SENlegal NEWSLETTER

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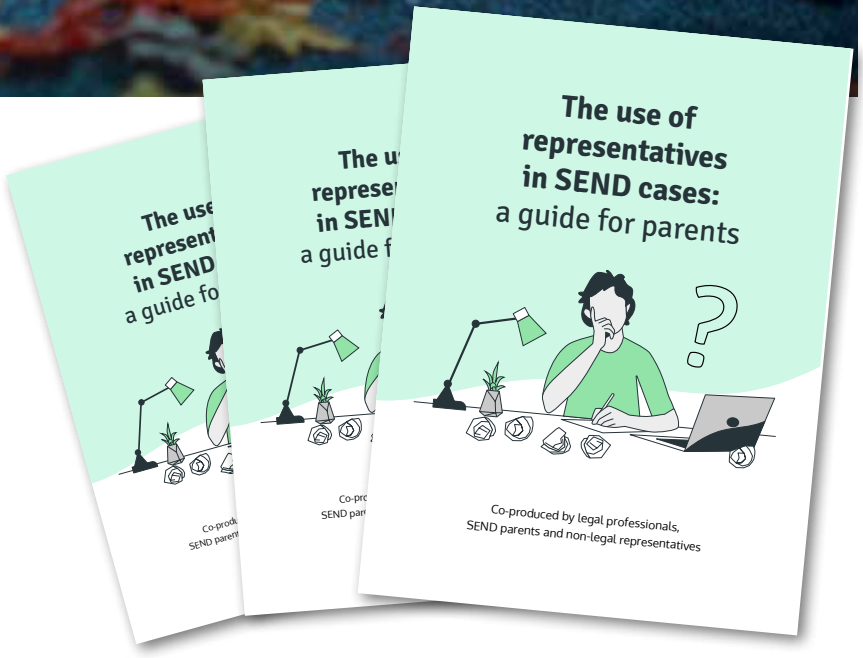

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The child or young person's views in the SEND Tribunal

By Deborah Camp, Solicitor

It is a well-known principle of SEN law that the child or young person should be at the centre of decision-making. In SEND Tribunal appeals, Local Authorities are required to obtain and provide the child's views on the issues in the appeal, wherever possible. Alternatively, the Local Authority must explain why a child's views have not been obtained, for example if a child is too young to be able to express their views on such issues.

In some cases, a child or young person's ability to express their views may well be impacted by their special educational needs and/or disability. However, there is still an expectation on the Local Authority to obtain their views wherever possible and this may involve using an independent advocate to support the child or young person.

"Whilst the child's views are not determinative as such, they can carry significant weight and may impact on the decision arrived at by a Tribunal panel".

A case that reached the Upper Tribunal earlier this year has highlighted the importance of the child's views within the context of an appeal.

In **TM and SM v Liverpool City Council: [2024] UKUT 201 (AAC)**, the Appellants were the parents of a 7-year-old boy with a diagnosis of Autistic Spectrum Disorder (ASD), with associated sensory processing difficulties and developmental coordination disorder. The appeal concerned Sections B, F and I of the child's EHC Plan. In relation to Section I, the Local Authority's proposed school was a mainstream primary school with a specialist resourced provision for pupils with ASD (**'School X'**).

The parents claimed that School X was not appropriate and instead were seeking a place at a non-maintained special school (**'School Y'**). The Local Authority argued that both schools were suitable and were opposing naming School Y due to the large cost difference between the two placements. The SEND Tribunal agreed with the Local Authority's arguments regarding placement and held that School X should be named in the child's EHC Plan.

The parents then appealed to the Upper Tribunal on the basis that the child's views, wishes and feelings about the Local Authority's preferred school had not been taken into account in the SEND Tribunal's decision. The Local Authority had provided some information about the child's views, however, crucially this did not include the child's feelings about attending School X, which were of particular significance. The Upper Tribunal allowed the parents' appeal and decided it was not clear that the SEND Tribunal had had regard to the child's feelings about the appropriateness of School X.

The Upper Tribunal made an important distinction between **Section 9** of the **Education Act 1996** (the general principle that a child will be educated in accordance with their parents' wishes) and **Section 19** of the **Children and Families Act 2014.**

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Whilst both require the views of parents to be taken into account, the Upper Tribunal noted that **Section 19** extends to taking into account the "feelings" of the child (as well as their "views" and "wishes") which may not necessarily be the same thing.

