

Education, Health and Care Plans (EHCP)

Education Health and Care Plans (EHCPs) are in effect the current version of what used to be a Statement, and were introduced by the Children and Families Act 2014 (CFA). They can remain in place up to the age of 25 provided the young person needs to be in education, although they are not available for university students.

Please see our separate factsheet about the process of negotiating an EHCP. It is particularly important that EHCPs be based on a proper assessment process, which means that LA should have obtained up to date and detailed advice and information from a range of people including parents, an educational psychologist, social services (if relevant), and other relevant experts including, for example, speech and language therapists, occupational therapists, physiotherapists, CAMHS and others.

When a local authority (LA) agrees to issue an EHCP, they will initially send a draft for consultation, and it is vitally important that it is checked carefully. The CFA and the 0- 25 Special Educational Needs Code of Practice 2015 (CoP) put considerable emphasis on the fact that the process of assessment and negotiating the EHCP is meant to be collaborative, with the parents and child, and/or young person (i.e. child over 16 and past school leaving age) (CYP) at the heart of the process with their views taken fully into account.

The primary purpose of an EHCP is to draw together a summary of all CYP's difficulties and the provision required to meet them so that the teachers, teaching assistants, therapists and others working with him/her know precisely what the difficulties are and what it is that they are required to do to help him/her. It is important that it should be properly detailed and accurate but, bearing in mind that education staff are busy people, it should not be so long and complex that they cannot find what they need to know reasonably quickly. The CYP is entitled to receive the education and health provision as a matter of law, so this can be enforced through the courts if necessary.

The format of EHCPs is not prescribed, and therefore every LA will have a slightly different format. However, it is required to include twelve separate sections, as set out below. To complicate matters further, many LAs set out EHCPs in tabular format and, for example, run some of the sections together.

The requirements for each section are set out in paragraph 9.69 of the CoP and we strongly recommend that parents and young people check this carefully.

A: The views and wishes of the child/young person (CYP) and the child's parents

This should be completed in consultation with both the CYP, where practicable, and the parents. It is often set out by reference to particular questions, for example the family and educational background, what the CYP likes, what he/she is good at, what he/she dislikes or finds difficult, what he/she wants to achieve from his/her education, what his/her aspirations are, what he/she feels he needs help with and the like.

This section has no statutory force, but it is important, not least because it is the first section the reader comes to. It is, in particular, the parents' opportunity to set out fully their views about their child's difficulties and what he finds helpful or unhelpful in meeting those difficulties, and what they outcomes they would like him to achieve. Parents' responses should therefore be reasonably full but should not over-long, and in general should focus mainly on what is happening currently and what is needed in the future, rather than what has happened in the past. The local authority is not entitled to amend the views expressed unless they are defamatory or unlawful for other reasons.

B: The CYP's educational needs

Section B has sometimes been referred to as the section which sets out the diagnosis of the CYP's education problems, with Section F being in effect the prescription. It summarises all the CYP's learning difficulties, and it is important that it should do so completely and accurately, not least so that teachers and others know what to expect. It is usually convenient to set the problems out under specific headings - for example, cognition, communication, social, emotional and mental health problems, and physical and sensory. It is helpful if it starts with a summary of the child's needs.

The Code of Practice (CoP) simply states that this section should identify the child's needs; therefore, there is no requirement (as some LAs appear to believe) for a separate list of strengths to appear here. If they are included, they need to be checked carefully to assess whether they really do describe strengths; for example, a statement that a 16-year-old can count up to 10 may not be a strength, and a statement that a child can concentrate with 1:1 support is in reality a description of his difficulty in concentrating without such support.

The CoP specifies that for most children speech and language problems should be included in Section B, since language underpins the whole of the learning process. Problems with motor control and sensory difficulties such as sensitivity to noise and touch are also likely to be classed as learning difficulties. Other medical difficulties may well be educational needs if they affect the child's ability to learn - for example, epilepsy, diabetes, incontinence, cerebral palsy may well appropriately be included in this section.

