered once per week by the on-site speech and language therapist, Johnny has really progressed in his speech and language. He has been attending social communication skills groups, with a maximum of 4 pupils on a twice weekly basis in order to achieve his current social communication and interaction outcomes. As a result of this continued work, next term Johnny will work towards.... [insert relevant outcome here]."

So why is it so important to get the information correct?

After the annual review meeting, the Local Authority will review the EHC Plan (and all of the evidence) and must notify you - the parent(s) of the child/young person within four weeks of the meeting:

1. Whether they will be leaving the EHC Plan as it is;
2. Whether they will be amending the EHC Plan; or
3. That they are ceasing to maintain the EHC Plan.

A Local Authority can only 'cease to maintain' an EHC Plan where it is no longer necessary for it to be in place. This should be happening in very few cases and only where there has been a substantial change in the child/young person's special educational needs.

Whichever decision the Local Authority makes, either 1, 2, or 3 above, this will provide you - the child/young person's parent(s) or the young person with a Right of Appeal to the SEND Tribunal.

Often however parents are happy with their placement and want their child to remain as they are.

Unfortunately however, if the level of detail in my example above, is missing from the Annual Review papers, we are seeing a sharp rise in the number of Local Authorities coming to the (in fact sensible) conclusion "why should we continue to fund this EHC Plan? Johnny has progressed, he has met all of his outcomes and he does not have any further outcomes to achieve?" This has led to Local Authorities either reducing some of the provision from the EHC Plan e.g. an hour of SALT to half an hour, or withdrawing provision in Section F entirely.

The Local Authority may also decide that if all progress has been made, a specialist setting is no longer necessary and 'Johnny's' needs can instead be met in a mainstream setting. This is often the complete opposite of what you - the child/young person's parent(s) or the young person themselves wishes. Often parents (who may have already been through an Appeal to get the provision or school named in their EHC Plan) wish for their child to remain at the same setting with the same level of provision specified in Section F of their child's EHC Plan.

We do recognise that due to time and budget constraints also often a lack of co-operation, putting these papers together can be cumbersome for a school/institution. If you have legal representation, it is worth asking your Representative to look through the paperwork for you, before they are circulated or to use a Solicitor for this piece of 'ad hoc' work. While it may cost you in the interim, a Legal Representative experienced in this field will often know the school's provision well and will be able to pick up on missing information. You have to weigh the costs up of a Solicitor reading your annual review papers/attending the meeting with you, to potentially facing another SEND Tribunal Appeal.

For example a typical discussion might go:

Legal Rep: *"How did Johnny progress so well with his speech and language?"...*

"Through one hour of direct speech and language therapy delivered once per week by the on-site speech and language therapist, and attending social communication skills groups, with a maximum of 4 pupils on a twice weekly basis"..."

Legal Rep: *"ok, so why doesn't the papers say that? – put it in"*

Don't let a lack of preparation by the School cost you an Appeal. With correct preparation, annual reviews can often run smoothly without requiring parents to Appeal to the SEND Tribunal to secure their current provision/placement. You just have to be active in your approach.

Visit the SENlegal team at these events...

In association with 
the autism show
The National Event for Autism

Manchester
29 - 30th June



BDA International Conference
and EXPO 2018
Telford
12 - 14th April

pinpoint

for parents by parents
St Ives, Cambs
1st February

 **SNAP PARENT CARER FORUM**
CENTRAL BEDFORDSHIRE

Bedfordshire
21st March

 **tes**
SEN Show

Central London
5 - 6th October



Farnborough
17th May

In association with 
the autism show
The National Event for Autism
Central London
15 - 16th June

Is there a topic you'd like us to cover in the next issue of our SEN Legal Newsletter?



Click on the box to register your suggestions

We value all feedback and will aim to cover as many topics as possible. Thank you.