

Education

- 4.1 Introduction – the SEN and disability scheme 0–25**
- 4.11 The human right to education**
- 4.20 Duty to participate to 18**
- 4.20 Introduction
- 4.25 Section 19 – general principles
- 4.30 Working together and sufficiency duties
- 4.41 The local offer**
- 4.48 Duties on schools**
- 4.48 Introduction
- 4.52 Key duties
- 4.56 The role of the SENCO
- 4.59 SEN information reports
- 4.62 Duty to support pupils with medical conditions
- 4.64 Duties under the Equality Act 2010
- 4.73 SEN support – early years, schools, colleges**
- 4.80 Education, Health and Care needs assessments**
- 4.80 Introduction
- 4.84 Criteria for assessment
- 4.95 The assessment process
- 4.102 Timescales
- 4.107 Education, health and care plans**

continued

- 4.107 Overview
 - 4.114 Contents of the EHC plan
 - 4.120 Outcomes
 - 4.126 The draft EHC plan and requests for a particular school, college or other institution
 - 4.128 Placements under EHC plans
 - 4.137 Finalising and maintaining the EHC plan
 - 4.142 Ceasing to maintain the EHC plan
 - 4.148 Reviews**
 - 4.164 Re-assessments**
 - 4.168 Personal budgets**
 - 4.181 Direct payments for SEN provision**
 - 4.184 Children and young people in custody**
 - 4.187 Residential and out-of-authority placements**
 - 4.192 School attendance**
 - 4.197 Elective home education**
 - 4.201 Education otherwise than at school**
 - 4.205 Duties to children who are without education (Education Act 1996 s19)**
 - 4.213 School admissions**
 - 4.216 Exclusions from school and colleges**
 - 4.236 School and college transport**
 - 4.239 Appeals to the tribunal**
 - 4.246 The national trial**
 - 4.247 Other enforcement methods**
 - 4.247 Judicial review
 - 4.249 Complaint to the secretary of state
 - 4.250 Complaint to the ombudsman
 - 4.251 Decision-making for young people**
 - 4.252 Further advice and support**
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Key points

- Disabled children and young people have a right to suitable, effective and appropriate education aimed at helping them achieve the ‘best possible’ outcomes.
- A large proportion of disabled children and young people have ‘special educational needs and disabilities’ (SEND). The legal framework to meet those needs is set out in Part 3 of the Children and Families Act (CFA) 2014.
- Local authorities have general duties to promote the welfare of children and young people with SEND and to promote the fulfilment by every child of his or her educational potential.
- There is a legal presumption in favour of mainstream education for children and young people with SEND.
- Most children with SEND in mainstream schools will have their needs met through a system of ‘SEN support’ under the SEND Code of Practice.
- The route to specialist provision is through a statutory assessment which may lead to an Education, Health and Care plan (EHC plan).
- Children, including children with complex needs, can also be educated at home.
- Children with SEND should not be excluded from school except as a ‘last resort’; where they are excluded, their parents can generally appeal to a Governor’s Committee and an Independent Review Panel or to the tribunal in some cases where disability discrimination is alleged.
- Local authorities owe a specific duty to children (including disabled children and children with SEND) who are out of school to offer suitable alternative provision.
- Disputes between parents and local authorities in relation to specific aspects of the SEND system can be resolved through an appeal to the First-tier Tribunal (Special Educational Needs and Disability).

Introduction – the SEN and disability scheme 0–25

- 4.1 This chapter considers the rights of disabled children to education. The right education is fundamental to achieving good outcomes for disabled children, as it is for every child. Although the focus of this

chapter is on children with special educational needs (SEN) it also considers the duties of schools towards children with disabilities that do not meet the definition of SEN.

4.2 The chapter focuses on the SEN and disability scheme for children and young people aged 0–25 that was introduced through Part 3 of the Children and Families Act (CFA) 2014, in force from 1 September 2014, with transitional arrangements being completed by 2018. The SEN and disability scheme 0–25 is underpinned by a number of important general duties on local authorities, including duties to:

- promote the fulfilment by every child (and young adult for whom an EHC plan is maintained) of the child’s educational potential;¹ and
- have regard to the need to safeguard and promote the welfare of children in carrying out their educational functions.²

4.3 These legal reforms were said to have been introduced ‘so that services consistently support the best outcomes. . . giving children, young people and their parents greater control and choice in decisions and ensuring needs are properly met’.³

4.4 However, the new scheme has been implemented against a backdrop of what has commonly been regarded as a ‘crisis’ in SEND funding⁴ and five years on, for many families these positive changes remain to be seen.

4.5 The Local Government and Social Care Ombudsman (LGSCO) Special Focus Report *Education, Health and Care plans: Our first 100 investigations*, published in October 2017, recorded a doubling of complaints under the new system with an ‘exceptionally high’ number being upheld; common themes including delay, gathering evidence to inform the EHC needs assessment, meetings and transfer reviews, making decisions about placements and the use panels in decision-making.

4.6 Similarly, the Office for Standards in Education, Children’s Services and Skills (Ofsted) has found that:⁵

In the second year of our local area SEND inspections, we have seen a continuing lack of coordinated 0–25 strategies and poor post–19 provision. We have seen a continuing trend of rising exclusions

1 Education Act 1996 s13A(1)(c).

2 Education Act 2002 s175. This mirrors the duty in section 11 of the Children Act 2004 in relation to other local authority functions, see chapter 2 at para 2.53.

3 Children and Families Bill 2013 Factsheet: www.gov.uk/government/uploads/system/uploads/attachment_data/file/219659/Children_20and_20Families_20Bill_20Factsheet_20-20Introduction.pdf.

4 See, for example, <https://neu.org.uk/funding/send-crisis>.

5 Ofsted Annual Report 2017–2018.

among children and young people with special educational needs and/or disabilities (SEND). Mental health needs are not being supported sufficiently. The quality of education, health and care (EHC) plans is far too variable. Critically, the gap in performance and outcomes for children with SEND is widening between the best and the worst local areas. . . We are still seeing too many local areas providing a sub-standard service when it comes to SEND provision.

- 4.7 When the report was announced, Amanda Spielman, Chief Inspector of Ofsted, stated:

Something is deeply wrong when parents repeatedly tell inspectors that they have to fight to get the help and support that their child needs. And I'm not talking about middle class parents wanting extra time in exams for their child. I mean adequate support for our most vulnerable children with SEND, which is a basic expectation of a decent, developed society. We need to do better.⁶

- 4.8 At the same time, appeals to the Special Educational Needs and Disability Tribunal continue to increase year on year. Statistics for the year September 2017–2018 showed that of the 5,679 appeals registered, the tribunal were asked to decide the outcome in 2,298 appeals and of those, 2,035 were decided in favour of the appellant (who generally will parent or young person) – that represents an approximate success rate of 89 per cent.⁷

- 4.9 The Education Select Committee launched a special educational needs inquiry in April 2018 intended to ‘review the success of these reforms, how they have been implemented, and what impact they are having in meeting the challenges faced by children and young people with special educational needs and disabilities’.⁸ The special educational needs select committee report was published on 23 October 2019. The report found that:

The reforms were ambitious: the Children and Families Bill sought to place young people at the heart of the system. However, as we set out in this report, that ambition remains to be realised. Let down by failures of implementation, the 2014 reforms have resulted in confusion and at times unlawful practice, bureaucratic nightmares, buck-passing and a lack of accountability, strained resources and adversarial experiences, and ultimately dashed the hopes of many.⁹

6 See: www.gov.uk/government/speeches/amanda-spielman-launches-ofsteds-annual-report-201718.

7 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768080/Tribunals_SEND_17-18_Tables_v4.ods.

8 See: www.parliament.uk/business/committees/committees-a-z/commons-select/education-committee/inquiries/parliament-2017/special-educational-needs-and-disability-inquiry-17-19/.

9 <https://publications.parliament.uk/pa/cm201920/cmselect/cmeduc/20/2003.htm>.

- 4.10 Cuts to local authority SEND budgets have been the subject of a number of judicial review claims over the last few years,¹⁰ including a challenge against the Chancellor of the Exchequer and/or the Secretary of State for Education considering whether the approach to funding of provision to meet the special educational needs of children and young people in England is lawful.¹¹

Key definitions – CFA 2014 Part 3

• Special educational needs (SEN)

A child or young person has SEN if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.¹²

A child of compulsory school age or a young person has a learning difficulty or disability if he or she:

- has a significantly greater difficulty in learning than the majority of others of the same age; or
- has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.¹³

A child under compulsory school age has SEN if he or she is likely to fall within the definition above when they reach compulsory school age or would do so if special educational provision was not made for them.¹⁴

Difficulties related solely to learning English as an additional language are not SEN. Identifying and assessing SEN for children and young people whose first language is not English requires particular care, and schools should look carefully at the child or young person's performance in different areas of learning and development or subjects to establish whether lack of progress is due to limitations in his or her command of English or if it arises from SEN or a disability.¹⁵

10 See *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin); (2018) 21 CCLR 751 and *R (Hollow) and Surrey County Council* [2019] EWHC 618 (Admin); (2019) 22 CCLR 395.

11 *R (Simone and others) v Chancellor of the Exchequer and Secretary of State for Education* [2019] EWHC 2609 (Admin).

12 CFA 2014 s20(1).

13 CFA 2014 s20(2).

14 CFA 2014 s20(3).

15 SEND Code, para 6.24.

• **Special educational provision**

CFA 2014 s21 defines ‘special educational provision’ for children over two and young people as:

‘educational or training provision¹⁶ that is additional to, or different from, that made generally for others of the same age in–

- mainstream schools in England,
- maintained nursery schools in England,
- mainstream post–16 institutions in England, or places in England at which relevant early years education is provided.¹⁷

Special educational provision for a child aged under two means educational provision of any kind.¹⁸

• **Disability**

The definition of ‘disability’ is set out in section 6(1) of Equality Act 2010, which states that a person (P) has a disability if:

- a) P has a physical or mental impairment; and
- b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

Further detail in relation to this definition of disability is set out in chapter 9 at para 9.7.

• **Health care and social care provision**

CFA 2014 s21(3) defines ‘health care provision’ as the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006 (see chapter 5 for duties in relation to healthcare provision for disabled children).

‘Social care provision’ means the provision made by a local authority in the exercise of its social services functions.¹⁹ This will include provision such as short breaks and domiciliary care in the home. Further information in relation to social care duties can be found in chapter 3.

There can often be difficulties in identifying whether particular provision is special educational provision, health care provision or social care provision. CFA 2014 s21(5) makes clear that health care

16 Special educational provision can also be equipment such as a powered wheelchair – see *East Sussex CC v JC* [2018] UKUT 81 (AAC); (2018) 21 CCLR 251.

17 CFA 2014 s21(1).

18 CFA 2014 s21(2).

19 CFA 2014 s21(4).

provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision). The Upper Tribunal has confirmed that in these circumstances, health and social care provision will be deemed ‘special educational provision’ and therefore should be included in Section F of the EHC plan.²⁰

Further guidance on the meaning of ‘educates and trains’ has been provided by the Upper Tribunal in *GL v West Sussex County Council (SEN)*.²¹ In this case, the Tribunal held that ‘educates and trains’ needs to be provision which does more than ‘support and assist’ and would be a question of fact and degree in each case.

The relevant tests summarised above should be applied in relation to each and every type of provision a child or young person receives, particularly if he or she has an EHC plan (see para 4.107 below).

The SEND Code states that speech and language therapy and other therapy provision can be regarded as either education or health care provision, or both. It could therefore be included in an EHC plan as either educational or health care provision. However, since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing so.²²

- **Young person**

A ‘young person’ is a person over compulsory school age but under the age of 25.²³ A child is of compulsory school age from the beginning of the term following his or her fifth birthday until the last Friday of June in the year in which he or she become 16, provided that his or her 16th birthday falls before the start of the next school year.²⁴ For example, if a child turns 16 in March 2016, he or she will be over compulsory school age (and therefore a ‘young person’) after Friday 24 June 2016.

The distinction between a child and a young person under the CFA 2014 is important as each group has differing rights in terms of decision-making (see para 4.239 below).

20 *East Sussex CC v TW* [2016] UKUT 528 (AAC).

21 [2017] UKUT 414 (AAC).

22 SEND Code, para 9.74.

23 CFA 2014 s83(2).

24 SEND Code, glossary of terms, page 279.

The human right to education

- 4.11 Education is a fundamental human right. The right is contained in a number of international treaties, but most importantly within Article 2 of Protocol 1 ('A2P1') to the European Convention on Human Rights (ECHR), which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

- 4.12 The United Kingdom has entered a reservation in respect of A2P1 which provides that the second sentence of the right (relating to parents' wishes) is only accepted in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable expenditure. This qualification reflects the position in Education Act 1996 s9 which gives only a qualified right to parents to have their choices and views respected in relation to their child's education.

- 4.13 The scope of the right to education under A2P1 in relation to a disabled child has been considered by the Supreme Court in *A v Essex CC*.²⁵ This was a damages claim under A2P1 in relation to a period of 18 months when A was effectively without any education, apart from irregular speech and language therapy sessions and access to some educational toys. A has complex needs, including severe learning disabilities, autism and epilepsy. His needs were ultimately met successfully in a residential special school placement.

- 4.14 The Supreme Court held by a majority of 3–2 that it was not arguable that A2P1 gave A an absolute right to education to meet his special needs during the 18 months he was out of school. However, a different 3–2 majority of the Justices found that it was arguable that Essex had failed to provide educational facilities that were available that might have mitigated the consequences of the failure to meet A's special needs during this period. Despite this, the Supreme Court declined to extend time to allow this part of A's claim to proceed to trial. This judgment is complex, with all five Justices giving separate speeches, but it clearly demonstrates that at the very least in order to comply with A2P1 authorities must not neglect the educational needs of children with even the most complex SEN and must do what is possible to provide these children with some education, even if less than suitable education, while a suitable placement for them is being found.

25 *A v Essex County Council* [2010] UKSC 33; [2011] 1 AC 280.

4.15 In relation to children with SEN like A who are out of school, the A2P1 right to education is supplemented by the powerful duties contained in Education Act 1996 s19 which require suitable alternative education to be provided regardless of resource difficulties – see below at para 4.206.

4.16 As discussed in chapter 2, case-law over the last five years²⁶ show that international human rights conventions are growing in significance in English law. The United Nations Convention of the Rights of Persons with Disabilities (UNCRPD) is one such international treaty and Article 24 sets out important rights for disabled children when accessing education. In particular:

States parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, state parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

- a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- c) enabling persons with disabilities to participate effectively in a free society.

4.17 Article 24(2) states:

In realising that right, states parties shall ensure that:

- a) persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- b) persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- c) reasonable accommodation of the individual's requirements is provided;
- d) persons with disabilities receive the support required, within the general education system, to facilitate their effective education; and
- e) effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

²⁶ For example, see *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449.