Educational difficulties need not be limited simply to learning problems. An academically average or able child may still have special educational needs if, for example, he has behavioural difficulties which lead to him frequently being educated outside the classroom or being excluded; or if he has cerebral palsy which affects his ability to record what he learns or to access classrooms; or if he has

continence problems which mean that he is frequently uncomfortable in class and which affect his confidence and self-esteem.

C: The CYP's medical needs connected to their educational needs

All health needs related to the child's SEN must be specified. This can include things like speech and language problems, but in general this type of difficulty should also appear in B. The Clinical Commissioning Group (CCG) can also include other health needs which are not related to SEN.

D: The CYP's social care needs connected to their educational needs

Any social care needs which relate to the child's SEN or which require provision for a child under 18 under s2 Chronically Sick and Disabled Persons Act 1970 must be specified. The latter is wide-ranging and includes such provision as practical assistance in the home, help in travelling to facilities, facilitating holidays, non-residential short breaks etc.

Many LAs tend to leave this section blank routinely, or will insert wording to the effect that the CYP has social care needs as set out in a separate Care Plan or other document produced by the Social Services Department or to be assessed by them. This is obviously unlawful as obviously it is the reverse of specific.

References to the fact that the child is or has been a child in need or the subject of a child protection plan can be included, but only if the child and parents agree.

Even if a young person over 16 has never previously had any social care needs, at this age this section should not be ignored because the EHCP should, by the age of 16, where practicable, be helped towards adulthood and independence: therefore there may well be social care needs in terms of helping him to achieve independence, housing and employment, and possibly he may need something in the nature of supported housing or longer term more intensive care.

E: The outcomes which the EHCP is designed to help the CYP achieve

Outcomes are defined as what it is hoped will be achieved for the CYP by the interventions set out in sections F, G and H. They should cover a range of timescales (i.e. short, medium and long term) and should be SMART (specific, measurable, achievable, realistic and time-limited). Unfortunately in our experience to date many EHCPs fail to achieve this. They should not be formulated until, at the very least, detailed reports on the child's difficulties and provision to meet them are available: too often LAs ask parents to formulate outcomes at the beginning of the assessment process,

before such evidence is available. The process should be that difficulties should be identified, then provision to meet each and every one of those difficulties: outcomes should only be drafted at that point, when all concerned are able to identify what it is hoped that the provision will achieve for the child in question.

Education outcomes are particularly important as the CYP gets older because they will determine whether the EHCP should continue beyond the age of 16: it will continue only if there is an educational need for it, and if the CYP has not achieved the outcomes set out in Section E. It is therefore important that outcomes should be reasonably ambitious and should focus on where the child should be in the longer term: if, for instance, outcomes are limited simply to achieving entry level NVQs or passes at GCSE and the young person duly does achieve that, the EHCP will come to an end even if the young person in fact wants to stay in education and needs support for that purpose.

F: Provision for the CYP's special educational needs

This section should detail and specify all the special educational provision which the CYP requires in order to meet all the needs set out in Section B.

Paragraph 9.69 makes this requirement very clear, stating:

- 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.
- Provision must be specified for each and every need specified in section B. It should be clear how the provision will support achievement of the outcomes.
- Where health or social care provision educates or trains a child or young person, it must appear in this section.
- There should be clarity as to how advice and information gathered has informed the provision specified. Where the local authority has departed from that advice, they should say so and give reasons for it.

Many LAs set out section 4 in two column tables with section E provisions on one side and section F on the other. Some extend this to include further columns for sections G and H. Whilst it is a requirement that support must help in achieving those outcomes and it should be clear how it is designed to do so, nevertheless the law and the Code of Practice make it very clear indeed that the primary requirement is that support should meet the needs set out in section B: if it does not, that is unlawful.

We would therefore strongly suggest that LAs should be asked to set out provision in Section F using the same headings as are used in Section B (e.g.. Cognition, communication, social, emotional and mental health, sensory and physical) - this makes it very much easier to demonstrate and check that all needs have been properly taken into account and provided for. If LAs are

determined to use tables, it could be suggested that the first column should be needs from section B with the corresponding provision in section F in the second column.

