SENlegal NEWSLETTER

Issue 20 for Schools and Professionals

In this Newsletter:

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

Parents are often wondering how the Local Authority have reached the decision to name that specific placement in Section I of the plan. Often many schools are also thinking the same, wondering why they have not been named or why, having returned a consultation expressing significant concern in respect of being able to meet needs, they have in fact been named.

With this in mind, we have set out the below a short summary of the legislation that the Local Authority should be applying when considering the parental request for a preferred placement and naming schools within EHC Plans.

The relevant legislation surrounding this is 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 be named in their child's EHC Plan. This section also confirms that confirms that parents are entitled to request, ranging from maintained mainstream schools, non maintained special schools and including schools that are Section 41 approved school 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.

Ultimately, parents have a right to challenge this decision if they have not been given their preferred placement, including SEND Tribunal Appeals, but also considering formal correspondence highlighting what might be an unlawful decision to seek to avoid an Appeal.

Typically, Local Authorities refuse parental placements on an inefficient use of resources. This article does go into detail what resources must be considered, but it is not lawful for Local Authorities to refuse a placement due to the costs of the placement if there is no alternative placement to compare this to.

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Equally, when considered properly and the provision the child requires in two different settings, i.e. specialist and mainstream, the costs may not be too different at all and may in any event not represent an unreasonable cost difference. There is a wide range of case law requiring consideration when analysing costs and any benefits to the child so as to decide the reasonableness.

Local Authorities, and schools in their consultation responses, may rightfully also refuse a placement on the issue of efficient education of others, particularly when placements are stating they are full. This has been very recently considered in detail by the Tribunal in **OO and BO v London Borough of Bexley [2023] UKUT 223 (AAC),** which confirms incompatible is a strong term, which has stronger meaning than prejudicial to. It must be shown that the child's placement would reduce the education of other children below the 'efficient education' acceptable standard. Therefore, it is not sufficient for a school to simply state they are full without consideration of this.

As set out above, parents can rightfully challenge decisions when preferred placement is refused. Schools can also challenge being named in Section I of EHC Plans, where they have legitimate concerns and these have not been adhered to by the Local Authority. Recent cases such as **R v Medway Council and Secretary of State for Education and Swalcliffe Park School, R v Wokingham Borough Council & Anor** confirm schools can challenge such decisions by way of Judicial Review.