4.18 In addition, there are also a number of important obligations relating to education in the UN Convention on the Rights of the Child including:

- Article 28 (right to education)

Article 28 provides that states should recognise that all children shall have an equal right to education and in particular:

- primary education should be compulsory and available free to all;
 - states should encourage the development of different forms of secondary education including general and vocational education; make them available and accessible to every child; and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - higher education should be accessible to all on the basis of capacity by every appropriate means;
 - states should make educational and vocational information and guidance available and accessible to all children;
 - states should take measures to encourage regular attendance at schools and the reduction of drop-out rates;
 - school discipline should be administered in a manner consistent with the children's human dignity.
- Article 29 (educational development)

Article 29 provides that a child's education should be aimed at the development of:

- the child's personality, talents and mental and physical abilities to their fullest potential;
- respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and
- the development of respect for the natural environment.

4.19 Although these conventions are 'unincorporated' and so are not formally part of English law, where the obligation or right has a link to a direct right under the ECHR – for example, the right to education

under A2P1 – then it is likely that they will be considered very carefully by the courts when deciding whether a public body has acted lawfully. They should also be taken into account in any case where domestic law is ambiguous. See further chapter 2 at para 2.23.

Duty to participate to 18

Introduction

4.20 The Education and Skills Act (ESA) 2008 raises the participation age so that all young people leaving year 11 are required to continue in education or training until at least their 18th birthday.²⁷ This does not necessarily mean that the young person has to remain in school and ‘participation’ can include:

- full-time study in a school, college or with a training provider;
- full-time work or volunteering (20 hours or more) combined with part-time education or training; or
- an apprenticeship or traineeship.

4.21 Every young person who reaches the age of 16 or 17 in any given academic year is entitled to an offer of a suitable place, by the end of September, to continue in education or training the following year.²⁸

4.22 The aim of these duties is to ensure that every young person continues his or her studies or takes up training and goes on to successful employment or higher education.

4.23 There are a number of legal duties on local authorities to encourage and support young people to participate. These include:

- local authority keeping under review and considering the extent to which provision is sufficient to meet the educational needs, training needs and social care needs of children and young people;²⁹
- promoting the effective participation in education and training of 16 and 17 year olds in their area with a view to ensuring that those persons fulfil the duty to participate in education or training;³⁰ and
- making arrangements to identify 16 and 17 year olds who are not participating in education or training.³¹

27 ESA 2008 Pt 1.

28 Department for Education, *Participation of young people in education, employment or training*, September 2016, para 25.

29 CFA 2014 s27.

30 ESA 2008 s10.

31 ESA 2008 s12.

- 4.24 Local authorities are also under a duty to secure participation of young people through their wider functions³² such as developing post-16 transport arrangements which ensure that young people are not prevented from participating because of the cost or availability of transport to their education or training.³³ Information in relation to post 16 education and training provision available to young people for children with SEN and disabilities up to the age of 25 must also be included in each local authority's 'local offer'³⁴ as described at para 4.41 below. There are also duties on providers to promote good attendance,³⁵ to tell their local authority when a young person is no longer participating³⁶ and to secure independent careers guidance.³⁷

Section 19 – general principles

- 4.25 The SEND Code states that 'Section 19 of the Children and Families Act 2014 sets out the principles underpinning the legislation and the guidance in this Code of Practice'.³⁸ Section 19 establishes the following core principles which must underpin all decisions taken by local authorities when exercising their functions in relation to children and young people. It requires local authorities to have regard to the following matters:

- a) the views, wishes and feelings of the child and his or her parent, or the young person;
- b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
- c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
- d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

32 ESA 2008 s10.

33 Education Act 1996 s509AA.

34 CFA 2014 s30 and SEND Regs 2014 Sch 2.

35 ESA 2008 s11.

36 ESA 2008 s13.

37 Department for Education, *Participation of young people in education, employment or training*, September 2014, para 38 and Annex 2.

38 SEND Code chapter 1, p19.

- 4.26 Whenever a local authority is taking any decision in relation to children and young people with SEN or disabilities under CFA 2014 Part 3, it must have ‘regard’ to the above principles. In essence, this requires consideration of these principles when all decisions are taken.
- 4.27 The principles will apply to all decisions taken by local authorities under Part 3 of CFA 2014, from individual decisions as to what provision is required to meet a child or young person’s needs in an EHC plan to macro decisions about commissioning of services and any criteria to be applied. While there may be boundary disputes as to whether health or social care decisions are taken in the exercise of the functions under Part 3 of CFA 2014, it is far less likely that there will be any such dispute in relation to educational decisions.
- 4.28 Although having ‘regard’ does not create a duty on a local authority to provide the ‘best’ provision or to agree to do something in accordance with a parent’s wishes in every case, it does mean local authorities will need to evidence how they have had regard to these principles when making all decisions. Under section 19(d), the aim must be now the ‘best possible. . . outcomes’ for children and young people in every case. The Upper Tribunal has clarified that the duty to have regard under section 19(d) requires those matters to be considered with ‘some thoroughness’, but it does not in itself impose any direct duties to provide provision – the test remains whether the provision is ‘appropriate’.³⁹
- 4.29 The Upper Tribunal has held that the duties under section 19 – including to have regard to the views, wishes and feelings of the child – also extend to the First-tier Tribunal when making decisions.⁴⁰

Working together and sufficiency duties

- 4.30 CFA 2014 Part 3 includes a number of important duties on local authorities and their partners to work together. These duties continue a theme in children’s legislation dating back to the Children Act 1989 (s27) and the Children Act 2004 (s10); see further chapter 2 at paras 2.52 and 2.55.
- 4.31 In particular, whenever local authorities are exercising any of their functions under Part 3 of CFA 2014, they must do so with a view to ensuring the integration of educational provision with health

39 *Devon CC v OH (SEN)* [2016] UKUT 0292 (AAC).

40 *M & M v West Sussex County Council (SEN)* [2018] UKUT 347 (AAC); and *S v Worcestershire CC (SEN)* [2017] UKUT 0092 (AAC).

and social care provision where this would promote the well-being of children or young people in its area who have SEN or a disability or it would improve the quality of special educational provision.⁴¹ ‘Well-being’ of children and young people includes:

- a) physical and mental health and emotional well-being;
- b) protection from abuse and neglect;
- c) control by them over their day-to-day lives;
- d) participation in education, training or recreation;
- e) social and economic well-being;
- f) domestic, family and personal relationships;
- g) the contribution made by them to society.⁴²

4.32 Similarly, local authorities and their health partners must make joint commissioning arrangements for education, health and care provision for children and young people with SEN and disability.⁴³ This must include arrangements for securing EHC needs assessments; securing the education, health and care provision specified in EHC plans; and agreeing personal budgets.⁴⁴ The duty to have joint commissioning arrangements is an important development, as it requires local authorities and their health partners to be able to demonstrate firm arrangements that are clearly documented.

4.33 The SEND Code states that joint commissioning arrangements should enable partners to make best use of all the resources available in an area to improve outcomes for children and young people in the most efficient, effective, equitable and sustainable way.⁴⁵ This duty will be particularly important for disabled children who need to access provision holistically from education, health and social care.

4.34 In order to ensure that joint commissioning is informed by a clear assessment of local needs, each local authority must have a Health and Wellbeing Board (HWB) who have a duty to promote greater integration and partnership working, including through joint commissioning, integrated provision and pooled budgets.⁴⁶ In order to understand the needs of its local population, HWBs must carry

41 CFA 2014 s25(1). See further the SEND Code, para 3.70 requiring councillors and senior officers to ‘co-operate . . . to ensure the delivery of care and support is effectively integrated in the new SEN system’.

42 CFA 2014 s25(2).

43 CFA 2014 s26(1).

44 CFA2014 s26(4).

45 SEND Code, para 3.4 and Commissioning Support Programme, *Good commissioning: principles and practice*, September 2010.

46 SEND Code, para 3.21.

out Joint Strategic Needs Assessments (JSNAs) which should include consideration of the needs of children and young people with SEN and disability in order to agree outcomes and joint commissioning decisions.⁴⁷

4.35 Local authorities are also under a duty to keep education (and care) provision for children and young people with SEN and disabilities under review and consider the extent to which provision is sufficient to meet the needs of children and young people in its area and for whom it is responsible.⁴⁸ They must consult with a range of people and bodies, including children, parents and young people in order to comply with these duties.⁴⁹ This duty will be important for parents and young people where there are concerns in a local area that provision may not be sufficient to meet needs. The assessment of sufficiency under CFA 2014 s27 must be informed by the comments made on the ‘local offer’ for the relevant area (see para 4.41 below). As such, it is vital that children, young people and parents use the ‘local offer’ comment facility to provide feedback on any gaps in the quality or quantity of local provision.

4.36 These sufficiency duties and the extent to which they impose a duty to consult before making decisions, have been considered by the courts in the context of a number of judicial review challenges against cuts to SEN budgets within local authorities. The courts have so far interpreted these duties in differing ways, but at the time of writing this chapter, the approach of the courts appears to be that the legislation ‘imposes a duty on local authorities, which arises from time to time, to consult at reasonable intervals, those identified in s.27(3) in order to keep the provision referred to under review’.⁵⁰ However, it does not require consultation each time a change to provision is proposed.

4.37 In addition, health bodies have a duty to bring certain children to the local authority’s attention. This duty applies where a clinical commissioning group (CCG), NHS trust or NHS Foundation Trust forms the opinion that a child has, or probably has SEN or a disability. Where this arises, the health body must inform the child’s parent that they have formed that opinion and give them the opportunity to discuss, and then bring their opinion to the attention of the appropriate local

47 Local Government and Public Involvement in Health Act 2007 s116B.

48 CFA 2014 s27.

49 CFA 2014 s27(3).

50 *R (Hollow and others) v Surrey County Council* [2019] EWHC 618 (Admin); (2019) 22 CCLR 395.

authority.⁵¹ By bringing the child to the attention of the local authority, this would then trigger the local authority's duty to consider when an assessment of the education, health and care needs is required (see below at para 4.90).⁵²

- 4.38 Parents, children and young people frequently face difficulties in ensuring that local authorities and their partners work together effectively and can face delays in accessing provision as result. The working together provisions under the CFA 2014 include specific duties in relation to co-operation and assistance. In particular, a local authority must co-operate with its local partners and each of its local partners must co-operate with the local authority when carrying out any functions under CFA 2014 Part 3.⁵³ Partners include district councils, schools, youth offending teams (YOTs) and CCGs.⁵⁴
- 4.39 These duties also extend to officers within the local authority to ensure that there is co-operation between education and social services departments.⁵⁵
- 4.40 Finally, CFA 2014 s31 creates a duty to ensure co-operation in individual cases, similar to the duty imposed by Children Act 1989 s27 in relation to social care decisions for children 'in need' generally (see chapter 2 at para 2.55). Section 31 allows a local authority to request the co-operation of a wide range of partners including health bodies in any individual case. The partner body must comply with the request, unless they consider that doing so would a) be incompatible with their duties, or b) otherwise have an adverse effect on the exercise of their functions.⁵⁶ A person or body that decides not to comply with a request under section 31 must give the authority that made the request written reasons for the decision.⁵⁷

The local offer

- 4.41 Under CFA 2014 s30, each local authority must publish a 'local offer' which sets out in one place information about provision they expect to be available across education, health and social care for children and young people in their area who have SEN or are disabled. One of

51 CFA 2014 s23.

52 CFA 2014 s36.

53 CFA 2014 s28(1).

54 CFA 2014 s28(2).

55 CFA 2014 s28(3).

56 CFA 2014 s31(2).

57 CFA 2014 s31(3).

the central purposes of this requirement is to make provision more responsive to local needs by directly involving children and young people and their parents in its development.⁵⁸ The 'local offer' is fundamental to the success of the reforms, given that a significant majority of disabled children and children with SEN will not have an EHC plan. A local authority must keep its 'local offer' under review and may from time to time revise it.⁵⁹

4.42 The information that must be published in the 'local offer' is set out at regulation 53 of and Schedule 2 to the SEND Regs 2014.⁶⁰ The regulations require detailed and comprehensive information including:

- the special educational provision and training provision which the local authority expects to be available in its area for children and young people in its area who have SEN or a disability;
- arrangements for identifying SEN;
- securing services, provision and equipment;
- approaches to teaching and adapting curriculum;
- provision to assist with preparation for adulthood and independent living;
- transport arrangements;
- sources of information, advice and support;
- complaints procedures and mediation;
- information about availability of personal budgets;
- information about any criteria that must be satisfied before any provision or service set out in the local offer can be provided.

4.43 When preparing and reviewing its 'local offer', local authorities must consult a wide range of specified persons, including children, young people and parents, but also governing bodies of maintained schools, advisory boards of children's centres and CCGs.⁶¹

4.44 The consultation with children, young people and parents must include consultation about:

- the services children and young people with special educational needs or a disability require;
- how the information in the local offer is to be set out when published;

58 SEND Code, para 4.2.

59 CFA 2014 s30(5).

60 SI No 1530.

61 SEND Regs 2014 reg 54.

- how the information in the local offer will be available for those people without access to the internet;
 - how the information in the local offer will be accessible to those with special educational needs or a disability; and
 - how they can provide comments on the local offer.⁶²
- 4.45 The local authority must seek and publish at least annually comments on the ‘local offer’ from children, young people and parents. Comments can be made on ‘the content of [the] local offer, including the quality of the provision that is included and any provision that is not included’.⁶³
- 4.46 The ‘local offer’ must be published by placing it on the local authority’s website.⁶⁴ Arrangements must also be made to enable (i) people without access to the Internet and (ii) different groups, including people with special educational needs or a disability to obtain a copy.⁶⁵
- 4.47 The importance of ensuring ‘local offers’ meet these requirements was emphasised by the High Court in *R (L and P) v Warwickshire County Council*, where the local authority’s proposed ‘local offer’ was the was found to fall ‘a considerable distance short of the statutory requirements’.⁶⁶ This was because there was no provision identified in the majority of the categories set out in Schedule 2 to the regulations.

Duties on schools

Introduction

- 4.48 Schools, colleges and other educational institutions have wide ranging duties to identify and support children with SEN and disabilities, whether or not they have an EHC plan.
- 4.49 The key duties that are described in this chapter only apply to the following schools and other institutions in England unless otherwise stated:
- mainstream schools (which includes mainstream academies);
 - maintained nursery schools;

62 SEND Regs 2014 reg 55.

63 SEND Regs 2014 reg 56.

64 SEND Regs 2014 reg 57.

65 SEND Regs 2014 reg 57(b).

66 [2015] EWHC 203 (Admin); (2015) 18 CCLR 458 at [78].

- 16 to 19 academies;
- alternative provision academies;
- institutions within the further education sector;
- pupil referral units.

4.50 There are separate regulations governing non maintained (independent) schools.⁶⁷

4.51 The duties owed by educational institutions are in general the responsibility of the ‘appropriate authority’. For a maintained school, maintained nursery school, or institution within the further education sector, this will be the governing body. In the case of an Academy, this will be the proprietor/owner. For pupil referral units (PRUs), the appropriate authority will be the management committee. It is important to identify who the ‘appropriate authority’ is in order to ensure that any concerns about compliance with these important duties are raised with the correct body.