In formulating outcomes, the LA should take into account all the CYP's difficulties; there should be outcomes related to every area of those difficulties. Some LAs insist on limiting outcomes to a defined number, e.g. four; that is incorrect. In particular, outcomes should not be limited solely to what is to be achieved at the end of a particular Key Stage or at a particular age, e.g. 16 or 19.

The requirement for specificity and detail is vitally important. This is partly so that each and every teacher, assistant, etc., dealing with the CYP knows precisely what they should be doing to help him, and also because, if provision is not specified and detailed in Section F, it may be difficult to enforce the CYP's entitlement to it. The LA has a statutory duty to ensure the child receives all the special educational provision set out in this section; if they fail to do so, that duty can be enforced by an action through the High Court for judicial review which can be brought in the CYP's name and which may therefore be funded by legal aid if the CYP qualifies financially. However, if provision is not specific, it is very difficult to enforce it; for instance, if an EHCP provides that "*X would benefit from access to therapy throughout the year*", that is largely meaningless and would be completely impossible to enforce through the courts. By contrast, if the EHCP provides "*X will receive one hour per week direct 1:1 speech and language therapy from a qualified therapist*", it is very easy to check whether that is happening and to enforce it if it is not.

It is in relation to the issue of the detail and specificity that most disagreements arise. Some LAs have a tendency to set out support in very vague terms – look out for wording such as

- “will benefit from”,
- “access to”,
- “opportunities are”,
- “regular”,
- “up to”,
- “as advised”,
- “as required”,
- “may be helpful”,
- “contacts”, and
- “adults.”

Such terms, if they appear in draft EHCPs, should always be challenged; there is simply no reason why the EHCP should not state that the child "*will receive*" the support in question, or specify precisely how often "*regular*" is, how long a "*contact is*", and who the "adults" should be (e.g. TA, teacher etc).

The following are further points which tend to arise:

- The CoP emphasises that speech and language provision should normally be in this section - it does not matter if it is also in section G. The same will normally apply to occupational therapy where the CYP has motor, co-ordination or sensory difficulties, and may include other therapies and medical provision where this affects education or the child's disabilities prevent their access to education (e.g. provision for diabetes, epilepsy, mobility access, hydrotherapy, incontinence etc).
- If an EHCP provides for a child to receive programmes, the EHCP should specify who is to draw up, amend and monitor the programmes, who is to ensure their delivery (e.g. teachers, the SENCO, therapists), and what training and/or experience they should have. It may set out arrangements for someone like the TA to receive specific training, perhaps by attending individual therapy sessions with the child, and also for the programme to be amended from time to time.
- EHCPs often provide for children to be taught through whole class, small group and individual teaching. The EHCP should normally give guidance as to how much time is to be spent respectively in small group and individual teaching, the maximum size of groups, who is to be in charge of the groups, who is to provide 1:1 teaching, and again what training and monitoring they should have.
- Where EHCPs provide for outside support, for example from specialist teachers and therapists, consideration should be given to writing in extra time for these individuals to prepare reports, contribute to IEPs, and attend meetings, particularly annual review meetings, unless that is already covered by an agreement between the authority and the provider in question.
- Occasionally, EHCPs provide or allow for support to be amended in future – e.g. *“6 1:1 occupational therapy sessions per term for two terms, after which it is to be reviewed by the occupational therapist and may be increased, reduced or ceased.”* That is unlawful: support should only be changed after going through the formal process of amendment allowing parents to challenge it if they disagree.
- EHCPs sometimes provide for support by reference to the authority's banding system, i.e. a statement that the child will receive support at Band X under the local SEN policy. That is unlawful, because it means the authority can amend support simply by changing their banding arrangements without formally amending the EHCP. Support should not be set out solely in terms of the funds to be allocated but in terms of the actual support that this translates into, because the child is entitled to that support irrespective of cost.