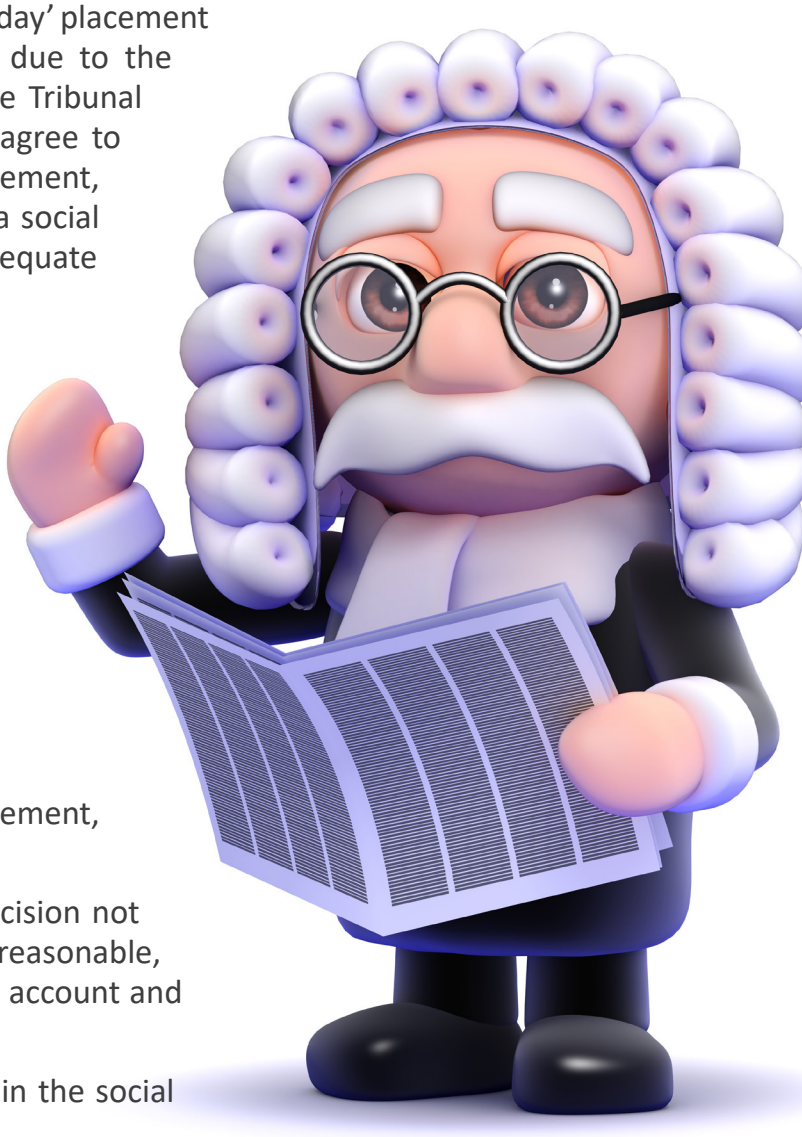
NEW CASE LAW

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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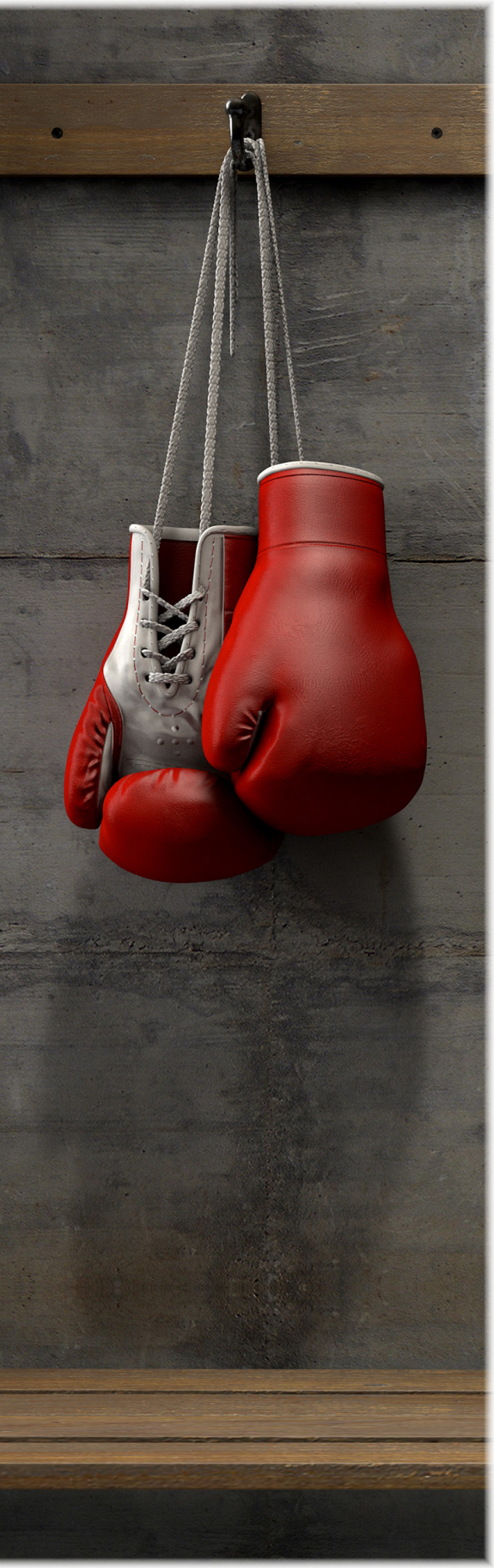

Judicial Review Outcome

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