

Education Other Than At School (EOTAS)

IASSN Policy Briefing

1. Introduction

The aim of this briefing is to provide clarity on the law surrounding EOTAS. This document covers two types of EOTAS which are distinct from one another. Although they share the same the acronym and outcome in that a child may be educated outside of school with the local authority (LA) being responsible for their education, each type of EOTAS has a separate legal framework which is not to be confused or conflated. This briefing will cover:

- The legal duties on LAs to arrange education for children of compulsory school age who may not otherwise receive suitable education by reason of illness, exclusion or otherwise.
- A type of 'EOTAS' which is unique to children and young people who have special educational needs and an Education, Health and Care Plans (EHCPs). This is also sometimes referred to as EOTIS/C (Education other than in school or college).
- Examples of case law relating to both types of EOTAS

TO NOTE: While this briefing has been legally checked it is not formal legal advice and it is important to note that this is a complex and developing area of law.

2. Law

The legislation which covers each type of EOTAS is as follows:

- The Education Act 1996
- The Children and Families Act 2014

The Education Act¹ requires parents to ensure children of compulsory school age receive full time education.

¹ Section 7 Education Act 1996 states the parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable to his age, ability and aptitude, and to any special educational needs he may have, either by regular attendance at school or otherwise. This is sometimes referred to as EOTAS or EHE. However, this briefing only covers the two types of EOTAS covered by section 19 EA 1996 and section 61 CFA 2014.

The Children and Families Act set out to reform services for vulnerable children, with the aim to give them greater protection and have a greater focus on those with special educational needs.

3. Education Act 1996

Section 19 of the Education Act sets out the responsibilities of LAs to arrange suitable education at school or otherwise than at school for those children² of compulsory school age who, by reason of illness, exclusion from school or otherwise may not for any period receive suitable education unless such arrangements are made for them.

EOTAS under section 19 is usually a short-term response to particular circumstances, and any arrangements made by the Local Authority will normally be temporary. PRU's, hospital schools, Alternative Provision and home school tutors are all examples of education provision used as a short-term response.

The duty applies whether or not a child is on roll of a school and irrespective of the type of school they attend. It is for the Local Authority to decide what education provision is suitable³ for the child, and includes all children, with or without special educational needs.

There is statutory [Guidance](#) accompanying the section 19 duty which sets out more detail of how Local Authorities and schools should support children with health needs who are unable to attend school.

- Local Authorities should arrange suitable alternative provision as soon as it is clear that a child will be away from school 15 days or more because of their health needs - whether consecutive or cumulative
- Where possible parents should provide specific, up to date evidence and advice from a medical practitioner (for example, the GP, consultant, psychologist). Where this is not possible the Local Authority should seek other forms of evidence to ensure appropriate provision is arranged as soon as possible.

There is also statutory [Guidance](#) covering the duties and powers concerning the use of alternative provision.

² Although LAs have a power to provide alternative education for those over compulsory school age - section 19(4) of the Education Act 1996.

³ Section 19(6) defines this: *"Suitable education", in relation to a child or young person in the area of a local authority in England, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have'.*

'Section 19 of the Education Act 1996:

(1) Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

(3A) In relation to England, the education to be provided for a child... shall be – (a) full-time education, or (b) in the case of a child within subsection (3AA), education on such part-time basis as the authority consider to be in the child's best interests.

(3AA) A child is within this subsection if the local authority consider that, for reasons which relate to the physical or mental health of the child, it would not be in the child's best interests for full-time education to be provided for the child.'

An example of a Local Government and Social Care Ombudsman (LGSCO) investigation regarding medical evidence is below. The LGSCO determined that even without medical evidence, the LA still had a duty to arrange suitable alternative education provision for the child under the category of 'otherwise'.

LGSCO report Leeds City Council (reference number: 18 011 706)

*'Section 19 also requires councils to make suitable educational arrangements for children of compulsory school age who, because of exclusion, illness or otherwise, may not receive a suitable education unless the Council arranges it for them. Even without medical evidence, the Council had a duty to arrange suitable alternative education provision for Y under the category of "**otherwise**".'*

Definition of 'Otherwise'

The Education Act 1996 does not define the term 'otherwise'. However, the courts⁴ have described this widely as meaning it is intended to cover any other situation where it is not reasonably possible for a child to take advantage of any existing suitable schooling.

This will always be fact sensitive but could include children without a school place, circumstances where there is no medical evidence readily available (as in the above Ombudsman case) or potentially, children who cannot attend school due to Emotionally Based School Avoidance.

⁴ R (G) v Westminster City Council [2004] EWCA Civ 45

4. Children and Families Act (CfA) 2014

This section of the briefing considers the type of EOTAS which is relevant to children and young people with special educational needs and, EHCPs (which is distinct to what is outlined above) and is covered within the CfA 2014.

Section 42 of the CfA imposes a duty on LAs to secure special educational provision (SEP) (and for Integrated Care Boards, to arrange the health provision) as specified in the EHCP.