Key duties

4.52 Under CFA 2014 s66(2), schools and other educational institutions must use their best endeavours to secure that the special educational provision called for by the pupil’s or student’s special educational needs is made. This duty applies to all children with SEN, including those without an EHC plan. Where special educational provision is made for a child or young people at maintained school, a maintained nursery school, an Academy school, an alternative provision Academy or a PRU and no EHC plan is in place, the appropriate authority must ensure that the child’s parent or the young person is informed.⁶⁸

4.53 All schools and post 16 institutions are under a duty to co-operate with each responsible local authority, and each responsible local authority must co-operate with their partners, in the exercise of their functions.⁶⁹ This would include, for example, a request for advice for the purposes of an EHC needs assessments.

4.54 In addition, maintained nurseries and mainstream schools must ensure that children with SEN engage in the activities of the school together with children who do not have special educational needs.⁷⁰

67 Non-Maintained Special Schools (England) Regulations 2015 SI No 728. See further, Department for Education, *The Non-Maintained (Special) Schools Regulations: Departmental advice for non-maintained special schools*, August 2015.

68 CFA 2014 s68.

69 CFA 2014 s29(3).

70 CFA 2014 s35(2).

However, this duty applies only in so far as is reasonably practicable and is compatible with:

- the child receiving the special educational provision called for by his or her special educational needs⁷¹ – for example, the child may need 1:1 or small group work which takes them away from the classroom for certain periods;
- the provision of efficient education for the children with whom he or she will be educated⁷² – this exception should only be used rarely where there it is not possible for any adjustments to be made to avoid the incapability;⁷³ and
- the efficient use of resources.⁷⁴

4.55 There are also a number of supplemental obligations on schools which are set out in the SEND Code. These include:

- *Equality and inclusion*: paragraph 6.8 of the SEND Code says that schools should regularly review and evaluate the breadth and impact of the support they offer or can access. Schools must co-operate with the local authority in reviewing the provision that is available locally and in developing the local offer. Schools should also collaborate with other local education providers to explore how different needs can be met most effectively. They must have due regard to general duties to promote disability equality, in other words the public sector equality duty (PSED) (see para 9.99 below).
- *Careers guidance for children and young people*: paragraph 6.13 of the SEND Code states that maintained schools and pupil referral units must ensure that pupils from Year 8 until Year 13 are provided with independent careers guidance. Academies are also subject to this duty through their funding agreements.
- *Identifying SEN in schools*: paragraphs 6.14–6.35 of the SEND Code states all schools should have a clear approach to identifying and responding to SEN and should seek to identify pupils making less than expected progress given their age and individual circumstances, focusing on four broad areas of need:
 - communication and interaction;
 - cognition and learning;

71 CFA 2014 s35(3)(a).

72 CFA 2014 s35(3)(b).

73 See para 4.64 below and chapter 9 at para 9.44 for the duty to make reasonable adjustments under the Equality Act 2010.

74 CFA 2014 s35(3)(c).

- social, emotional and mental health difficulties;
- sensory and/or physical needs.
- The SEND Code states at para 6.63 that:
... where, despite the school having taken relevant and purposeful action to identify, assess and meet the SEN of the child or young person, the child or young person has not made expected progress, the school or parents should consider requesting an Education, Health and Care needs assessment. To inform its decision the local authority will expect to see evidence of the action taken by the school as part of SEN support.
- *Involving parents and pupils in planning and reviewing progress:* paragraphs 6.64–6.71 of the SEND Code states that schools must provide an annual report for parents on their child's progress. A record of the outcomes, action and support agreed through the discussion should be kept and shared with all the appropriate school staff. This record should be given to the pupil's parents. The school's management information system should be updated as appropriate.

The role of the SENCO

- 4.56 In mainstream schools and maintained nursery schools, there is a duty on the appropriate authority to designate a member of staff at the school (to be known as the 'SEN co-ordinator' or 'SENCO') as having responsibility for co-ordinating the provision for pupils with special educational needs.⁷⁵ The SENCO will play a central role in ensuring that children and young people receive the special educational provision that they require.
- 4.57 It will be for the appropriate authority of the school to determine the particular role and functions of the SENCO but they may include a range of tasks including selecting, supervising and training learning support assistants, advising teachers at the school about differentiated teaching methods, and identifying the pupil's special educational needs and co-ordinating the making of special educational provision which meets those needs.⁷⁶
- 4.58 SENCOs must meet minimum requirements for qualification and experience. This includes that they have been a qualified teacher working at the school and has been a SENCO for at least twelve months or has a postgraduate qualification in special educational

75 CFA 2014 s67(2).

76 SEND Regs 2014 reg 50.

needs co-ordination, for the time being known as ‘The National Award for Special Educational Needs Co-ordination’, awarded by a recognised body.⁷⁷

SEN information reports

4.59 The governing bodies of maintained schools and maintained nursery schools and the proprietors of Academy schools are also now required to prepare a report containing SEN information – known as the ‘SEN information report’ – about the implementation of its policy for pupils at the school with SEN.⁷⁸

4.60 The information that must be contained in the SEN information report is set out in Schedule 1 to the SEND Regs 2014 and includes, for example:

- the kinds of SEN for which provision is made at the school;
- information in relation to mainstream schools and maintained nursery schools, about the school’s policies for the identification and assessment of pupils with SEN;
- information about the school’s policies for making provision for pupils with SEN whether or not pupils have EHC plans;
- information on where the local authority’s local offer is published.

4.61 The SEN information report must be published on the school’s website.⁷⁹ It should act as an important reference point for parents and young people when deciding which school they wish to apply to attend or ask to be named in the EHC plan.

Duty to support pupils with medical conditions

4.62 CFA 2014 s100 imposes a legal duty on maintained schools and academies to make arrangements to support pupils with medical conditions, including children who do not have SEN or an EHC Plan.

4.63 Statutory guidance⁸⁰ published in April 2014 on ‘Supporting pupils at school with medical conditions’ sets out arrangements for Individual Healthcare Plans and other key duties including:

77 SEND Regs 2014 reg 49.

78 SEND Regs 2014 regs 51–52.

79 SEND Regs 2014 reg 52.

80 See CFA 2014 s100(2) for the obligation on appropriate authorities to ‘have regard’ to this guidance.

- The school should have a named person with overall responsibility for policy implementation.
- All schools must develop a policy for supporting pupils with medical conditions that is reviewed regularly and is readily accessible to parents and school staff. The policy must include:
 - the procedures to be followed whenever a school is notified that a pupil has a medical condition;
 - the role of individual healthcare plans, and who is responsible for their development, in supporting pupils at school with medical conditions;
 - arrangements for children who are competent to manage their own health needs and medicines;
 - the procedures to be followed for managing medicines;
 - what should happen in an emergency situation;
 - details of what is considered to be unacceptable practice (examples are provided in the guidance);
 - how complaints may be made and will be handled concerning the support provided to pupils with medical conditions.

Duties under the Equality Act 2010

4.64 Many children and young people with SEN will be disabled and will benefit from having the ‘protected characteristic’ of disability under the Equality Act 2010. This means that they have a right not to be discriminated against and can enforce a legal duty to make reasonable adjustments on a wide range of bodies, including schools and other providers of education.

4.65 This duty is not limited to schools and extends to all educational bodies that a child or young person might attend who are required to make adjustments to their policies and their premises and to provide auxiliary aids and services to avoid young people with disabilities being placed at a substantial disadvantage.

4.66 The reasonable adjustments duty requires those subject to it to anticipate the likely needs of disabled learners and take steps that are reasonable to meet those needs – with the cost of those reasonable steps to be met by the body concerned.

4.67 A failure to make a reasonable adjustment amounts to unlawful discrimination and can be challenged in a court or tribunal.

4.68 The reasonable adjustments duty requires action in the following three areas; policies, physical features and auxiliary aids or services. This means that the education provider must undertake an assessment of the young person’s needs and what detriment is being caused

by the relevant policy or physical feature or the failure to provide the relevant aid.

- 4.69 In deciding whether an adjustment is reasonable, the educational body can take into account the cost of the adjustment sought, the organisation's resources and size and the availability of financial support.
- 4.70 Other duties under the Equality Act 2010 include a prohibition on direct discrimination (refusing to provide a service because the person is disabled) and on treating a person less favourably because of a reason connected with their disability without justification (described as 'discrimination arising from disability').
- 4.71 For children whose impairment(s) give rise to an enhanced risk of physical aggression and so may be held to have a 'tendency to physical abuse', reg 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010⁸¹ has for many years excluded them from the definition of 'disability' where the act that resulted in the alleged discriminatory treatment arose from a 'tendency to physical abuse'. This has left many thousands of disabled children with diagnosis such as autism, who are excluded from school for reasons of physically aggressive behaviour, outside the protection of the Equality Act 2010. In these cases, schools would not have to show that their treatment was justified, and as part of that, would not have to demonstrate that reasonable adjustments were made prior to any exclusion decision. However, the Upper Tribunal has now found that reg 4(c) unlawfully discriminates against this group of children in breach of Article 14 ECHR and so the regulation will need to be disapplied in similar cases.⁸²
- 4.72 Further details in relation to duties under Equality Act 2010 are set out in chapter 9. There is a range of guidance about the implications of the Equality Act 2010 for schools and education providers from the Equality and Human Rights Commission (EHRC).⁸³ There is also a guide to the Equality Act 2010 for schools that is specific to disabled children published by the Council for Disabled Children.⁸⁴

81 SI No 2128.

82 *C & C v The Governing Body of a School, the Secretary of State for Education (First Interested Party) and the National Autistic Society (Second Interested Party) (SEN)* [2018] UKUT 269 (AAC).

83 For example, EHRC, *Technical Guidance for Schools in England*, last updated July 2014.

84 P Stobbs, *Disabled Children and the Equality Act 2010: What teachers need to know and what schools need to do, including responsibilities to disabled children and young people under the Children and Families Act 2014*, Council for Disabled Children, March 2015.

SEN support – early years, schools, colleges

- 4.73 In January 2019, 14.9 per cent of pupils in schools in England have identified SEN (equating to 1,318,300 pupils) with 3.1 per cent having an EHC Plan (equating to 236,165 pupils).⁸⁵ The majority of children with SEN will therefore not have an EHC plan and their needs will be met through a scheme of ‘SEN support’, a graduated approach to identifying and supporting pupils of SEN which will extend to young people in further education colleges/sixth forms.
- 4.74 Detailed information in relation to the SEN support system at each stage is set out in SEND Code:
- early years – paragraphs 5.36–5.60;
 - schools – paragraphs 6.44–6.99; and
 - further education – paragraphs 7.13–7.34.
- 4.75 All early years settings, schools and post 16 institutions should adopt an ‘assess, plan, do, review’ cycle. The SEND Code states at para 6.44 that:
- ... where a pupil is identified as having SEN, schools should take action to remove barriers to learning and put effective special educational provision in place. This SEN support should take the form of a four-part cycle through which earlier decisions and actions are revisited, refined and revised with a growing understanding of the pupil’s needs and of what supports the pupil in making good progress and securing good outcomes. This is known as the graduated approach. It draws on more detailed approaches, more frequent review and more specialist expertise in successive cycles in order to match interventions to the SEN of children and young people.
- 4.76 The SEND Code makes clear at para 5.44 that:
- This cycle of action should be revisited in increasing detail and with increasing frequency, to identify the best way of securing good progress. At each stage parents should be engaged with the setting, contributing their insights to assessment and planning. Importantly, class and subject teachers are still responsible even when the pupil is away from the main class for parts of their provision.
- 4.77 All school and academy sixth forms, sixth form colleges, further education colleges and 16–19 academies are provided with resources to support students with additional needs, including young people with SEN and disabilities.⁸⁶

⁸⁵ Department for Education, National Statistics – Special Educational Needs in England January 2019 *local authority*.

⁸⁶ SEND Code, para 7.28.

4.78 SEN support requires support for transitions between schools and phases of education. Paragraph 5.47 of the SEND Code states that:

SEN support should include planning and preparing for transition, before a child moves into another setting or school. This can also include a review of the SEN support being provided or the EHC plan. To support the transition, information should be shared by the current setting (in agreement with parents) with the receiving setting or school.

4.79 The guidance in the SEND Code on when schools or settings should seek an EHC plan is as follows:

Where, despite the setting having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child, the child has not made expected progress, the setting should consider requesting an EHC needs assessment.⁸⁷

Education, Health and Care needs assessments

Introduction

4.80 In order for a child or young person to obtain an EHC plan, there first needs to be an assessment of his or her needs. This is called an Education, Health and Care needs assessment. EHC plans are important documents; if correctly drafted they give rise to legally enforceable rights to special educational provision and give rights to request a particular placement.

4.81 An EHC needs assessment for a child or young person aged between 0 and 25 can be requested by:

- the child's parent;
- a young person over the age of 16 but under the age of 25;⁸⁸ and
- a person acting on behalf of a school or post-16 institution (the SEND Code states that this should be with the knowledge and agreement of the parent or young person where possible).⁸⁹

4.82 The SEND Code states at para 9.9 that:

87 SEND Code, para 5.49.

88 Where a young person lacks capacity, a request for an assessment must be made on their behalf by an 'alternative person', ie a parent or 'representative' – see chapter 11 at para 11.86.

89 CFA 2014 s36(1).

In addition, anyone else can bring a child or young person who has (or may have) SEN to the attention of the local authority, particularly where they think an EHC needs assessment may be necessary. This could include, for example, foster carers, health and social care professionals, early years practitioners, youth offending teams or probation services, those responsible for education in custody, school or college staff or a family friend. This should be done with the knowledge and, where possible, agreement of the child's parent or the young person. Where a child or young person has been brought to the local authority's attention, they must determine whether an EHC needs assessment is required.⁹⁰

- 4.83 There is a right to request an assessment up to the young person's 25th birthday.⁹¹

Criteria for assessment

- 4.84 CFA 2014 s36 provides that when a request for an EHC needs assessment for a child or young person is made, the local authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

- 4.85 In making this determination, the local authority must consult the child's parent or the young person as soon as practical after receiving a request and notify the parent or young person that they have the right to express views to the authority (orally or in writing) and submit evidence.⁹²

- 4.86 Where a local authority is considering whether to secure an EHC needs assessment, it must also notify:

- the responsible CCG;
- the officers of the local authority who exercise the local authority's social services functions for children or young people with SEN;
- in relation to a child, the head teacher of the school the child or if the child receives education from a provider of relevant early years education, the person identified as having responsibility for SEN (if any) in relation to that provider;
- in relation to a young person, the head teacher of the school or if the young person is a student at a post-16 institution, to the principal of that institution.⁹³

90 CFA 2014 s36(3).

91 SEND Code, para 9.115.

92 SEND Regs 2014 reg 3.

93 SEND Regs 2014 reg 4(2).

- 4.87 The local authority must secure an EHC needs assessment for the child or young person if, after regard to the views of the parent or young person and evidence submitted, the local authority is of the opinion that:
- a) the child or young person has or may have SEN; and
 - b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.⁹⁴
- 4.88 In relation to a young person over the age of 18, the local authority must consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.⁹⁵
- 4.89 Higher education (HE) is excluded from the definition of education under the Part 3 of CFA 2014⁹⁶ and an HE education institution cannot be named in Section I of an EHC plan. The Upper Tribunal has therefore held that if a young person is simply seeking a placement in HE, then a local authority is not obliged to carry out an EHC needs assessment as: 'An assessment would be pointless because it could not lead to an EHC plan that would deliver what the young person wants'.⁹⁷ That said, the Upper Tribunal also held that there are some courses which may be offered by HE institutions which are not HE courses as these can still fall within the scope of the CFA 2014.⁹⁸ Accordingly, when deciding whether or not an assessment is necessary, the local authority should have regard to the type of HE course the young person wishes to access.
- 4.90 Paragraph 9.14 of the SEND Code sets out factors which local authorities must pay particular attention to when determining whether an EHC needs assessment is required. These include:
- academic attainment and rates of progress;
 - nature, extent and context of the child or young person's SEN;
 - evidence of action already being taken by placement;
 - evidence that where progress has been made, it is only as a result of additional intervention and support above that usually provided;
 - evidence of physical, emotional and social development and health needs.

