

# SENlegal

NEWSLETTER

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For Professionals, Schools  
and Academies working in  
the SEND sector.

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Want to find out more about the  
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# Who Pays Once you are 25 (NHS Continuing Healthcare)

# 25

By Melinda Nettleton - Principal Solicitor, SEN Legal

Once a young person reaches 25 the EHCP Plan falls away. Funding is then from Adult Social Care or NHS Continuing Healthcare. Exactly the same procedure for NHS Continuing Healthcare applies at 26 as at 86 or 106.

**Section 22** of the **Care Act 2014** prohibits Adult Social Care from providing services or facilities that should be provided by Health. NHS Continuing Healthcare is non-contributory, so the inheritance position is better, because Adult Social Care can run Discretionary Trusts down to £23,000 pretty quickly, if expensive provision is needed.

If dealt with before 25 the mediation procedure in the **Children and Families Act 2014** and the current two year Health and Social Care Trial in the SEND Tribunal are helpful, due to their speed (30 days for mediation, and 12 weeks in the SEND Tribunal).

Clinical Commissioning Groups may try and insist on their own procedure pre-25, however in

Administrative Law legislation trumps Regulation and they have already lost on this issue.

NHS Continuing Healthcare can be applied for at 18. If left to 25 to resolve the point, the NHS Continuing Healthcare procedure in the event of a dispute is:

Exhaust Local Review Processes, Ask Board for Independent Review Panel (they scrutinise and review), Parliamentary Health Service Ombudsman.

In other words, this is a "lose the will to live" labyrinth without robust judicial scrutiny.

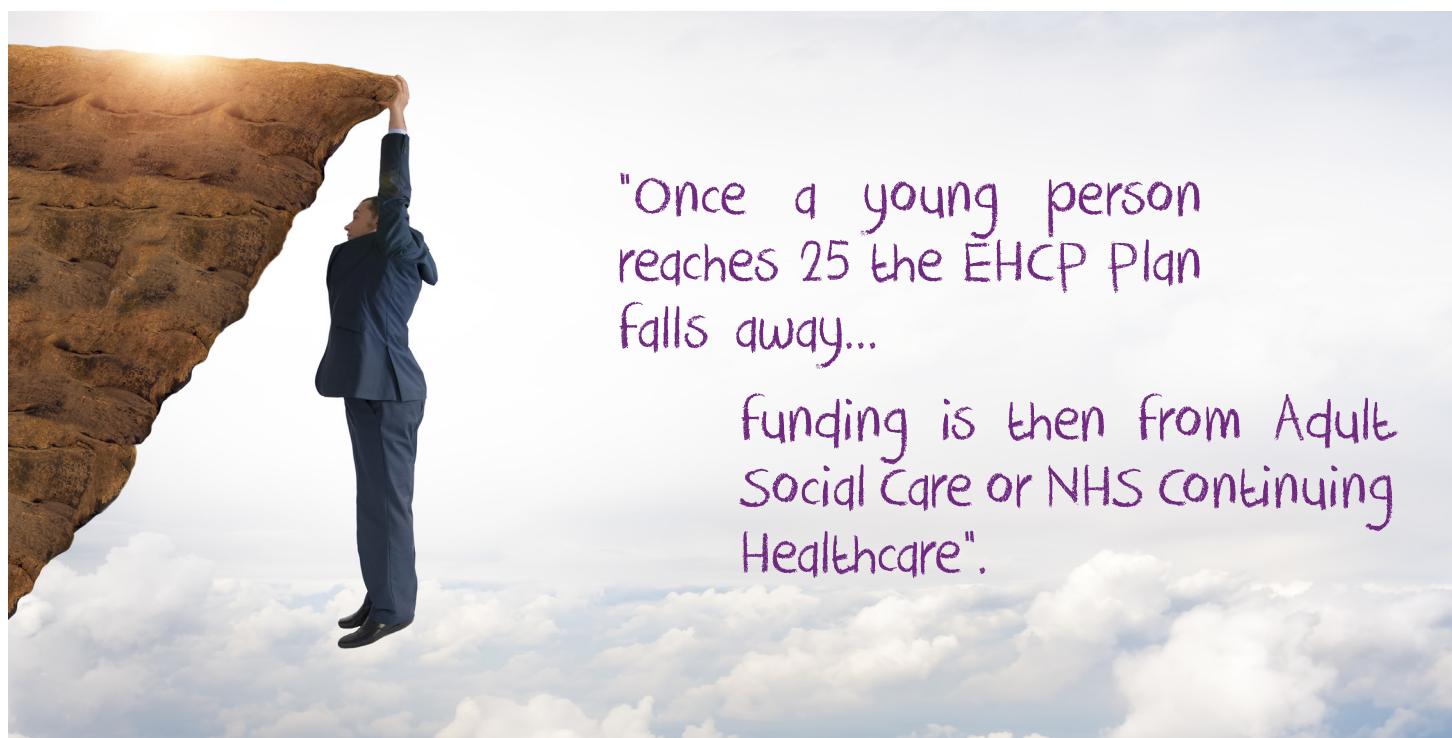
The relevant Statutory Regulation is the **National Health Service Commissioning Board** and

**Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 No 2996** and the guidance is the **National Framework for NHS Continuing Healthcare** and **NHS Funded Nursing Care**.

The current guidance is dated 2012, however new guidance was published in March 2018 and takes effect from October 2018. The guidance is substantially the same, although the paragraph numbers change.

The first step is a screening checklist. It's like tick box credit scoring, you need either three highs or one severe to move onto the second stage. The second stage comprises completion of the Decision Support Tool.

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Ask Board for Independent Review Panel (they scrutinise and review), Exhaust Local Review Processes, Parliamentary Health Service Ombudsman.

The “domains” in the Decision Support Tool appear to be geared towards the elderly and not young people with severe, complex and unpredictable Autistic and Mental Health conditions.

A multi-disciplinary team with relevant skills and knowledge should complete the Decision Support Tool (**Regulation 20(5)** and page 39 March 2018 guidance). The guidance refers to learning disabilities and brain injury and the need to involve a Speech Therapist if significant communication difficulties are indicated.

Guidance states that well managed needs are still needs unless they have permanently gone.

Experience suggests a lumping together of those with Autistic Spectrum Disorders, severe Learning Difficulties and Mental Health issues irrespective of need and severity despite anti-discrimination guidance.

The Court of Appeal considered the dividing line in the case of the **Secretary of State for Work and Pensions v Slavin (by his Litigation Friend Slavin) 2011 EWCA [Civ]1515**. Where provision is supervised and under the direction of doctors or qualified nurses (that definition plainly includes HCPC Clinical Psychologists, HCPC registered Speech & Language Therapists and HCPC Occupational Therapists who are sensory integration trained), then the provision is medical treatment not normally provided by Adult Social Care under the Care Act 2014. These are provisions in law provided by the Health Service.

Provision may be in **Section F** of the EHC Plan. In **SENT v London Borough of Bromley 1999 ELR 260 CA** the Court of Appeal held that as between Education and Health there was a **shared territory (295F – 296E)**.

Analysis of existing provision and appropriately targeted independent expert reports are required to resolve these issues.



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# School Exclusions & The Law

By Richard Nettleton - Paralegal, SEN Legal

In recently released figures by the Government, pupils who have an EHCP/Statement are five times more likely to be permanently excluded than those without SEN. Children with "SEN support", are six times more likely to be excluded than those without SEN support.

This is an alarming trend that I can only see increasing in the future due to a combination of many factors e.g. poor EHCP's, incorrect placements, intervention opportunities missed, the list goes on and on.