Section 61 of the CfA says that, if an LA is satisfied that it would be inappropriate for a child or young person's SEP to be made in a school (or post-16 institution or relevant early years setting), the LA may arrange for the SEP to be made otherwise than in a school, post 16 institution or relevant early years setting. Before doing so, the LA must consult with the child's parent or young person. Unlike the Education Act section 19, this type of EOTAS is often not a temporary or short-term solution to a specific circumstance. It follows a decision by the LA, typically after an Education, Health and Care Needs Assessment (EHCNA) or annual review, based on the current and foreseeable needs of the child or young person. that special educational provision in a school would be inappropriate.

'Section 61: Children and Families Act 2014

(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided. (2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.

(3) Before doing so, the authority must consult the child's parent or the young person.'

Definition of 'inappropriate'

The CfA 2014 does not define 'inappropriate'. However, the courts⁵ have said that it is not enough for an LA to ask whether a school 'can' meet a child or young person's SEN. The LA is obliged to ask whether provision of education in a school – that is to say, any school - 'would not be suitable' or 'would not be proper' having regard to all the circumstances of the individual case including, for example (but not limited to):

- The child or young person's background and medical history
- The educational needs of the child
- Facilities that can be provided by a school and otherwise than in a school

⁵ TM v Hounslow [2009] EWCA Civ 859, [2011] ELR 137

- The comparative costs of alternative educational provision
- Parental wishes
- The child or young person's reaction to the provisions.

The use of EOTAS has also been considered by the Upper Tribunal⁶. The judge set out a number of important factors where EOTAS is being considered:

1. If the LA is satisfied that it would be inappropriate for any such SEP to be made in any school then the LA will need to specify the SEP to be provided otherwise than in a school in Section F, and Section I should be blank.
2. If the LA is not satisfied that it would be inappropriate for any such SEP to be made in any school then it follows that a particular school or type of school would be appropriate and should be specified in Section I.
3. However, if it would only be appropriate for 'some' of the SEP to be provided in a school but not all of it, then a school or type of school should be specified in Section I and any SEP made otherwise than in a school or type of school set out in Section F (with Section F also setting out any SEP to be provided in school).

5. EHCPs and Section 19 – interaction with other duties

If a child with an EHCP triggers the Local Authority's Section 19 duty (for example, because of illness, exclusion or otherwise), they also remain under section 42 of the Children and Families Act. This means that the Local Authority must continue to secure the SEP set out in the EHCP (and the health authority must continue to arrange any health provision).

The SEP is the provision which has been determined as required and must continue to be provided by the LA, albeit this could be in an alternative setting, or potentially in the child's home. There may be circumstances where the provision provided does not identically replicate what is in Section F but nonetheless is suitable and achieves the same outcome for the child or young person.

It is important to note that, for young people, LAs have a power (not a duty) to provide alternative education⁷. However, the section 42 duty (to secure SEP/) applies to children and young people **equally**. Therefore, the SEP in Section F of the EHCP would need to be secured for a young person out of education.

Where the reason for the need for EOTAS pursuant to section 19 is straightforward and short term (a broken leg or planned operation for example) and there is nothing to suggest that the

⁶ NN v Cheshire East (SEN) [2021] UKUT 220 (AAC)

⁷ Section 19 (4) Education Act 1996

EHCP needs amending, then there is no need to urgently review or amend the EHCP (not least because it's likely that the child will be back at school before the process is complete).

For less straightforward scenarios (a child experiencing Emotionally Based School Avoidance, or a long term medical condition) where there is a realistic expectation the child will return to school, the LA should review the EHCP to explore whether there is a change needed in need and provision, not necessarily for the 'now' but for when the child starts a gradual return to school and then when they are in school to address/prevent what was going wrong leading up to the absence. What they would be provided with in the meantime would be the SEP which may need to be modified in some way to take into account what the child can realistically manage.

If the review in the above scenario determined that the child needed a longer-term alternative and based on the evidence, the LA is satisfied that it would be inappropriate for any or part of the SEP that it has decided is necessary for the child to be made in any school, taking into account the factors the case law has determined, then the LA would need to consider amending the EHCP to specify EOTAS provision pursuant to section 61 CFA 2014.

6. Delivery of EOTAS pursuant to CFA section 61

Section 61 CFA EOTAS cases are often complex and unique to the child or young person's circumstances. Therefore, there is no 'one size fits all' approach. The most straightforward cases are likely to be those where there is clear evidence and agreement that it would be inappropriate for the SEP to be made in a school (or other relevant setting) and a package of SEP is specified in Section F with Section I being left blank.

Once a LA has decided that the test for EOTAS as per section 61 CFA has been met, it is for them to decide what the package is and how it is to be delivered as they have the duty to 'secure' the SEP in Section F. However, a parent or young person may request a personal budget and direct payment. If the Local Authority agrees to this, and the parent or young person commissions any SEP directly through the use of direct payments, the Local Authority will have been deemed to have secured that provision for the purposes of section 42(2) CFA⁸.

Further Reading

[Education for children out of school - childlawadvice.org.uk](https://childlawadvice.org.uk/education-for-children-out-of-school/)

[Stat guidance template \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/section-42-2-cfa)

⁸ Section 49(5) CFA.

[Home education - childlawadvice.org.uk](http://childlawadvice.org.uk)

[Supporting children with medical needs in schools - childlawadvice.org.uk](http://childlawadvice.org.uk)

This guide is provided for general information about the law as it applies in England only and should not be treated as legal advice. The guide has been checked for legal accuracy by Claire Jackson, Paralegal.