94 CFA 2014 s36(8).

95 CFA 2014 s36(10).

96 CFA 2014 s83(4).

97 *Royal London Borough of Kensington and Chelsea v GG (SEN)* [2017] UKUT 0141 (AAC).

98 A course will be excluded from the CFA 2014 if it is a type listed in Education Reform Act 1988 Sch 6.

- 4.91 Local authorities may develop criteria to help them decide whether to carry out an EHC assessment, but must be prepared to depart from criteria where there are good reasons to do so.⁹⁹ They must not apply a blanket policy to particular groups/types of needs, and must consider the child or young person's needs individually and on their merits, applying the tests in section 36.
- 4.92 Where the local authority determines that it is not necessary for special educational provision to be made in accordance with an EHC plan, it must notify the child's parent or young person of:
- the reasons for the determination not to secure an EHC needs assessment;
 - their right of appeal;
 - the time limits for doing so;
 - information concerning mediation;
 - the availability of disagreement resolution services and information and advice about matters relating to the SEN of children and young people.¹⁰⁰
- 4.93 The local authority is not required to secure an EHC needs assessment if the child or young person has been assessed during the previous six months, although can do so if it considers necessary.¹⁰¹
- 4.94 The local authority must make its determination regarding whether to secure an EHC needs assessment within six weeks of the request subject to exceptions outlined below.¹⁰²

The assessment process

- 4.95 Where the local authority secures an EHC needs assessment for a child or young person, it must seek advice and information on the needs of the child or young person, what provision may be required to meet such needs and the outcomes that are intended to be achieved by the child or young person receiving that provision from the following persons on the following topics:
- the child's parent or the young person;
 - manager, head teacher or principal of education institution;
 - medical advice and information from a health care professional identified by the responsible commissioning body (usually the CCG);

⁹⁹ SEND Code, para 9.16.

¹⁰⁰ CFA 2014 s36(5) and SEND Regs 2014 reg 5(3).

¹⁰¹ SEND Regs 2014 reg 24.

¹⁰² SEND Regs 2014 reg 4(1).

- psychological advice and information from an educational psychologist;
 - advice and information in relation to social care;
 - any other person the local authority thinks is appropriate;
 - any person the child's parents or young person reasonably request the local authority obtain advice from;
 - from Year 9 onwards – advice to assist with preparation for adulthood and independent living;
 - where it appears that the child or young person is either visually or hearing impaired or both, the school or placement should consult with a person who is qualified to teach children or young people with visual or hearing impairment before they provide their advice.¹⁰³
- 4.96 When the local authority is requesting advice, they must provide the person or body with a copy of any representations made by the child's parent of the young person and any evidence submitted.¹⁰⁴
- 4.97 Partners must respond within a maximum of six weeks of requests for advice,¹⁰⁵ although there are exceptions to the time limits as outlined at para 4.105 below.
- 4.98 SEND Regs 2014 reg 7 states that when securing an EHC needs assessment a local authority must:
- consult the child and the child's parent, or the young person and take into account their views, wishes and feelings;
 - consider any information provided to the local authority by or at the request of the child, the child's parent or the young person;
 - consider the information and advice obtained;
 - engage the child and the child's parent, or the young person and ensure they are able to participate in decisions; and
 - minimise disruption for the child, the child's parent, the young person and their family.
- 4.99 There is an emphasis in the SEND Code on ensuring all assessments have a person centred approach and there is effective co-ordination. Paragraph 9.22 of the SEND Code states that the assessment and planning process should:
- focus on the child or young person as an individual;
 - enable children and young people and their parents to express their views, wishes and feelings;

103 SEND Regs 2014 reg 6.

104 SEND Regs 2014 reg 6(3).

105 SEND Regs 2014 reg 8(1).

- enable children and young people and their parents to be part of the decision-making process;
- be easy for children, young people and their parents or carers to understand, and use clear ordinary language and images rather than professional jargon;
- highlight the child or young person's strengths and capabilities;
- enable the child or young person, and those that know them best to say what they have done, what they are interested in and what outcomes they are seeking in the future;
- tailor support to the needs of the individual;
- organise assessments to minimise demands on families;
- bring together relevant professionals to discuss and agree together the overall approach;
- deliver an outcomes-focused and co-ordinated plan for the child or young person and their parent;
- support and encourage the involvement of children, young people and parents or carers by:
 - providing them with access to the relevant information in accessible formats;
 - giving them time to prepare for discussions and meetings; and
 - dedicating time in discussions and meetings to hear their views.

4.100 In addition, the local authority must not seek any of the advice referred to above if such advice has previously been provided for any purpose and the person providing that advice, the local authority and the child's parent or the young person are all satisfied that it is sufficient for the purposes of an EHC needs assessment.¹⁰⁶

4.101 When securing an EHC needs assessment, the local authority must also consider whether the child's parent or the young person requires any information, advice and support in order to enable them to take part effectively in the EHC needs assessment, and if it considers that such information, advice or support is necessary, it must provide it.¹⁰⁷

Timescales

4.102 If a local authority decides, following an EHC needs assessment, not to issue an EHC plan, it must inform the child's parent or young

106 SEND Regs 2014 reg 6(4).

107 SEND Regs 2014 reg 4(9).

person within a maximum of 16 weeks from the request for an EHC needs assessment.¹⁰⁸

- 4.103 Where the local authority decides to issue an EHC plan, the child's parent or young person must be provided with a draft plan and given 15 days to provide their views.¹⁰⁹
- 4.104 The entire process of EHC needs assessment and EHC plan development, from the point when an assessment is requested (or a child or young person is brought to the local authority's attention) until the final EHC plan is issued, must take no more than 20 weeks.¹¹⁰
- 4.105 Where there are exceptional circumstances, it may not be reasonable to expect local authorities and others partners to comply with the time limits above. The SEND Regs 2014 set out specific exemptions. These include where:
- the local authority has requested advice from the head teacher or principal of a school or post-16 institution during a period beginning one week before any date on which that school or institution was closed for a continuous period of not less than four weeks from that date and ending one week before the date on which it re-opens;
 - exceptional personal circumstances affect the child, the child's parent or the young person during that time period; or
 - the child, the child's parent or the young person, are absent from the area of the authority for a continuous period of not less than four weeks during that time period referred to.¹¹¹
- 4.106 Where these timescales are not met, the child's parents or the young person would be able to challenge this failure either under the local authority's complaints procedure or by way of judicial review.

Education, health and care plans

Overview

- 4.107 CFA 2014 s37 states that a local authority must issue an EHC plan where, in the light of an EHC needs assessment, it is necessary for

108 SEND Regs 2014 reg 10(1).

109 SEND Regs 2014 reg 13(1)(a).

110 SEND Regs 2014 reg 13(2).

111 SEND Regs 2014 regs 10(4) and 13(3).

special educational provision to be made for a child or young person in accordance with an EHC plan.

4.108 Paragraphs 9.54 and 9.55 of the SEND Code set out the factors which local authorities should consider when deciding whether to issue a plan. These include:

- the child or young person's SEN and the special educational provision made for the child or young person;
- whether the information from the EHC needs assessment confirms the information available on the nature and extent of the child or young person's SEN prior to the EHC needs assessment; and
- whether the special educational provision made prior to the EHC needs assessment was well matched to the SEN of the child or young person.

4.109 Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account:

- whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions; or
- whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan.¹¹²

4.110 In considering what resources are normally available in mainstream schools, it is necessary to consider what the local authorities have set out in its 'local offer' (see para 4.41 above). Many local authorities will apply a 'resource line' of £6,000 per annum of special educational provision under which schools are expected to meet children's needs from within their own notional SEN budget. The Upper Tribunal has accepted that:

... there is a clear, albeit rough and ready resource line to be crossed before an EHC plan is considered to be necessary. It is based on the kinds of provision a school could make from its own notional SEN budget¹¹³

However, it will still be necessary to consider what a particular school is actually able to offer.

112 SEND Code, para 9.56

113 *CB v Birmingham CC* [2018] UKUT 13 (AAC).

- 4.111 The ultimate question is, without an EHC plan, ‘can the child’s special educational needs be met through provision from the resources normally available to a mainstream school *and* will they actually be met’?¹¹⁴
- 4.112 The Upper Tribunal has also held that there may be other reasons why an EHC plan is ‘necessary’ beyond the question of whether the child’s needs can reasonably be met from the resources normally available to mainstream schools. What is ‘necessary’ has ‘a spectrum of meanings, somewhere between indispensable and useful’ and will vary according to the particular circumstances of the case.¹¹⁵
- 4.113 Where a local authority decides it is necessary to issue an EHC plan, it must notify the child’s parent or the young person and give the reasons for its decision.¹¹⁶ The local authority should ensure it allows enough time to prepare the draft plan and complete the remaining steps in the process within the 20-week overall time limit within which it must issue the finalised EHC plan.¹¹⁷

Contents of the EHC plan

- 4.114 Paragraph 9.61 of the SEND Code sets out the key requirements and principles which apply to local authorities and those contributing to the preparation of an EHC plan. These include:
- EHC plans should be clear, concise, understandable and accessible and written so they can be understood by professionals in any local authority.
 - EHC plans should be forward looking – for example, anticipating, planning and commissioning for important transition points in a child or young person’s life, including planning and preparing for their transition to adult life.
- 4.115 The SEND Code states at para 9.62 that:
- As a statutory minimum, EHC plans must include the following sections, which must be separately labelled from each other. The sections do not have to be in the order below and local authorities may use an action plan in tabular format to include different sections and demonstrate how provision will be integrated, as long as the sections are separately labelled.

114 *JP v Sefton MBC* [2017] UKUT 0364 (AAC); *DH & GH v Staffordshire CC* [2018] UKUT 49 (AAC).

115 *Hertfordshire CC v (1) MC, (2) KC (SEN)* [2016] UKUT 0385 (AAC).

116 CFA 2014 s36(9).

117 SEND Regs 2014 reg 13(2).

Format of EHC plan:

- A the views, interests and aspirations of the child and his parents or the young person;
- B the child or young person's special educational needs;
- C the child or young person's health care needs which relate to their special educational needs;
- D the child or young person's social care needs which relate to their special educational needs or to a disability;
- E the outcomes sought for the child or young person;
- F the special educational provision required by the child or young person;
- G any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN;
- H1 any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 and
- H2 any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN;
- I the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person; and
- J where any special educational provision is to be secured by a direct payment, the SEN and outcomes to be met by the direct payment.

4.116 In addition, from Year 9, the EHC plan must include (in sections F, G, H1 or H2 as appropriate) the provision required to assist in preparation for adulthood and independent living – for example, support for finding employment, housing or for participation in society.¹¹⁸

4.117 Paragraph 9.69 of the SEND Code states that:

Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise, including where this support is secured through a Personal Budget.

118 SEND Regs 2014 reg 12(3).

- 4.118 Where a child is at a special school or college, rather than a mainstream placement, that may be a factor to be taken into account in allowing greater flexibility.¹¹⁹ However, the Upper Tribunal has also held that ‘even for a child in specialist provision, the requirement of specificity cannot be abandoned where detail could reasonably be provided’.¹²⁰
- 4.119 The Council for Disabled Children has published guidance which provides examples of good practice when drafting EHC Plans.¹²¹

Outcomes

- 4.120 EHC plans must specify the outcomes sought for the child or young person in section E.¹²² The outcomes section of an EHC plan is very important because the duty to maintain the plan after a young person’s 18th birthday depends on whether the outcomes have been achieved. Despite their importance, the outcomes section cannot however be appealed to the tribunal; the only legal remedy in relation to a flawed outcomes section of a plan is judicial review.
- 4.121 The SEND Code suggests at para 9.64 that:

EHC plans should be focused on education and training, health and care outcomes that will enable children and young people to progress in their learning and, as they get older, to be well prepared for adulthood.

The SEND Code goes on to give the following general guidance on outcomes:

EHC plans can also include wider outcomes such as positive social relationships and emotional resilience and stability. Outcomes should always enable children and young people to move towards the long-term aspirations of employment or higher education, independent living and community participation.

- 4.122 Paragraph 9.66 of the SEND Code provides a definition of outcomes as follows:

An outcome can be defined as the benefit or difference made to an individual as a result of an intervention. It should be personal and not expressed from a service perspective; it should be something that those involved have control and influence over, and while it does not

119 *East Sussex CC v TW* [2016] UKUT 528 (AAC).

120 *B-M and B-M v Oxfordshire CC (SEN)* [2018] UKUT 35 (AAC).

121 See: <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/EHCP%20Exemplar%20Guide%202017.pdf>.

122 SEND Code, para 9.64.

always have to be formal or accredited, it should be specific, measurable, achievable, realistic and time bound (SMART). When an outcome is focused on education or training, it will describe what the expected benefit will be to the individual as a result of the educational or training intervention provided.

4.123 Outcomes are not a description of the service being provided – for example, the provision of speech and language therapy is not an outcome. The outcome is what it is intended that the speech and language therapy will help the individual to do that they cannot do now and by when this will be achieved.¹²³

4.124 In all cases, EHC plans must specify the special educational provision required to meet each of the child or young person's SEN. The provision should enable the outcomes to be achieved.¹²⁴

4.125 The SEND Code addresses the relationship between shorter term targets and longer term outcomes at para 9.69:

The EHC plan should also specify the arrangements for setting shorter term targets at the level of the school or other institution where the child or young person is placed. Professionals working with children and young people during the EHC needs assessment and EHC plan development process may agree shorter term targets that are not part of the EHC plan. These can be reviewed and, if necessary, amended regularly to ensure that the individual remains on track to achieve the outcomes specified in their EHC plan. Professionals should, wherever possible, append these shorter term plans and targets to the EHC plan so that regular progress monitoring is always considered in the light of the longer term outcomes and aspirations that the child or young person wants to achieve. In some exceptional cases, progress against these targets may well lead to an individual outcome within the EHC plan being amended at times other than following the annual review.