In this particular case, the child had expressed very strong "feelings" about School X which had not been put before the SEND Tribunal and therefore had not been fully considered as part of the original decision. The Upper Tribunal found this to be an error of law as the strength of the child's feelings may have had an impact on the SEND Tribunal's decision as to the appropriateness of School X. The decision regarding the school to be named in Section I was therefore set aside and the case has been directed back to the SEND Tribunal for rehearing.

The Upper Tribunal's findings in this case highlight the importance of the child or young person's views within the context of an appeal. If you are a professional supporting parents with SEND Tribunal appeals, don't forget to ensure that the child or young person's views are captured within the evidence and provide a true reflection of their wishes and feelings. If you are a professional working directly with a child or young people involved in an appeal, might you be able to support them with expressing and/or recording their views, wishes and feelings? Remember that evidence can be provided to the Tribunal in a variety of formats including written or typed information, video or audio files, or a combination of the above and including within professional reports.

Accessing support from Social Services

By Sophie Norris, Paralegal

For a lot of families, support is required not just at school or college but is also needed at home. There is support available to families who need this, including respite, from their Local Authority. A request for support from Social Care services can be made under **Section 17** of the **Children Act 1989**, by asking for assessments.

Under **Section 17**, a Local Authority has a duty to assess where a child is in 'need', which is met where a child is disabled and they are unlikely to achieve or maintain a reasonable standard of health or development, or their health or development is likely to be significantly impaired without support.

Parents or carers can also be assessed, to establish whether support is required. The legislation for a 'Parent Carer's Needs Assessment' is set out under **Section 17ZD** and a Local Authority must assess if it appears that a parent / carer may have needs for support, or the authority receives a request for support. Further, the Local Authority must be satisfied that the child and family are *'persons for whom they may provide or arrange for the provision of services under Section 17.'*

Following receipt of a request, a Local Authority should confirm within **one working day** whether an assessment will be taking place and must complete assessments **within 45 working days**.

If it is agreed following assessments that a family require support, a 'Child in Need Plan' or 'Social Care Support Plan' will be produced to include provision that a Local Authority view is required.

Support could look like respite care at weekends, access to clubs or activities for a child in need or support during school holidays. Requests can be made for specific support.

If an adult over 18 is being supported by a parent or carer, support can also be requested under **Sections 9** and **10** of the **Care Act 2014**. Under **Section 9,** a Local Authority must assess an adult where it appears they may have needs for care and support, and under **Section 10**, must assess a carer where it appears that they may have needs for support (whether currently or in the future).

*"It's important to note that the threshold to assess under both the **Children Act 1989** and **Care Act 2014** is a low one, as it requires a Local Authority to assess where they consider you or your child **'may'** have care needs that require support."*

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While there are no legal timescales for when assessments must be completed under the Care Act, these should take place within a timescale that is 'reasonable' in the circumstances. Once the Care Act assessment is concluded, a Care Plan will be produced and reviewed at least annually, which the Code of Practice says should ideally fall in line with the Annual Review of the EHC Plan where applicable, for consistency.

If it is decided that Social Care support is required and the child has an EHC Plan, the plan should then be updated to include needs and provision in the relevant **sections (D & H).**

Note: It is important to note that the threshold to assess under both the **Children Act 1989** and the **Care Act 2014** is a low one, as it requires a Local Authority to assess where they consider you or your child ***'may'*** have care needs that require support.

Not all needs disappear at the end of the school day, and it is important that families are aware of their right to ask for support outside of education hours where required. Local Authorities have a responsibility to help.

ANNUAL REVIEWS
WHEN THEY SHOULD HAPPEN & UNLAWFUL LA POLICIES...

By Allys Kelsey, Trainee Solicitor

Once an EHC Plan is issued by a Local Authority, the Local Authority have a duty to keep the EHC Plan under review. So, when should these reviews take place? Well, there are a few circumstances when a Local Authority must review an EHC Plan.

The most common one is a once a year, under **Section 44(1)** of the **Children and Families Act 2014,** which sets out that the Local Authority **must** review an EHC Plan every 12 months from the date that EHC Plan was previously reviewed. Despite the name 'Annual Review' being as clear as possible as to when this should happen, a lot of Local Authorities seem to forget their duty, and children/young people can have years pass without a review taking place.

The Local Authority also have a duty under **Regulation 18** of the **Special Educational and Disabilities Regulations 2014** to review an EHC Plan when a child/young person is in a phase transfer year (moving from primary to secondary school or from secondary school to post 16 setting). The Local Authority have a legal requirement to review the EHC Plan and specifically consider the placement due to be named in Section I, and they must do so by no later than **31 March** for secondary to post 16 transfer and **15 February** for primary to secondary transfer in order to comply with their duty.