- For similar reasons, if the EHCP says that some or all support will be provided by the school, responsibility for providing support still lies with the LA even if it has delegated funds to the school for SEN support, and funding arrangements are irrelevant for this purpose. If, therefore, an LA subsequently claims that it is not their fault but the school's that support has not been put in place, that is simply incorrect. Ideally where an EHCP is phrased in these terms the LA should make it clear that overall responsibility remains with them.
- EHCPs should match provision to need, not vice versa. Some NHS therapy departments tend to recommend their standard model provision for all children irrespective of what their difficulties are. LAs should not accept this and should instruct the relevant experts to recommend what the child actually needs – if the NHS cannot provide it then they will have to make arrangements with independent therapists.
- Some LAs tailor section F to provide only for provision available in the school they propose to name. That is unlawful. Section F must contain the support the child actually needs and, if the school the LA wants cannot provide it, then either they should arrange to fund the relevant support there or name a different school.
- Arrangements for transport should only be in the EHCP in exceptional cases where the child has particular transport needs. Rights to transport for all children are set out in s308 Education Act 1996 and include the right for children who live close to the school named in the EHCP but who cannot be expected to walk because of their SEN or disability, so they do not need to be included in the EHCP.
- Paragraph 9.69 of the Code of Practice includes a statement that "*in some cases, flexibility will be required to meet the changing needs of the child or young person.*" It should be noted that that, where there is provision for flexibility in section F, that should only be because it is in the interests of the CYP, not because it suits the convenience of the school or LA. The fact that it is only appropriate "*in some cases*" should also be noted: it is emphatically not appropriate in every case. In general, this relates to established case law that there is rather less need to specify and detail support for children placed in specialist schools: the courts have recognised that such schools can be expected to have the necessary expertise to ensure that children's needs are met, and also need to be able to react quickly and flexibly as children develop. However, even for specialist school placements it is recognized that this is a factor to be taken into account in appropriate cases, and this principle should never be used as an excuse for failing to specify when detail can reasonably be provided.

It is therefore strongly arguable that this exception cannot apply in relation to some of the more generic types of special schools (e.g. those described as catering for unspecified "Moderate learning difficulties") because it is unlikely that the staff in such schools will be experts in all aspects of all the types of learning difficulty for which they cater. It may also be that special schools themselves will in future want Section F provision to be more specific as

a result of recent changes in funding arrangements which mean that it may be easier to attract extra funding if it is clear from the EHCP that the child needs a large amount of specialist support.

In general it tends to be in the interests of a child in a special school to have provision reasonably detailed, particularly the type of help that that school specialises in, simply to avoid any arguments in the event of the child moving schools for any reason.

G: Provision for the CYP's medical needs

This must again be detailed and specific and should normally be quantified, and it should be clear how it will support achievement of the outcomes. It may include specialist support and therapies, such as medical treatments and delivery of medication, mobility equipment and the like.

It is again particularly important that this section be detailed and specific for the reasons set out above - staff need to know what medical help the CYP needs and, if it is not forthcoming, the CYP's entitlement to it can be enforced against the Clinical Commissioning Group by way of an application for Judicial Review.

LAs tend to make section G very brief, stating, for instance, that the child is under the care of X hospital in relation to his autism and sensory problems. Strictly this is unlawful, but whether it is worth making an issue of it really depends on how essential the health care provision is – it may be that educational provision is enough. It may however be worth pushing for, for example, adequate regular psychiatric help through CAMHS for child with severe anxiety, particularly bearing in mind how difficult it can be to access CAMHS via other routes, or for support like regular hearing checks, wheelchair checks etc.

The health authority has a right of veto in respect of provision in Section G and there is no right to appeal against that. However, it is a right that can only be exercised in good faith - if a CCG vetoed provision solely because the CYP was seeking to enforce it and not because it genuinely believed he did not need it, that veto itself could be challenged through the Judicial Review process.

H1: Any social care provision which must be made for the CYP under 18 resulting from s2 Chronically Sick and Disabled Persons Act 1970

Again these must be specific and detailed, and normally should be quantified, and it should demonstrate how social care will support achievement of the outcomes. A list of the type of services that might be accessed through these means appears on page 168 of the CoP.