The draft EHC plan and requests for a particular school, college or other institution

4.126 Before issuing the final EHC plan, the child's parents or the young person must be sent plans in draft and given 15 days to make representations including on particular school named.¹²⁵

123 SEND Code, para 9.66. For practical guidance, see Council for Disabled Children, *EHC Outcomes Pyramid*, September 2014.

124 SEND Code, para 9.68.

125 SEND Regs 2014 reg 13(1).

- 4.127 The SEND Code states at para 9.77 that when the local authority sends the draft EHC plan to the child's parent or the young person, the following apply:
- The local authority must notify the child's parent or the young person that during this period they can request that a particular school or other institution, or type of school or other institution, be named in the plan. The draft plan must not contain the name of the school, maintained nursery school, post-16 institution or other institution or the type of school or other institution to be attended by the child or young person.¹²⁶
 - The local authority must advise the child's parent or the young person where they can find information about the schools and colleges that are available for the child or young person to attend, for example through the local offer.¹²⁷
 - The local authority should also seek agreement of any personal budget specified in the draft plan.¹²⁸

Placements under EHC plans

- 4.128 Where a particular school is requested, the local authority must consult with governing body and relevant local authority if out of area.¹²⁹
- 4.129 The child's parent or the young person has the right to request a particular school, college or other institution of the following type to be named in their EHC plan:
- maintained nursery school;
 - maintained school and any form of academy or free school (mainstream or special);
 - further education or sixth form college;
 - independent special school or independent specialist colleges (where they have been approved for this purpose by the secretary of state and published in a list available to all parents and young people).¹³⁰

126 SEND Regs 2014 reg 13(1)(a)(i).

127 SEND Regs 2014 reg 13(1)(b).

128 SEND Code, para 9.77.

129 CFA 2014 s39(2).

130 CFA 2014 ss38(3) and 41. Parents may also make representations for places in non-maintained early years provision and independent schools or colleges not on the approved list. These requests must be considered in accordance with Education Act 1996 s9. See SEND Code at para 9.84.

- 4.130 CFA 2014 s39 provides that the local authority must name the requested school or other institution in the EHC plan names the school or other institution specified in the request, unless:
- the school is unsuitable for the age, ability, aptitude or SEN of the child or young person concerned; or
 - the attendance of the child or young person at the requested school or other institution would be incompatible with:
 - the provision of efficient education for others; or
 - the efficient use of resources.
- 4.131 In determining whether attendance would be incompatible with the efficient use of resources, the local authority must consider the cost to the public purse generally when comparing the costs of the parents' requested school with the LA's own provision. The Upper Tribunal has clarified that:
- for maintained special schools and maintained specialist units, the place funding is ignored for the purposes of calculating relative placement cost;
 - for maintained mainstream schools, the age weighted pupil unit (AWPU) is taken into account as an additional cost, as is any further funding provided to meet the child's needs.¹³¹
- 4.132 The Upper Tribunal has also held that when determining whether to name an independent school in section I, this would only be an inefficient use of resources if there was a more efficient option available which was appropriate. In deciding whether a particular placement is appropriate, the Upper Tribunal held that the First-tier Tribunal had not erred when placing significant weight on the strongly held wishes of the child that he did not wish to attend the School. In that case, the First-tier Tribunal had found that the child had 'formed an entrenched and currently intractable opposition to attending [school R] or any mainstream provision' and the evidence of the educational psychologist was that these views were rooted in his SEN (rather than being influenced by his parents) and would most likely result in the placement failing. Accordingly, it was concluded the mainstream placement was not appropriate and the independent school was named.¹³²

131 *Hammersmith and Fulham LBC v L and F; O and H v Lancashire CC* [2015] UKUT 523 (AAC), see summary at [6]–[9]. Although this was a decision in the context of Education Act 1996 s9 it would appear also to apply where the relevant statutory provision is CFA 2014 s39.

132 *St Helens BC v TE and another* [2018] UKUT 278 (AAC).

- 4.133 The SEND Code states at para 9.88 that where a parent or young person does not make a request for a particular nursery, school or college, or does so and their request is not met, the local authority must specify mainstream provision in the EHC plan unless it would be:
- against the wishes of the parent or young person; or
 - incompatible with the efficient education of others.¹³³
- 4.134 Mainstream education cannot be refused by a local authority on the grounds that it is not suitable: SEND Code, para 9.89.
- 4.135 If the local authority considers a particular mainstream place to be incompatible with the efficient education of others, it must demonstrate that there are no reasonable steps that it, or the school or college, could take to prevent that incompatibility.¹³⁴
- 4.136 Where a school is named in section I of an EHC plan but considers that it is unsuitable for the child or young person, then it is able to challenge that decision by way of judicial review.¹³⁵ It can also request that the Secretary of State for Education intervene where it considers a local authority has acted unlawfully.¹³⁶

Finalising and maintaining the EHC plan

- 4.137 Regulation 14 of the SEND Regs 2014 provides that the finalised EHC plan must be in the form of the draft plan, or in a form modified in the light of the representations made by the child's parent or young person.
- 4.138 When sending a copy of the finalised EHC plan to the child's parent or the young person, the local authority must notify them of:
- their right to appeal matters within the EHC plan;
 - the time limits for doing so;
 - the information concerning mediation;
 - the availability of:
 - disagreement resolution services; and
 - advice and information about matters relating to the special educational needs of children and young people.¹³⁷

133 CFA 2014 s33(2).

134 CFA 2014 s33(3) and SEND Code, para 9.90.

135 *R (An Academy Trust) v Medway Council* [2019] EWHC 156 (Admin).

136 Education Act 1996 s496.

137 SEND Regs 2014 reg 14(2).

- 4.139 CFA 2014 s42(2) provides that local authorities must secure the specified special educational provision in the EHC plan. Section 43 requires any of a wide range of schools, colleges and institutions to admit a child or young person if named in their EHC plan. If a local authority names an independent school or independent college in the plan as special educational provision, it must also meet the costs of the fees, including any boarding and lodging where relevant.¹³⁸
- 4.140 The specific duties in relation to maintaining the health and social care aspects of the plans are summarised in chapters 5 and 3 respectively.
- 4.141 Once a plan has been finalised, the child or young person is entitled to receive the special educational provision at all times and it can only be amended by a local authority in accordance with the legislation and SEND Code of Practice. This means that they can only be amended following the process for Review or Re-assessment outlined below. Further, in order to legitimately trigger this process the power must be used lawfully and rationally.¹³⁹

Ceasing to maintain the EHC plan

- 4.142 Decisions to cease to maintain an EHC plan are governed by CFA 2014 s45. There are only two bases on which a local authority can decide to cease to maintain a plan:
- the authority is no longer responsible for the child or young person; or
 - the authority determines that it is no longer necessary for the plan to be maintained.¹⁴⁰ The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan.¹⁴¹
- 4.143 Importantly, section 45(3) is clear that in deciding whether a young person over 18 no longer requires the special educational provision specified in the plan, 'a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved'. This is why the outcomes section of any plan is of critical importance, particularly a plan for a child who is approaching trans-

138 SEND Code, para 9.131.

139 *R (S) v Camden LBC* [2018] EWHC 3354 (Admin); (2019) 22 CCLR 208.

140 CFA 2014 s45(1).

141 CFA 2014 s45(2).

ition to adulthood. However, the Upper Tribunal has held¹⁴² that although ‘outcomes’ in the EHC plan are one factor to consider, there are numerous reasons why it may be necessary to continue to maintain an EHC plan, and local authorities must not simply consider whether the outcomes have been achieved. It is also necessary to consider the young person’s educational and training aspirations (set out in section A); the reasons why the outcomes were achieved; and whether the young person’s SEN profile has altered. Before making the decision, local authorities must ensure that they have up to date information and assessments regarding the young person’s educational needs. The Upper Tribunal stated that:

In deciding whether to cease to maintain an EHC Plan, a local authority should ask itself whether a young person would meet the test for preparing and maintaining an EHC Plan in 3 the first instance. If the answer is ‘yes’, I do not see how a local authority could properly decide that it is no longer necessary for an EHC Plan to be maintained.

4.144 Where a local authority decides that an EHC plan is no longer necessary because the outcomes can be achieved through social care provision, the Upper Tribunal has emphasised that the social care provision needs to be practically available in reality and not merely theoretical.¹⁴³

4.145 The Upper Tribunal has also held that when deciding whether a young person could still benefit from educational provision, that it is not necessary for the young person to be working towards any formal qualifications; finding that:

For many of those to whom the 2014 Act and Regulations apply, attaining any qualifications at all is not an option. That does not mean that they do not require, or would not benefit from, special educational provision.¹⁴⁴

In that case it was accepted by the tribunal that even though ‘further achievements may be small’, they would be valuable in the young person’s life.

4.146 If there is a decision to cease to maintain a plan, it must continue to be maintained until the end of the period allowed for bringing an appeal under section 51 against its decision to cease to maintain the plan or until the appeal is finally determined.¹⁴⁵

142 *B & M v Cheshire East Council* [2018] UKUT 232 (AAC).

143 *Buckinghamshire County Council v SJ* [2016] UKUT 0254 (AAC).

144 *Buckinghamshire County Council v SJ* [2016] UKUT 0254 (AAC).

145 CFA 2014 s45(4).

4.147 Specific circumstances where a local authority must not cease to maintain a plan are set out in regs 29–30 of the SEND Regs 2014. The procedure which must be followed in determining whether to cease to maintain a plan is mandated by regulation 31. In particular, the local authority must:

- inform the child's parent or the young person that it is considering ceasing to maintain the child or young person's EHC plan;
- consult the child's parent or the young person; and
- consult the head teacher, principal or equivalent person at the educational institution that is named in the EHC plan.

Reviews

4.148 CFA 2014 s44 requires local authorities to review EHC plans every 12 months starting on the date the plan was first made. Regulation 18 of the SEND Regs 2014 provides further specific circumstances where plans must be reviewed.

4.149 Where a child or young person is within 12 months of a transfer between phases of education, the local authority must review and amend the plan to include the placement the child or young person will attend following transfer no later than:

- 31 March in the calendar year of the child or young person's transfer from secondary school to a post-16 institution; and
- 15 February in the calendar year of the child's transfer in any other case.¹⁴⁶

4.150 Where it is proposed that a young person transfers from one post-16 institution to another post-16 institution at any other time, the local authority must review and amend the EHC plan at least five months before that transfer takes place so that it names the post-16 institution that the young person will attend following the transfer.¹⁴⁷

4.151 Where a child or young person is due to transfer from a secondary school to a post-16 institution on 1 September 2015 the local authority must amend and review the EHC plan before 31 May 2015.¹⁴⁸

4.152 Local authorities should consider reviewing an EHC plan for a child under five at least every three to six months to ensure that the provision continues to be appropriate. Such reviews would be in

146 SEND Regs 2014 reg 18(1).

147 SEND Regs 2014 reg 18(2).

148 SEND Regs 2014 reg 18(3).

addition to the annual review and are not subject to the same requirements regarding invitations and obtaining advice. However, the child's parent must be fully consulted on any proposed changes to the EHC plan and made aware of their right to appeal to the tribunal – both if they do not agree with the proposed changes and if no changes are made.¹⁴⁹

4.153 When undertaking a review of an EHC plan, a local authority must:

- consult the child and the child's parent or the young person, and take account of their views, wishes and feelings;
- consider the child or young person's progress towards achieving the outcomes specified in the EHC plan and whether these outcomes remain appropriate for the child or young person; and
- consult the school or other institution attended by the child or young person.¹⁵⁰

4.154 Where the child or young person attends a school, the local authority can require the head teacher or principal of the school to arrange and hold the meeting. The local authority can ask a further education college to convene the review.¹⁵¹

4.155 The following persons must be invited to attend with at least two weeks' notice:

- the child's parent or the young person;
- the provider of the relevant early years education or the head teacher or principal of the school, post-16 or other institution attended by the child or young person;
- relevant local authority officers in relation to SEN and social care functions; and
- a health care professional identified by the responsible commissioning body to provide advice about health care provision in relation to the child or young person.¹⁵²

4.156 The person arranging the review meeting must obtain advice and information about the child or young person from the persons invited to attend and must circulate it to those persons at least two weeks in advance of the review meeting.¹⁵³

149 SEND Code, para 9.178.

150 SEND Regs 2014 reg 19.

151 SEND Regs 2014 reg 20.

152 SEND Regs 2014 reg 20(2) and (3).

153 SEND Regs 2014 reg 20(4).

- 4.157 The child or young person's progress towards achieving the outcomes specified in the EHC plan must be considered at the meeting.¹⁵⁴ This requirement is particularly important for young people aged over 18 as the educational and training outcomes will determine whether the EHC plan ceases.
- 4.158 When the child or young person is in or beyond Year 9, the review meeting must consider what provision is required to assist the child or young person in preparation for adulthood and independent living.¹⁵⁵
- 4.159 Following the review, the head teacher or principal of the school or educational institution must prepare a written report which sets out any recommendations or amendments to be made to the EHC plan. The report must include the advice and information obtained prior to the annual review.¹⁵⁶ The report must be prepared within two weeks of the review meeting and sent to everyone who was invited to attend/prepared advice.¹⁵⁷
- 4.160 When the local authority receives the report they must decide whether to:
- continue to maintain the EHC plan in its current form;
 - amend it; or
 - cease to maintain it.¹⁵⁸
- 4.161 The local authority must notify the child's parent or the young person of their decision within four weeks of the review meeting and, if the decision is to continue the plan in its previous form or cease to maintain it, inform them of:
- their right to appeal;
 - the time limits for doing so; and
 - information concerning mediation and the availability of disagreement resolution services and information and advice.¹⁵⁹
- 4.162 Where a local authority decides to make amendments following the annual review it must:
- send the child's parent or the young person a copy of the EHC plan together with a notice specifying the proposed amendments,

154 SEND Regs 2014 reg 20(5).

155 SEND Regs 2014 reg 20(6).

156 SEND Regs 2014 reg 20(7) and (9).

157 SEND Regs 2014 reg 20(9).

158 SEND Regs 2014 reg 20(10).

159 SEND Regs 2014 reg 20(11).

together with copies of any evidence which supports those amendments;

- provide the child's parent or the young person with notice of their right to request that a particular school or other institution is named in the plan;
- give them at least 15 days, beginning with the day on which the draft plan was served, in which to:
 - make representations about the content of the draft plan;
 - request that a particular school or other institution be named in the plan;
 - request a meeting with an officer of the local authority; and
 - advise them where they can find information about the schools and colleges.¹⁶⁰

- 4.163 The local authority must then send the finalised EHC plan to the child's parent or young person, the governing body or principal of the school or educational institution and the CCG, as soon as possible and in any event within eight weeks of first sending the plan and proposed amendments to the parent and notify them of the matters specified at para 4.161 above.¹⁶¹

Re-assessments

- 4.164 Provided that an assessment has not been undertaken within the previous six months, and the local authority considers it is necessary, the local authority must carry out a re-assessment of the educational, health care and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by:
- the child's parent or the young person;
 - governing body, proprietor or principal of the school or institution which the child or young person attends; or
 - the responsible CCG.¹⁶²
- 4.165 The local authority may also secure a re-assessment of those needs at any other time if it thinks it necessary.¹⁶³
- 4.166 The local authority must notify the child's parent or the young person whether or not it is necessary to reassess the child or young

160 SEND Regs 2014 reg 22.

161 SEND Regs 2014 reg 22.

162 CFA 2014 s44(2) and SEND Regs 2014 reg 24.

163 CFA 2014 s44(3).

person within 15 days of receiving the request to re-assess.¹⁶⁴ Where the local authority does not consider it is necessary to re-assess they must notify them of:

- their right to appeal;
- the time limits for doing so;
- information concerning mediation and the availability of disagreement resolution services and information and advice.¹⁶⁵

4.167 If, at any time, a local authority proposes to amend an EHC plan, it shall proceed as if the proposed amendment were an amendment proposed after a review, with parents or young people having the same appeal rights and entitlement to notification.¹⁶⁶

Personal budgets

4.168 The SEND Code states at para 9.95 that:

A personal budget is an amount of money identified by the local authority to deliver provision set out in an EHC plan where the parent or young person is involved in securing that provision.¹⁶⁷

It can include funding for education, health and social care.