Regulation 18 specifically provides that where a young person is within 12 months of these transfers, the plan must be reviewed. What we are currently seeing across the country is Local Authorities carrying out these reviews in the academic year before the child enters into this 12-month transfer period. The information then often being passed onto schools for consultation is outdated.

Furthermore, any review carried out must comply with the statutory timescales. The Local Authority has **4 weeks** to make a decision following the Annual Review. If the LA decides to amend, they have **8 weeks** following this decision to provide a finalised amended EHC Plan. These timescales cannot be missed simply because the Local Authority labels the Annual Review as a phase transfer review. For example, any phase transfer review that has been held in June/July 2024, is not lawfully able to be kept going until the phase transfer deadlines set out above. A final EHC Plan must be issued by September/October.

Alarmingly, we have also seen correspondence from one Local Authority who has confirmed to parents that due to backlogs with Annual Reviews, they will not be reviewing EHC Plans for phase transfer this academic year. Previous Annual Review reports will be relied upon. Again, this is entirely unlawful in our view and inappropriate to the child concerned. If a plan has not been reviewed and/or not updated for many years, the future school will be provided with information entirely out of date and will not be able to provide an accurate consultation response. Such policies need challenging, to ensure updated and accurate information is provided to potential future schools. If you as professionals and those working in schools are being given such information from LAs, we would certainly suggest challenging this, to support the parents and child concerned.

Cease to Maintain the EHC Plan

What can parents do next?

By Sarah Bearman, Solicitor

The Annual Review process can be a stressful time for all parents with a child or young person with an Education and Health Care Plan. After what can be weeks of emails, documents, meetings and chasing for a final decision letter (as set out in our recent webinar series) one of the decisions that is possible is for the Local Authority to seek to 'cease to maintain' a child/young person's EHC Plan, i.e. the plan will come to an end.

This is commonly seen when the child is moving from one post-16 education placement to the next, 18 – 19 years old, although still possible for younger children. It's important to remember that if there is a need for an EHC Plan to continue, it can continue up to the age of 25. This can be a daunting decision to receive following an Annual Review and understandably causes parents distress. It is therefore important that schools and professionals working with parents can relay accurate advice in respect of the legal criteria concerning cease to maintain decisions and suggest to parents whether the Local Authority have done this correctly. A successful challenge on these points could ensure the young person's EHC Plan continues for a number of years.

Section 45 of the **Children and Families Act 2014,** provides a local authority can lawfully cease to maintain a plan on the following basis:

1. The authority is no longer responsible for the child or young person (moving different LA areas, the young person enters employment or university).

2. The authority determines that it is no longer necessary for the plan to be maintained.

Looking at part 2 of the above, the legislation confirms it must be determined that the young person no longer requires the special educational provision specified in the plan. When determining this, the Local Authority must have regard to whether educational or training outcomes specified in the plan have been achieved. This should be the focus of the Annual Review, to ensure that the Annual Review focuses on whether outcomes remain unmet and whether continuing provision is required and therefore the plan to continue. Education providers should be focusing on this within their Annual Review paperwork, as should professionals preparing reports for the Annual Review.

When the Local Authority are considering exercising their power to cease to maintain a plan, they must also consider **Regulation 31** of the Special Educational Needs and Disability Regulations, which provides a duty of consultation.

The LA must inform the parents and/or young person, consult the parents and/or young person and consult the head (or equivalent) of the educational institution they currently attend.

Only once those 3 steps have been completed can the Local Authority confirm their decision to cease to maintain. If they fail to complete this consultation process and issue their notice to cease the plan, this can be challenged by way of Pre-Action Protocol process with a view to Judicial Review, as it is unlawful.

If the correct process has not been followed it can lead to the Local Authority withdrawing their decision and carrying out the consultation, buying you more time.

If the Local Authority does issue a lawful notice, it must be accompanied with a right of Appeal to the SEND Tribunal. It is important to remember under **Section 45(4)** the plan will not come to an end until the right of Appeal expires, or if an Appeal is submitted, the Appeal reaches a conclusion. Parents are therefore well advised to submit an Appeal to the SEND Tribunal, to ensure the plan is kept. Some Appeals are taking nearly 52 weeks to reach the hearing stage and the plan will have to be maintained during this time.