Since the CFA came into effect, in our experience LAs are frequently completing this section solely by reference to a care plan which the Social Services Department has formulated or which it hopes to formulate at some time. This is wholly unlawful, since obviously this is the reverse of detailed and specific provision.

It should however be noted that Section H, unlike F and G, cannot be enforced through the courts. That is largely because there is separate provision in other statutes (notably s17 Children Act 1989 for children under 18, and the Care Act 2014 for adults) relating to care entitlement which entitle CYP to properly detailed care plans, where appropriate, and those plans can themselves be enforced through the courts if necessary. Therefore if a CYP has social care needs it may well be sensible to ask for a care assessment under these Acts at an early stage.

It is worth bearing in mind that, when considering the respective costs of proposed education placements, the LA and tribunal must take into account all costs to public funds, including social care costs. This may be particularly relevant to residential school placements: it may be that, particularly for a child with extensive social care needs, a residential school may be no more expensive than a day placement once the costs involved in education, social care and other costs such as additional TAs, therapies and transport are taken into account.

H2: Any social care provision reasonably required by the learning difficulties or disabilities which result in the CYP having SEN

This can include provision identified through other assessments, e.g. children in need, adult care or safeguarding assessments. This is particularly relevant to young people over 18.

I: Placement

The name and type of school, nursery, post 16 institution or other institution to be attended by the CYP; or, if the name is not specified, at least the type of placement.

Note that this section will be left blank in the draft, since the LA has to consult the parent or young person and take their preferences into account.

If the preference is for a mainstream school, that preference should be met unless it would be prejudicial to the efficient education of other children (and even then it should still be met unless there are no adjustments the school can make which would counteract such prejudice). I

if the parents prefer an independent school, the LA has no obligation to meet that preference unless it is unable to nominate another school or provision which will meet the child's needs appropriately and at lesser cost. The LA is however fully entitled to take cost into account, and if the child's needs can be met at a school other than the one preferred by the parent at lesser cost, they are entitled to nominate the cheaper school.

The LA must consult potential schools at which they envisage the child could be placed, normally supplying them with a copy of the EHCP and the reports annexed to it. If the school states that it is unable to take a child or meet the child's needs, the LA should not accept that blindly; if it disagrees, it may name the school in any event. If the school still disputes this, the issue can be referred to the Secretary of State for Children, Schools and Families for adjudication.

If a placement has not been identified, this section can simply set out the type of placement which the CYP needs, but the LA should aim to remedy this as soon as possible and should put in place interim arrangements such as home tuition. If the type of school is simply “a mainstream school”, this should be strongly challenged: if the LA is stating that a mainstream school is suitable, that should mean any such school is available unless it is full, and it should be easy to find a place. The failure to do is a strong indicator that the reality is that schools approached do not agree that mainstream education is viable.

Occasionally this section will say something like “*The LA considers that X’s needs could be met in a mainstream school but his parents have made their own arrangements for him to be educated at Y School*”. This is lawful but means that it is solely the parents’ responsibility to pay fees, where relevant, and to ensure that the CYP receives all the support he needs at the school they have chosen (including, for instance, buying in therapies that the school does not provide), and that they will have to provide transport. This is often the result of a deal negotiated with the LA, and parents should be aware that this commits to providing transport long term: if their financial or health circumstances change making this difficult, the LA is entitled to place the child in another cheaper school.

J: Personal Budget, including arrangements for direct payments

Detailed information on any Personal Budget that will be used to secure provision in the EHCP, including arrangements for direct payments. Personal budgets are defined as an amount of money identified by the LA to deliver provision set out in an EHCP where the parent or young person is securing that provision. There is more detailed information about Personal Budgets from page 178 onwards in the CoP.

K: A list of evidence on which the EHCP is based and which should be annexed to the EHCP.

This should include not only the reports obtained by the LA during the assessment process but also other relevant reports, e.g. paediatrician’s reports, and reports commissioned by the parents.

ELEANOR WRIGHT

SOS!SEN

November 2022

© SOS Special Educational Needs