4.169 The right to a personal budget and right to request a direct payment in respect of SEN provision offer opportunities to parents and young people to be able to use funding available to access specialist interventions which may not ordinarily be commissioned or available within local authorities.

4.170 This is recognised in the SEND Code, which says at para 9.61 that where a young person or parent is seeking an innovative or alternative way to receive their support services – particularly through a personal budget, but not exclusively so – then the planning process should include the consideration of those solutions with support and advice available to assist the parent or young person in deciding how best to receive their support.

4.171 It is therefore important that parents, young people and professionals working with them understand how personal budgets and direct payments work, and when they can be accessed.

164 SEND Regs 2014 reg 25(1).

165 SEND Regs 2014 reg 25(2).

166 SEND Regs 2014 reg 28.

167 CFA 2014 s49(2).

- 4.172 Parents and young people have a right to request a personal budget figure be included on the EHC plan.¹⁶⁸ There is no right for a personal budget or direct payment for education where a child or young person does not have an EHC plan.
- 4.173 Each local authority must have a policy on personal budgets as part of their local offer which should include:
- a description of the services across education, health and social care that currently lend themselves to the use of personal budgets;
 - how that funding will be made available;
 - clear and simple statements of eligibility criteria and the decision-making processes.¹⁶⁹
- 4.174 The local authority is not required to prepare a personal budget for special educational provision which is secured by the local authority under an arrangement with a third party (such as the NHS) where the local authority pays an aggregate sum for the provision and a notional amount for that child's particular provision cannot be disaggregated without having an adverse impact on other services or if it would not be an efficient use of the local authority's resources.¹⁷⁰ This amendment appears to have been made to alleviate local authority concerns about the burden of having to prepare a personal budget in such cases.
- 4.175 A request for a personal budget can be made at any time during the EHC needs assessment process or when a draft EHC plan is prepared.¹⁷¹
- 4.176 There are four ways in which a personal budget can be delivered:
- 1) *direct payments* – where individuals receive the cash to contract, purchase and manage services themselves;
 - 2) *an arrangement* – whereby the local authority, school or college holds the funds and commissions the support specified in the plan (these are sometimes called notional budgets);
 - 3) *third party arrangements* – where funds (direct payments) are paid to and managed by an individual or organisation on behalf of the child's parent or the young person;
 - 4) *a combination of the above*.¹⁷²

168 CFA 2014 s49(1).

169 SEND Code, para 9.96.

170 Special Educational Needs (Personal Budgets) Regulations 2014 SI No 1652 reg 4A.

171 Special Educational Needs (Personal Budgets) Regulations 2014 reg 4(1).

172 SEND Code, para 9.101.

- 4.177 The first step in setting a personal budget figure is for the local authority to provide an indication of the level of funding required. This is called an ‘indicative budget’ or ‘indicative figure’. It can be calculated through a resource allocation scheme or banded funding system but this should only be a starting point and local authorities should be clear that any figure discussed at this stage an indicative amount only.¹⁷³
- 4.178 The final allocation of funding budget must be sufficient to secure the agreed provision specified in the EHC plan and must be set out as part of that provision.¹⁷⁴
- 4.179 Local authorities must consider each request for a personal budget on its own individual merits. If a local authority is unable to identify a sum of money for a particular provision they should inform the child’s parent or young person of the reasons.¹⁷⁵
- 4.180 The SEND Code states at para 9.106 that demand from parents and young people for funds that cannot, at present, be disaggregated should inform joint commissioning arrangements for greater choice and control.

Direct payments for SEN provision

- 4.181 As explained above, one of the ways in which funding from a personal budget can be accessed is through a ‘direct payment’. A direct payment is a cash payment made by the local authority to the child’s parent or young person to contract, purchase and manage services themselves.
- 4.182 A local authority may only make direct payments where they are satisfied that:
- the recipient will use them to secure the agreed provision in an appropriate way;
 - where the recipient is the child’s parent or a nominee, that person will act in the best interests of the child or the young person when securing the proposed agreed provision;
 - the direct payments will not have an adverse impact on other services which the local authority provides or arranges for chil-

173 See by close analogy *R (KM) v Cambridgeshire CC* [2012] UKSC 23; (2012) 15 CCLR 374, discussed at para 3.107.

174 SEND Code, para 9.102.

175 SEND Code, para 9.106.

dren and young people with an EHC plan which the authority maintains; and

- securing the proposed agreed provision by direct payments is an efficient use of the authority's resources. This means in practice a local authority will only agree to make direct payment for special educational provision where it will not cost them anymore than if they provided the provision themselves or through their existing contracting arrangements.¹⁷⁶

4.183 Where a direct payment is proposed for special educational provision, the early years setting, school or college must agree to a direct payment being used before it can go ahead.¹⁷⁷

Children and young people in custody

4.184 Sections 70–75 of the CFA 2014 apply the scheme in a modified form to children and young people in custody up to the age of 18. This is an extremely important development given the widespread acknowledgment that outcomes for this group are even worse than those for other children and young people with SEN.

4.185 The SEND Code addresses these provisions at paras 10.60–10.150. Practice guidance is also available from the Council for Disabled Children.¹⁷⁸

4.186 The central requirement of the scheme for detained children and young people are as follows:

- Local authorities must not cease an EHC plan when a child or young person enters custody. They must keep it while the detained person is detained and maintain and review it when the detained person is released.
- If a detained person has an EHC plan before being detained (or one is completed while the detained person is in the relevant youth accommodation) the local authority must arrange appropriate special educational provision for the detained person while he or she is detained.

176 Special Educational Needs (Personal Budgets) Regulations 2014 reg 6(1).

177 Special Educational Needs (Personal Budgets) Regulations 2014 reg 9.

178 Council for Disabled Children, *Children and Families Act 2014: Children and young people with SEN in youth custody, Implementation Support Materials*, March 2015.

- If it is not practicable to arrange the provision specified in the EHC plan, provision corresponding as closely as possible to that in the EHC plan must be arranged.
- Where a detained person does not have an EHC plan, the appropriate person¹⁷⁹ or the person in charge of the relevant youth accommodation can request an assessment of the detained person's post-detention EHC needs from the 'home' local authority. When considering a request the local authority must consult the appropriate person and the person in charge of the relevant youth accommodation. There is a right to appeal to the tribunal for the appropriate person.
- The local authority must secure an assessment of post-detention needs if the detained person has or may have SEN and it may be necessary for special educational provision to be made in accordance with an EHC plan on the person's release from detention.
- Advice and information must be sought from the usual range of sources as part of the assessment process – see para 4.95 above.
- The standard 20-week timescale for the completion of the EHC planning process applies – see para 4.104 above.
- Anyone else, including YOTs and education providers in custody, has a right to bring the detained person to the notice of the local authority as someone who may have SEN and the local authority must consider whether an assessment of the person's post-detention EHC needs is necessary.
- The local authority must promote the fulfilment of the detained person's learning potential while the person is in custody and on his or her release, whether the person has an EHC plan or not.
- The duties in the CFA 2014 no longer apply once a young person is transferred to the adult secure estate.

Residential and out-of-authority placements

- 4.187 Children with complex needs may at some stage require residential schooling – whether as a result of the complexity of their needs, family breakdown or indeed a combination of the two. When considering whether an educational need for a residential school placement arises, the question asked is often whether the child needs a 'waking day' curriculum, and there are a number of court and tribunal

179 The detained person's parent, where the detained person is a child, or the young person, where the detained person is a young person.

decisions under the old SEN scheme addressed to this question. However, the joined-up approach across education, health and social care which is supposed to be at the heart of the new scheme, including the National Trial (see para 4.246 below) should reduce the tendency to focus on children's needs in silos. In practice an argument for residential schooling which has tended to gain more support in tribunal appeals is that there is no local provision that can meet the child's needs.

4.188 Where there is social care input into a residential school placement, it is likely that it will be made under CA 1989 s20 and the child will become 'looked after'.¹⁸⁰ In other cases where a child is placed in a residential special school with the intention that he or she should remain there for longer than three months, the Director of Children's Services must be notified.¹⁸¹ The Director must then 'take such steps as are reasonably practicable to enable them to determine whether the child's welfare is adequately safeguarded and promoted' and consider whether to exercise any of their functions under the Children Act 1989 in relation to that child.¹⁸²

4.189 Some independent residential school placements will include elements of healthcare provision within its costs. In these cases, the local authority is neither obliged nor able to fund the healthcare provision even where that provision is 'essential for [the child] to be educated' and funding for the healthcare elements will need to be sought from the responsible CCG.¹⁸³ The 'National Trial' referred to at para 4.187 above will mean that the tribunal will now have the power to make recommendations to a CCG about the funding of the element of provision, albeit the Upper Tribunal has emphasised (in refusing to allow a CCG to be joined as a party to an appeal which concerned healthcare provision in a young person's EHC plan) that tribunal recommendations on healthcare provision do not create any substantive legal obligations for CCGs.¹⁸⁴

4.190 Many children in residential schools will be placed out of their 'home' authority. Other disabled children will be placed out of authority either as a result of family breakdown or to meet their social care

180 *R (O) v East Riding of Yorkshire CC* [2011] EWCA Civ 196. See chapter 3 at para 3.145 for the consequence of 'looked after' status.

181 CA 1989 s85. See further chapter 3 at para 3.149.

182 CA 1989 s85(4).

183 *East Sussex CC v KS (SEN)* [2017] UKUT 273 (AAC).

184 *NHS West Berkshire Clinical Commissioning Group v The First-tier Tribunal (Health, Education and Social Care Chamber)* (interested parties: (1) AM; (2) MA; (3) Westminster City Council) [2019] UKUT 44 (AAC).

needs. Responsibility for meeting these children's SEN remains with the authority where they are ordinarily resident. So if a child moves to a settled placement with foster parents, then the responsibility for the child's SEN moves to the local authority in whose area the foster parents live.

- 4.191 Regulation 15 of the SEND Regs 2014 makes provision for the transfer of responsibility for EHC plans where a child or young person moves between local authorities.

School attendance

- 4.192 Education Act 1996 s7 places a duty on parents to ensure that children of compulsory school age receive suitable education either by regular attendance at school, alternative provision or otherwise (at home).

- 4.193 The statutory guidance relating to parental responsibility for attendance¹⁸⁵ states that:

Local authorities and all schools have legal powers to use parenting contracts, parenting orders and penalty notices to address poor attendance and behaviour in school. In addition to using these powers, local authorities and schools can develop other practices to improve attendance.

- 4.194 Penalty notices are fines imposed on parents as an alternative to prosecution where a child's absence has not been authorised. The scheme is governed by the Education (Penalty Notices) (England) Regulations 2007¹⁸⁶ which requires each local authority to have its own Code of Conduct.

- 4.195 Parents can in some circumstances be prosecuted for failing to secure the regular attendance of their children at school.¹⁸⁷ However, the High Court has held¹⁸⁸ that there will be a defence if there is 'reasonable justification' for the failure. Although the burden will be on the parent to prove that their child was prevented from attending due to sickness or other avoidable cause, written medical evidence is not essential and parental evidence can be sufficient.

- 4.196 The Department for Education has also published guidance for schools and local authorities on pupil registers and absence and

185 Department for Education 'School attendance parental responsibility measures – Statutory guidance for local authorities, school leaders, school staff, governing bodies and the police' January 2015.

186 SI No 1867.

187 Education Act 1996 s444(1).

188 *East Sussex CC v Sussex Central Area Justices* [2019] EWHC 164 (Admin).

attendance codes.¹⁸⁹ In relation to children out of school due to illness, the guidance makes clear that parents should only be asked for medical evidence to support illness where there is a genuine cause for concern about the veracity of an illness and that schools are advised not to request medical evidence unnecessarily.

Elective home education

4.197 Parents retain a legal right under Education Act 1996 s7 to *choose* to educate their children at home for either some or part of their total education at school as long as children of compulsory school age receive efficient full-time education suitable to meet their needs. It should be made clear that this is different to situations where a child is unable to attend school for example through reasons of illness or where ‘education otherwise than at school’ is considered by the local authority to be appropriate (see para 4.201 below).

4.198 The Department for Education has published new guidance for both parents and local authorities on ‘Elective home education’ in April 2019 which sets out the requirements on parents when delivering a full time suitable education at home and the responsibilities on local authorities.

4.199 The SEND Code provides guidance on the considerations for children with SEN who are being educated at home at paras 10.30–10.38. The Code emphasises that:

- Home education must be suitable to the child’s age, ability, aptitude and SEN.
- Local authorities should work in partnership with, and support, parents to ensure that the SEN of these children are met where the local authority already knows the children have SEN or the parents have drawn the children’s special needs to the authority’s attention.
- Local authorities should fund the SEN needs of home-educated children where it is appropriate to do so.¹⁹⁰

189 Department for Education, School attendance Guidance for maintained schools, academies, independent schools and local authorities (July 2019).

190 The Code notes at para 10.30 that ‘The high needs block of the Dedicated Schools Grant is intended to fund provision for all relevant children and young people in the authority’s area, including home-educated children’. See further the Department for Education’s undated document ‘Revised Funding Guidance for Local Authorities on Home Educated Children’.