*"Guidance on exclusions suggests Headteachers should, as far as possible, avoid permanently excluding any pupil with an EHC Plan. However, there is nothing to suggest what outcomes, if any, the Government expects schools to achieve for excluded pupils and those with SEN".*



## Types of Exclusions

As you may know, there are two types of exclusions for state funded schools.

The first is a fixed term exclusion which is for a specific period of time. A pupil may be excluded for one or more fixed periods (up to a maximum of 45 school days in a single academic year).

The second is a permanent exclusion involving a child being removed from the school roll. However, it's important to note that the Headteacher must not remove a pupil's name from the school Admissions Register until the outcome of the Independent Review Panel has been reached.

## Informal/Unofficial Exclusions

Informal or 'unofficial' exclusions, such as sending a pupil home 'to calm down' are

unlawful, regardless of whether they occur with the agreement of the child's parents.

Any exclusion of a pupil, even for short periods of time, must be formally recorded. Failing to do this places the school at risk of litigation.

## What does the Law say on Exclusions?

The legislation governing exclusions in state funded schools only permits its use for disciplinary reasons, indicating that its key purpose is to punish the child. For children with SEN, it fails to take into account the inherent difficulties they may have in conforming to certain standards of behaviour.

The guidance on exclusions suggests Headteachers should, as far as possible, avoid permanently excluding any pupil with an EHC Plan. However, there is nothing to suggest what outcomes, if any, the Government expects schools to achieve for excluded pupils and in particular those with SEN raising Equality Act issues.

When a Headteacher decides to exclude a pupil, the parents or carers should be notified immediately, usually by telephone, followed by a letter without delay. It is worth noting that parents may now be given an exclusion notice electronically, if they have provided written consent for notice to be sent this way. However, ideally notification should be provided in person or by telephone in the first instance to allow for any initial questions or concerns.

### The correspondence must state

- \* Whether the exclusion is permanent;
- \* Where the exclusion is fixed-term, the precise period of the exclusion;
- \* The reasons for the exclusion;
- \* The parent's right to make representations to the governing body, and how the pupil can be involved in this;
- \* Who to contact about making such representations;
- the right on written request to see copies of a child's school record (Local Authority maintained schools only);
- \* The arrangements made by the school/pupil referral unit for the pupil to continue their education during the first 5 days of the exclusion, including setting and marking of work (with parents having responsibility for ensuring that work sent home is completed by the pupil and returned to school);
- \* The school days (or school day from) which the pupil will be provided with alternative suitable education.

The DfE Exclusions Guidance (September 2017) states that "the law does not allow for extending a fixed period exclusion or 'converting' a fixed period exclusion into a permanent exclusion. In exceptional cases, usually where further evidence has come to light, a further fixed period exclusion may be issued to begin immediately after the first fixed period ends; or a permanent exclusion may be issued to begin immediately after the end of the fixed period."

The child should not return to school between these periods. This does mean that the school could exclude for a fixed period while 'investigation is underway' and decide to permanently exclude or extend the fixed term exclusion if new evidence is provided to them during the investigation period.

If the child is excluded for a further fixed period, or is permanently excluded following the original exclusion, the Headteacher must issue a new exclusion notice to parents and notify them of the new exclusion without delay.

If as a professional you are assessing the correctness of a decision to exclude, ask yourself the following questions:

- \* What is the purpose of exclusion?
- \* Who is the exclusion meant to benefit?
- \* What do we want for children and young people who are excluded, and is this happening?
- \* Have I complied with the Equality Act? Have I made reasonable adjustments which are part of Equality Act compliance?
- \* If the child has an EHC Plan, consider requesting an Emergency Annual Review.
- \* Is this a Social Care issue? Have Safeguarding issues been raised?