- In cases where local authorities and parents agree that home education is the right provision for a child or young person with an EHC plan, the plan should make clear that the child or young person will be educated at home. If it does then under CFA 2014 s42(2) the local authority must arrange the special educational provision set out in the plan, working with the parents.
- In cases where the EHC plan gives the name of a school or type of school where the child will be educated and the parents decide to educate at home, the local authority is not under a duty to make the special educational provision set out in the plan provided it is satisfied that the arrangements made by the parents are suitable. The local authority must review the plan annually to assure itself that the provision set out in it continues to be appropriate and that the child's SEN continue to be met.
- Where a child or young person is a registered pupil and the parent decides to home educate, the parent must notify the school in writing that the child or young person is receiving education otherwise than at school and the school must then remove the pupil's name from the admission register.
- The local authority is required to intervene through the school attendance order framework 'if it appears . . . that a child of compulsory school age is not receiving suitable education'.

4.200 Importantly, the SEND Code notes at para 10.34 that:

Local authorities do not have the right of entry to the family home to check that the provision being made by the parents is appropriate and may only enter the home at the invitation of the parents. Parents should be encouraged to see this process as part of the authority's overall approach to home education of pupils with SEN, including the provision of appropriate support, rather than an attempt to undermine the parents' right to home educate.

Education otherwise than at school

4.201 Education otherwise than at school includes all forms of education that can take place outside of the formal registered school environment. It can include home education and 'alternative education provision'.

4.202 The power for local authorities to arrange for special educational provision to be made otherwise than at school or college is contained in CFA 2014 s61. The local authority must be satisfied that 'it would be inappropriate for the provision to be made in a school or post-16

institution or at such a place'.¹⁹¹ Before reaching its decision, the local authority must consult the parent or young person.¹⁹² The local authority may decide to arrange *part* of the provision otherwise than at school – for example, it may be appropriate for certain therapies to be provided in another setting while the remainder of the special educational provision is made at school.

4.203 In deciding whether it would be inappropriate for a child to be educated in school, the local authority must consider all of the circumstances, including that a child's school related anxiety may make local authority provision for it to be 'inappropriate' for provision to be made at school.¹⁹³

4.204 For children with an EHC plan, case-law¹⁹⁴ has confirmed that 'education otherwise than in a school' cannot be specified in section I of an EHC plan. However, the Upper Tribunal has held¹⁹⁵ that section F of an EHC plan can set out required special educational provision to reflect that, in an appropriate case, provision for education otherwise than in a school might be made. In these cases, the EHC plan needs to be framed either a) with the ultimate aim of making it appropriate for a child to attend a school or b) as part of an education package which includes elements of attending a school.

Duties to children who are without education (Education Act 1996 s19)

4.205 Any child (regardless of disability or SEN) who is out of the education system for any reason is owed the duty in Education Act 1996 s19 by their local authority. This duty is to 'make arrangements for the provision of suitable education at school or otherwise' for such a child. 'Suitable education' means 'efficient education suitable to his age, ability and aptitude and to any special educational needs he may have'.¹⁹⁶ As a consequence, a failure to provide adequate home tuition while a child is not in mainstream schooling will be maladministration.¹⁹⁷

191 CFA 2014 s61(2).

192 CFA 2014 s61(3).

193 *M v Hertfordshire CC* [2019] UKUT 37 (AAC).

194 *East Sussex CC v TW* [2016] UKUT 528 (AAC).

195 *M & M v West Sussex County Council (SEN)* [2018] UKUT 347 (AAC).

196 Education Act 1996 s19(6).

197 See, for example, Local Government Ombudsman's Digest of Cases (Education) 2007/08, Report 05A15425 5192, where it was recommended that compensation of £7,000 be paid for the failure of support.

4.206 Given the number of children with SEN who are, for one reason or another ‘out of the education system’ it is of no surprise that there has been considerable attention as to the nature, extent and enforceability of the section 19 duty on local authorities. Any failure to comply with the section 19 duty will generally need to be remedied through judicial review, given the urgency of getting the child back into education. The nature of the section 19 duty has been clarified by a number of court and local government ombudsman decisions. These have established in particular that local authorities cannot plead a ‘shortage of resources’ as a reason for not making suitable arrangements for disabled children in such cases. More importantly still, in the landmark case of *Tandy*,¹⁹⁸ the House of Lords held that the duty under the Education Act 1996 s19 is owed to each individual child who falls within the definition in the section and that ‘suitable education’ must be determined purely by educational considerations, disregarding any resource constraints a local authority may face.

4.207 The Department for Education has issued statutory guidance on ‘alternative provision’ for children who are out of school.¹⁹⁹ The first three key points made in this guidance are as follows:

- 1) Local authorities are responsible for arranging suitable education for permanently excluded pupils,²⁰⁰ and for other pupils who – because of illness or other reasons – would not receive suitable education without such arrangements being made.
- 2) Governing bodies of schools are responsible for arranging suitable full-time education from the sixth day of a fixed period exclusion.
- 3) Schools may also direct pupils off-site for education, to help improve their behaviour.

4.208 The guidance goes on to state that:

While there is no statutory requirement as to when suitable full-time education should begin for pupils placed in alternative provision for reasons other than exclusion, local authorities should ensure that such pupils are placed as quickly as possible.²⁰¹

198 *R v East Sussex CC ex p Tandy* [1998] AC 714; (1997–98) 1 CCLR 352.

199 Department for Education, *Alternative Provision: Statutory guidance for local authorities*, January 2013.

200 See para 4.216 below in relation to school exclusions.

201 Department for Education, *Alternative Provision: Statutory guidance for local authorities*, January 2013, para 2.

- 4.209 Further advice has been given by government on ‘Ensuring a good education for children who cannot attend school because of health needs’.²⁰² The key points in this guidance are as follows:

Local authorities must:

- Arrange suitable full-time education (or as much education as the child’s health condition allows) for children of compulsory school age who, because of illness, would otherwise not receive suitable education.

Local authorities should:

- Provide such education as soon as it is clear that the child will be away from school for 15 days or more, whether consecutive or cumulative. They should liaise with appropriate medical professionals to ensure minimal delay in arranging appropriate provision for the child.
- Ensure that the education children receive is of good quality . . . allows them to take appropriate qualifications, prevents them from slipping behind their peers in school and allows them to reintegrate successfully back into school as soon as possible.
- Address the needs of individual children in arranging provision. ‘Hard and fast’ rules are inappropriate: they may limit the offer of education to children with a given condition and prevent their access to the right level of educational support which they are well enough to receive. Strict rules that limit the offer of education a child receives may also breach statutory requirements.

Local authorities should not:

- Have processes or policies in place which prevent a child from getting the right type of provision and a good education.
- Withhold or reduce the provision, or type of provision, for a child because of how much it will cost (meeting the child’s needs and providing a good education must be the determining factors).
- Have policies based upon the percentage of time a child is able to attend school rather than whether the child is receiving a suitable education during that attendance.
- Have lists of health conditions which dictate whether or not they will arrange education for children or inflexible policies which

202 Department for Education, *Ensuring a good education for children who cannot attend school because of health needs: Statutory guidance for local authorities*, January 2013.

result in children going without suitable full-time education (or as much education as their health condition allows them to participate in).

4.210 Many disabled children are failed by their schools either due to bullying or due to the inability of the school to provide suitable education. On occasions this results in their parents withdrawing them and subsequently making a complaint to the courts or local government ombudsmen. In *R (G) v Westminster CC*,²⁰³ however, the Court of Appeal held that a father had not acted reasonably in withdrawing his son from school on the grounds he was being bullied when the school was taking reasonable steps to address his bullying. The court did hold that where a child was not receiving suitable education and there was no suitable education available that was reasonably practicable for the child, the authority would be in breach of Education Act 1996 s19.²⁰⁴

4.211 The ombudsman has, however, held in a different case that parents acted reasonably in removing their son from a school (and educating him at home) when the local authority and the school had comprehensively failed to comply with his statement of SEN, and indeed their associated SEN obligations under the Education Act 1996.²⁰⁵ Likewise in a 2007 complaint the local government ombudsman considered that a mother's removal of her disabled son due to bullying was not unreasonable, given the local authority's maladministration in failing to use its mediation process to help to address the bullying and its failure to provide assistance to reintroduce child to his school or to find an alternative.²⁰⁶

4.212 The Education Act 1996 s19 duty has been considered by the High Court in cases involving children with SEN. In *R (B) v Barnet LBC*,²⁰⁷ the court held that it was not reasonably practicable for a child to attend a school which the head-teacher had said was unsuitable for her and as such there had been a breach of the section 19 duty. In a case such as this, there is then a duty on the local authority to make alternative provision which the court enforced in relation to B by way of a mandatory order. By contrast, in *R (HR) v Medway*

203 [2004] EWCA Civ 45; [2004] 1 WLR 1113.

204 Judgment at [46].

205 Local Government Ombudsman's Digest of Cases (Education) 2003/04, Report 02/A/13068.

206 Local Government Ombudsman's Digest of Cases (Education) 2006/07, Report 05/B/11513.

207 [2009] EWHC 2842 (Admin); (2009) 12 CCLR 679.

Council,²⁰⁸ the court approved the *Barnet* case but held that on the facts, the local authority had discharged its section 19 duty by offering a placement in a hospital special school, even though an independent educational psychologist has said that this school was not suitable for HR. This was essentially because it was not sufficiently obvious that the school was unsuitable, given the local authority's evidence to the contrary. These two cases together suggest that even where a disabled child is out of school for a significant period the administrative court will only intervene when it is obvious that the local authority has not offered 'suitable' education, particularly if there is an ongoing tribunal appeal pending (as there was in relation to both B and HR).

School admissions

- 4.213 Children with SEN but without an EHC plan must apply for school admission in the usual way. This means that parents will need to address the relevant over-subscription criteria for schools where the demand for places exceeds the available supply. In most cases this means that preference is given to children living nearer the school, unless the child is adopted or looked after by the local authority or has a sibling at the school or there is an exceptional medical or social need for them to attend the particular school.
- 4.214 Parents can appeal to the independent Review Panel (IRP) responsible for their particular admissions authority (usually the local authority) if they disagree with a school admissions decision. These appeals and the prior decision making by the local authority are regulated by two Codes of Practice, issued under School Standards and Framework Act 1998 s84.²⁰⁹ Relevant bodies including admissions authorities and IAPs must 'act in accordance' with the codes.²¹⁰
- 4.215 The Council for Disabled Children has published a briefing note on 'School admissions, children and young people with disabilities or special educational needs', which provides a useful summary of

208 [2010] EWHC 731 (Admin).

209 Department for Education, *School Admissions Code: Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels*, December 2014; Department for Education, *School Admission Appeals Code: Statutory guidance for school leaders, governing bodies and local authorities*, February 2012.

210 School Standards and Framework Act 1998 s84(3).

the difference admissions arrangements which apply in different circumstances.

Exclusions from school and colleges

- 4.216 Pupils with identified SEN accounted for around half of all permanent exclusions (46.7 per cent) and fixed period exclusions (44.9 per cent). Pupils with an EHC plan or with a statement of SEN had the highest fixed period exclusion rate at 15.93 per cent – over five times higher than pupils with no SEN.²¹¹ Exclusion, particularly for disabled children and children with SEN, should be regarded as ‘a remedy of last resort’.²¹² This is reinforced (although perhaps not as strongly as previously) in the regulations²¹³ and statutory exclusions guidance for schools in England.²¹⁴ In particular, the guidance states that:
- head teachers²¹⁵ should, as far as possible, avoid excluding permanently any child with a statement of SEN or a looked after child (para 22);²¹⁶
 - where a school has concerns about the behaviour, or risk of exclusion, of a child with additional needs a pupil with a statement of SEN or a looked after child, it should, in partnership with others (including the local authority as necessary) consider what additional support or alternative placement may be required (para 24); and
 - early intervention to address underlying causes of disruptive behaviour should include an assessment of whether appropriate provision is in place to support any SEN or disability that a pupil may have (para 18).
- 4.217 At para 15, the guidance states that a decision to exclude a pupil permanently should only be taken in response to serious or persist-

211 DFE National Statistics – Permanent and Fixed Period Exclusions in England: 2016–2017.

212 Department of Education Guidance, ‘Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion’ (September 2017).

213 School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 SI No 1033.

214 Department of Education Guidance, ‘Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion’ (September 2017).

215 The term ‘Headteacher’ in the guidance and in this section applies also to a teacher in charge of a pupil referral unit and to a principal of an academy.

216 This must now be read as including a child with an EHC plan.

ent breaches of the school's behaviour policy *and* where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school. By using the word 'only', the guidance creates a discrete and exclusive test for when a permanent exclusion is a justified and a lawful response. When asking whether the pupil acted as alleged, the standard of proof is the balance of probabilities and this means whether something is 'more likely than not' to have occurred.²¹⁷

4.218 The guidance recognises (at para 22) that pupils with statements of SEN and looked after children are particularly vulnerable to the impacts of exclusion as well as having disproportionately high rates of exclusion. As such, it is essential that schools and local authorities comply with the guidance in relation to children with SEN and looked after children who are at risk of exclusion or who have been excluded.

4.219 For both fixed period and permanent exclusions, there is a duty to provide alternative education for the pupil from the sixth day of the exclusion. For a child with a statement of SEN or EHC plan, the local authority must identify an appropriate full-time placement in consultation with the child's parents who retain the right to express a preference for a school they wish their child to attend or make representations for a placement in any other school (para 45).

4.220 Notwithstanding these time-specific duties, it has been and is still all too often the case that provision of education for excluded children is inadequate. A 2004 local government ombudsman report,²¹⁸ for example, concerned a child who was excluded for violent and disruptive behaviour while the local authority was in the process of assessing his SEN. He was out of school for over a year. For the first half term no education was provided, and after this he received tuition which varied between six and 12 hours a week. In the ombudsman's opinion, this was grossly inadequate and could not be described as 'suitable education'.

217 *Re B (Children) (Sexual Abuse: Standard of Proof)* [2009] 1 AC 11.

218 Local Government Ombudsman's Digest of Cases (Education) 2003/04, Report 01/B/6663, where it was recommended that compensation of over £2,000 be paid for the failure of support. See also the Digest of Cases (Education) 2007/08, Report 06C06190, which concerned the exclusion (for behavioural reasons) from a mainstream school of a young person with a statement of SEN. The ombudsman found there to be maladministration, not least because requests for a reassessment of his needs were ignored by the local authority because he was approaching Year 11. The ombudsman also noted the failure of the local authority to have regard to the likelihood that these facts engaged its general duties under the Disability Discrimination Act 1995.

4.221 A similar finding emerges from a 2010 report,²¹⁹ which concerned a six-month exclusion of a child who had mental health difficulties (and for whom an application for a statement of SEN was then made). The ombudsman found that during the exclusion period the education provided ‘was well below the requirements of the statutory guidance’, and observed (para 30):

According to section 19 of the Education Act 1996, the Council was responsible for this once it became impossible for [the child] to attend School A. . . . Therefore, it is not sufficient for the Council to say that [she] remained on the school roll and so the local authority was not responsible for her education. That fails to reflect the reality of the situation: that the school had become unsuitable for [her] and it was impossible for her to attend. Accordingly, the Council was responsible for arranging suitable educational provision.

4.222 The school’s governing body must consider the reinstatement of an excluded pupil within 15 school days of receiving notice of an exclusion which brings the pupil’s total number of excluded days to more than 15 in a term; or of a permanent exclusion; or of any exclusion which would result in a pupil missing a public examination or a national curriculum test. Parents of children who are permanently excluded (and excluded pupils aged 18 or over) can ask for the governing body’s decision to be reviewed by an independent review panel (IRP). The time limits are set out in paras 72 and 84 of the statutory guidance. There is also a right to make a claim under the Equality Act 2010 to the First-tier Tribunal (Special Educational Needs and Disability) if parents believe the permanent exclusion was the result of disability discrimination. This appeal right also exists for fixed term exclusions. The tribunal has issued guidance on how to bring a disability discrimination claim in light of the changes.²²⁰

4.223 In their application for an IRP hearing, parents have a right to request that the local authority/academy trust appoints and pays for an SEN expert (para 117), regardless of whether or not the school recognises that their child has SEN (para 119). The statutory guidance sets out the nature of the SEN expert’s role as ‘analogous to an expert witness, providing impartial advice to the panel on how special educational needs might be relevant to the exclusion’ (para 155). The focus of their advice should be on ‘whether the school’s policies

219 Complaint no 07/A/14912 against Barnet LBC, 19 April 2010.

220 HM Courts and Tribunals Service, *How to claim against disability discrimination in schools – a guide for parents*, 2013.

which relate to SEN, or the application of these policies in relation to the excluded pupil, were legal, reasonable and procedurally fair' (para 156) and if a school does not recognise the pupils has SEN, also address this issue (para 157). The panel members should apply the tests of illegality, irrationality and procedural impropriety in relation to the decision to exclude (para 148).

4.224 Unlike an IAP under the previous scheme, an IRP can only uphold the exclusion decision, recommend that the governing body reconsiders their decision or quash the decision if it considers it was flawed when considered in the light of judicial review principles and direct that the governing body considers the exclusion again. However, it cannot direct reinstatement, be this immediate or at some later date. If the IRP directs a governing body to reconsider its decision and the governing body does not offer to reinstate a pupil, the IRP can order a readjustment of the school's budget (or payment in the case of an academy) so that money follows the excluded pupil; a panel does not have this power where it has only made a recommendation. The main power in relation to exclusions therefore now vests in the school rather than in an independent body, which is a concerning development for excluded pupils. However, if a parent brings a claim of disability discrimination in relation to the permanent exclusion, the tribunal will expedite the timetable (unless the exclusion is being considered by an IRP) so that a decision can be reached in no more than six weeks; if successful, the tribunal can order reinstatement.

4.225 An example of an IAP (the forerunner to the IRP) considering proportionality is found in *W v Bexley LBC Independent Appeal Panel*,²²¹ a case in which the IAP accepted the school's evidence that W had cut another student's folder with a knife and sliced this student's shirt with the knife while the student was wearing it. However, despite making this finding, the IAP concluded that permanent exclusion was a disproportionate response and that a fixed-term exclusion would have been more appropriate. As the IAP had no power to order a fixed-term exclusion, reinstatement was ordered.

221 [2008] EWHC 758 (Admin).

School and college transport

- 4.236 The statutory provisions in relation to school transport in England are found in Education Act 1996 ss508A–509A. The school transport duties on local authorities in England are further explained in the relevant guidance.²²² There is separate guidance for post-16 transport which covers provision of transport to post-16 education and training for young people of sixth form age and the provision of transport to post-19 education and training for those aged 19–25 and for whom an EHC plan is maintained.²²³
- 4.227 Under section 508B, local authorities must arrange free suitable home-to-school travel arrangements for ‘eligible’ children of compulsory school age for whom no, or no suitable, free travel arrangements have been provided. Eligibility is generally determined by distance from school. However, other groups of children can also be ‘eligible’, including here children with SEN, a disability or mobility problems who as a result of their difficulties cannot reasonably be expected to walk to school.²²⁴
- 4.228 Where a parent chooses to send his or her child to a school which is not the nearest appropriate school and is not named as the ‘appropriate school’ in the child’s EHC plan, the local authority may choose not to provide assistance with transport. This will arise where the local authority has made suitable arrangements for the child to become a registered pupil at a school nearer to his home.²²⁵ Local authorities should not, therefore, adopt general transport policies that seek to limit the schools for which parents of children with EHC plans may express a preference if free transport is to be provided. In most cases local authorities will have clear general policies relating to transport for children with EHC plans; these should be made available to parents and more often than not are well publicised on local authority websites.
- 4.229 However, it is acceptable for the local authority to name the school preferred by the child’s parents in the EHC plan on condition that the parents agree to meet all of or part of the transport costs, so long as there is a nearer school which is held to be suitable. If there is no

222 Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014.

223 Department for Education, *Post-16 transport to education and training: Statutory guidance for local authorities*, January 2019.

224 Education Act 1996 Sch 35 para 2.

225 Education Act 1996 Sch 35B, para 2(c). Such children will therefore not be ‘eligible’ children for the purposes of section 508B.

nearer suitable school the local authority is likely to owe the section 508B duty to arrange free, suitable transport.

- 4.230 The Upper Tribunal has held that generally school transport cannot be considered to be a ‘special educational need’ or ‘special educational provision’ and therefore cannot be included in the EHC plan. Ordinarily, the tribunal does not have jurisdiction to resolve transport disputes and if a parent or young person wishes to challenge a decision regarding school transport then the appropriate legal remedy is through the statutory appeals process and judicial review.²²⁶ However, there is no rule that school transport may never be considered to be special educational provision and the Upper Tribunal has held that it can be included in section F of the EHC plan where the transport itself fulfils some education or training function.
- 4.231 Home-to-school transport should not cause the child undue stress, strain or difficulty that would prevent the child benefiting from the education the school has to offer. The statutory guidance states that: ‘For arrangements to be suitable, they must also be safe and reasonably stress free, to enable the child to arrive at school ready for a day of study’.²²⁷ Proper safeguarding procedures should be in place in relation to drivers and escorts.
- 4.232 If a child is not eligible for free home-to-school transport, the local authority may still make transport arrangements for the child.²²⁸ This includes children who are older or younger than compulsory school age. Such arrangements do not have to be free of charge, but whether or not there will be a charge should be made clear in the authority’s school travel policy. Local authorities may put in place school travel schemes in which case different rules in relation to eligibility for free home to school transport will apply.
- 4.233 Local authorities are under a duty to publish a post-16 Transport Policy Statement.²²⁹ The statutory guidance contains an example Local Authority Post-16 Transport policy template.²³⁰ This must

226 *Staffordshire County Council v JM* [2016] UKUT 0246 (AAC).

227 Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014 para 35.

228 See Education Act 1996 s508C. Guidance on the exercise of the section 508C power is given in Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014 at paras 36 and 37.

229 Education Act 1996 s509AA.

230 Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, January 2019, Annex B.

include specific provision for disabled learners.²³¹ In particular, it must:

... specify arrangements for persons with learning difficulties or disabilities receiving education or training at establishments other than schools maintained by the authority which are no less favourable than arrangements specified for pupils of the same age with learning difficulties or disabilities attending such schools.²³²

The relevant statutory guidance expressly states that the overall intention of the 16 to 18 transport duty is to 'ensure that learners of sixth form age are able to access the education and training of their choice; and ensure that, if support for access is required, that this will be assessed and provided where necessary'.²³³

4.234 Education Act 1996 ss508F–508H provide additional duties in relation to adult learners. Essentially, section 508F states that the local authorities should provide transport in order to facilitate the attendance of adults at further education or higher education institutions. They should also facilitate the attendance of an adult for whom an EHC plan is maintained. Any transport provided under section 508F should be provided free of charge.²³⁴ This means that for many disabled young people the only ages at which they can be charged for school or college transport will be 16 and 17, ie when they are no longer 'eligible' children for the purposes of section 508B and before the adult transport duty under section 508F applies to them.

4.235 Disputes in relation to school transport will generally be resolved by local education transport panels, such panels being required to act fairly and to take into account any educational needs an individual learner may have.

4.236 The statutory guidance states as follows in relation to resolving school transport disputes:

Local authorities should have in place both complaints and appeals procedures for parents to follow should they have cause for complaint about the service, or wish to appeal about the eligibility of their child for travel support. The procedure should be published alongside the local authority travel policy statement. If an appellant considers that there has been a failure to comply with the procedural rules or if there are any other irregularities in the way an appeal was handled they may have a right to refer the matter to the Local Government Ombudsman.

231 Education Act 1996 s509AB.

232 Education Act 1996 s509AB(2).

233 Department for Education, *Post-16 transport to education and training: Statutory guidance for local authorities*, January 2019 para 6.

234 Education Act 1996 s508F(1).

If an appellant considers the decision of the independent appeals panel to be flawed on public law grounds, they may apply for a judicial review.²³⁵

4.237 Whereas previously each local authority was free to adopt its own procedure for school transport appeals, the statutory guidance now includes at annex 2 a ‘recommended review/appeals process’. This suggests that:

- At stage 1, a parent has 20 working days from receipt of the local authority’s home to school transport decision to make a written request asking for a review of the decision.
- The written request should detail why the parent believes the decision should be reviewed and give details of any personal and/or family circumstances the parent believes should be considered when the decision is reviewed.
- Within 20 working days of receipt of the parent’s written request a senior officer reviews the original decision and sends the parent a detailed written notification of the outcome of their review.
- A parent has 20 working days from receipt of the local authority’s stage one written decision notification to make a written request to escalate the matter to stage two.
- Within 40 working days of receipt of the parents request an IRP considers written and verbal representations from both the parent and officers involved in the case and gives a detailed written notification of the outcome (within five working days).

4.238 There is a flow-chart setting out the recommended process in the statutory guidance at page 36. However, parents will need to check with their local authority whether the recommended process has been adopted or if a decision has been taken to depart from the guidance.

Appeals to the tribunal

4.239 The principal remedy in relation to disputes under CFA 2014 Part 3 is an appeal to the First-tier Tribunal (Special Educational Needs and Disability). The appeal right lies with parents in relation to children. For young people, those who have capacity in relation to the relevant decision can appeal in their own name while for young people

235 Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014, para 35.

who lack the relevant capacity the appeal can be brought by any 'representative' or their parent acting as the 'alternative person' – see further para 11.83.²³⁶

- 4.240 The following decisions can be appealed to the tribunal:²³⁷
- a refusal to carry out an EHC needs assessment following a request;
 - a refusal to make an EHC plan following an assessment;
 - disputes in relation to sections B, F or I of the EHC plan (see para 4.114 above for these sections, which concern SEN issues only);
 - a refusal to make requested amendments to an EHC plan following an annual review;
 - a refusal to carry out a re-assessment following a request;
 - a decision to cease to maintain an EHC plan.
- 4.241 In addition to the above, there is a National Trial (see para 4.246 below) which allows the tribunal to make non-binding recommendations in relation to the health and social care parts of an EHC plan.
- 4.242 It is important to note that a tribunal appeal must be lodged within two months of the decision letter from the local authority confirming one of the decisions above has been made.
- 4.243 Parents and young people who wish to make an appeal to the tribunal may do so only after they have contacted an independent mediation adviser and discussed whether mediation might be a suitable way of resolving the disagreement.²³⁸ This requirement does not apply where the appeal is solely about the name or type of the school, college or other institution named on the plan. It is important to note that there is no requirement to mediate before appealing to the tribunal, merely to consider mediation.
- 4.244 Where a parent or young person is required to obtain a mediation certificate, he or she must contact the mediation adviser within two months of written notice of the local authority's decision being sent, inform the mediation adviser that he or she wishes to appeal and inform the mediation adviser whether they wish to pursue mediation.²³⁹
- 4.245 Further information in relation to the tribunal process is set out in chapter 11, see para 11.60.

236 If a young person's capacity is unclear or in doubt, the First Tier Tribunal can determine this as a preliminary issue – see *Hillingdon LBC v WW* [2016] UKUT 0253 (AAC).

237 CFA 2014 s51.

238 CFA 2014 s55(3). See further, chapter 11 at paras 11.48–11.59.

239 SEND Regs 2014 reg 33.

The national trial

- 4.246 In April 2018, the SEND tribunal launched a two-year ‘Single route of redress national trial’ which extends the powers of the SEND tribunal to also be able to make non-binding recommendations on the health and social care aspects of EHC plans.²⁴⁰ Further information about the trial is set out in chapter 11, para 11.74.

Other enforcement methods

Judicial review

- 4.247 As explained in chapter 11 (see para 11.92), where a child is suffering an ongoing disadvantage as a result of a school or local authority’s breach of duty – for instance, the duty on local authorities to provide suitable education for children out of school – it may be possible to achieve a remedy through an application for judicial review in the High Court. Care must be taken, however, to ensure that no other effective remedy can be obtained through another route, in particular through a tribunal appeal; otherwise the High Court is likely to either refuse permission for the judicial review to proceed or refuse to grant any relief at the end of the proceedings.
- 4.248 Judicial review proceedings should be brought promptly and in any event, no later than three months after the decision complained about; the time limit can be extended in exceptional circumstances. As such families should take advice from a specialist solicitor as quickly as possible if an application for judicial review may be required. Legal aid may be available to meet the costs of an application for judicial review, depending on both the merits of the proposed application and an assessment of the financial means of the child, young person and/or parent(s). For a more extensive discussion of legal aid eligibility, see further chapter 11 at para 11.113.

Complaint to the secretary of state

- 4.249 Alternatively, a parent or child may make a complaint to the secretary of state if a local authority or governing body of a maintained school in England has acted unreasonably or is in breach of its duties. It is

²⁴⁰ Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 SI No 1306.

usually necessary to follow all internal complaints procedures before making a written complaint to the secretary of state and the complaint will not normally be able to be investigated if the child has left the school in question. An investigation by the secretary of state can take in excess of six months so this should not be used as a remedy in urgent cases. If the complaint is upheld, however, the secretary of state can issue directions to require the local authority or school to carry out its legal obligations properly.

Complaint to the ombudsman

- 4.250 Complaints in relation to maladministration by local authorities can also be made to the local government and social care ombudsman (www.lgo.org.uk) in England. Further information in relation to the role of the ombudsman in resolving disputes in relation to education issues can be found in chapter 11 at para 11.36.

Decision-making for young people

- 4.251 CFA 2014 s80 and the related regulations²⁴¹ govern how decisions are made by and for young people aged over 16 under CFA 2014 Part 3. These provisions are discussed in chapter 11 at para 11.83.

Further advice and support

- 4.252 Education law is notoriously complex, and even in this lengthy chapter it has not been possible to cover all relevant issues. Parents, young people and others are strongly advised to seek independent advice on their own case.
- 4.253 Details of where further advice and support can be obtained can be found in chapter 11 along with information as to the availability of legal aid.

241 SEND Regs 2014 Part 6.