## Do you know what a 'good' EHC Plan looks like?

By Hayley Mason - Senior Solicitor, SEN Legal

You may have seen Nadhim Zahawi MP – the current Children and Families Minister, talking on BBC Breakfast a couple of months ago about how the SEND reforms are a 'huge success' and claiming that he hasn't seen an EHC Plan that is not worth the paper it is written on. Many of you will have also recognised that Mr Zahawi's experience sounds very different to the stories you have heard from families or EHCPs you have seen for yourself.

When pressed on the current difficulties faced by parents of children/young persons with special educational needs (SEN) - in terms of delays, lack of funding and limited special educational provision being provided, Mr Zahawi stated that the Government will "continue to look at the statistics to understand why a handful of Local Authorities are having problems."

It didn't take long before vast numbers of parents took to social media to air their concerns, highlighting the difficulties they have faced in each of their respective Local Authority areas. These personal accounts covered the length and breadth of the UK.

Whilst the Government have pledged to invest £6 billion in special educational needs and disabilities by 2018/19, the question remains as to the usefulness of such funding if the Government's basic understanding of the difficulties parents face is so wholly misunderstood. Furthermore if you are a school you will already know the difficulty of trying to obtain the right amount of funding for a child with SEN rather than exhausting your own resources.

### Poor EHCPs can even lead to exclusion

One of the issues that Mr Nahawi did recognise was that the rate of children with SEN being excluded from mainstream school is disproportionately high. He sought to reassure parents by announcing a set of reviews which will look into why this is. My question therefore is why can't Mr Nahawi put 2 + 2 together to get 4?

Children with 'poor' EHC Plans, which do not specify the child's specific special educational needs and do not quantify the proper amount of provision that those needs require, often result in the child's genuine difficulties being wrongly categorised as 'bad behaviour' for which they are excluded. This appears to be because, as mentioned above, funding is scarce and mainstream schools do not generally have the resources or the funding to provide above the level of provision specified in the child's EHC Plan from their own resources.

## Doubts

Every child with SEN is entitled to a properly specified and quantified EHC Plan so that it is visible at first glance by any professional, what that child's specific needs are and how best to support them. The special educational provision detailed should be what the child's SEN require - not simply what their Local Authority is willing to provide. The funding then follows. There is no 'if we afford it' clause in any of the legislation.

Mr Nahawi proudly states "I have got EHC Plans on my desk which I would certainly be proud of if that was my child," but is the minister too far removed to know what a 'good' EHC Plan looks like?

Some parents do not know their legal rights. Therefore if you are holding or attending an annual review, you should do your best to assist them. Here are Hayley's **10 top tips...**

1

**Wording should be specific.** If you know the child in question has a diagnosis of autism, dyslexia etc and this is not listed in Section B, this should be inserted.

2

**Provision should be quantified.** 'Access to' and 'opportunities for' allow the LA to provide as much/ as little as they want and will leave you fighting for funding. Quantify Section F. Ask yourself What? By Who? How Often? For how long?

4

**Is the EHCP dated and signed?** It is from the date of the final, signed and dated EHC Plan that your Local Authority becomes responsible for the provision within it.

3

**Does the EHCP contradict itself?** If so, incorrect information should be removed. Suggest deletions.

5

**If a child/ young person was receiving any therapies or support under a SSEN, is this still included in the EHC Plan?** If not, reinsert it.

6

**Protect yourself.** If quantified provision is included in Section F and the LA stop providing it, they can be forced to restart via a simple pre-action protocol letter from parents.

7

**Is the information current?** Anything older than two years old should be removed and updated.

**Too positive?** Schools often fall into this trap. Remember an EHCP is a description of 'needs' not 'strengths'.

8

9

**Do you understand it?** If you don't understand the EHC Plan you are reviewing, it is not doing its job properly. Try a simpler format or redraft it.

**Is therapy in the right place?** SALT/ OT/ 1:1 support etc must be included in Section F, not D, H1 or H2. If they are only included in Health/ Social Care sections, Local Authorities cannot be forced to provide them and you will be left unfunded.

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