

Judicial Review FAQ

1. Isn't it awfully expensive to bring a JR claim?

Most education JR cases relate to the rights of the child. Therefore it is likely that your child will qualify financially for legal aid if or when it becomes necessary to start a claim.

2. Does that mean that legal aid is not available before a claim is started? What about the costs of the pre-action letter?

Yes: unless the parents themselves also qualify for legal aid in their own right, or unless the young person concerned is over 18, the pre-action letter won't be covered by legal aid. Solicitors will tend to charge a few hundred pounds. See our Services page for details of the donation we request.

3. Can I write the pre-action letter myself/can a friend write it/do I have to have it written by solicitors?

There is nothing specifically requiring a pre-action letter to be sent by solicitors. However, it is fairly technical and ideally requires knowledge and experience of JR and all the law involved. The danger of a "do it yourself" approach is that you may make an error or leave out something important, which will simply mean that you have wasted time and haven't saved any money because either your solicitors (when they get involved) have to redo the letter or, if you start proceedings, the case gets thrown out of court.

4. Can any solicitor write a pre-action letter or bring a JR claim?

In theory yes, but again in practice you would be much better advised to go to solicitors with experience in education and/or public law, ideally with a legal aid contract. We have seen some poor quality pre-action letters from solicitors or self-styled legal advisers/SEN advisers which were simply a waste of time and money. Details of solicitors with the relevant contracts can be obtained from the Legal Aid Agency.

5. I phoned the Legal Aid Agency and was told that we couldn't get legal aid in our child's name. Why?

If you were asking about legal aid for the pre-action letter, they were right. If they were talking about legal aid for the purposes of starting a JR claim, they were wrong, and unfortunately this is an error we come across too frequently. It is better to contact one of the firms that has an education or public law legal aid contract direct.

6. If we have to take JR action in our child's name and lose, could we or our child be ordered to pay the other side's costs?

Assuming this is with the benefit of legal aid, almost certainly not. The law takes a pragmatic view that it is pointless to order someone who has no money to pay costs. There might be an order for costs which is not to be enforced without the leave of the court – that allows for the situation where the child suddenly comes into money somehow. However, neither we nor any solicitor we deal with regularly have never known any such order to be enforced.

7. Isn't it very stressful and time-consuming to bring JR proceedings?

Yes and no. If it becomes necessary you would be referred to solicitors with a legal aid contract who would do virtually all the work, although you will obviously have to liaise with them about evidence etc.

However, the vast majority of cases never proceed beyond the original pre-action letter. If, for instance, a local authority has missed a statutory deadline it will be well aware that it has no defence to a JR claim and will not want to risk becoming liable for its own and the claimant's costs.

8. Isn't JR really slow?

If, as happens in the majority of cases, the issue is very clear and the LA concedes on receipt of the pre-action letter, that could mean the problem being resolved within two or three weeks.

If you do have to take it to the next stage, solicitors can apply in urgent cases for emergency legal aid – and where a child is not receiving education or SEN provision, the Legal Aid Agency is prepared to treat it as urgent. That means that legal aid could be secured within a week or two of solicitors being instructed. It might be limited to something like requiring counsel's opinion in the early stages, but again that can normally be dealt with quickly. If or when Legal Aid is granted, notice of that fact has to be served on the LA and sometimes that alone persuades them to concede.

If you have to start proceedings, how long it will take depends on the circumstances and the court's backlog. In theory a fully defended claim may take several weeks to come to hearing, but this is rare; only a tiny proportion of defended JR cases get that far because they tend to be settled.

However, if the issue is urgent, you may be able to ask for "interim relief": i.e. a temporary order granting what you need – for example tuition at home – until the main action itself is heard. This is normally arranged by way of a shorter hearing which could take place within 2-3 weeks of the action starting, or even sooner in a really urgent case.

9. Who should I write to at the LA to warn of a potential JR claim?

For SEN cases, write to your case officer and copy in the Head of Department. For issues that are not limited to SEN, write to the Head of Education. For a transport issue, write to the head of school transport but again copy in the Education Department. You should be able to get

addresses from the website; if in doubt, use the central Town Hall address and/or phone for the address.

10. Should I write to the LA's complaints department?

Probably not. If you write to the complaints department, the official complaints procedure will kick in and that will be much slower; also this could be treated as an admission that there is an alternative route to dealing with your claim, which would make JR inappropriate as it is supposed to be used only as a last resort.

This does not prevent you raising a complaint at a later stage, e.g. about overall delay.

11. My child goes to a private school and they have imposed a part time timetable. Can I use JR?

No. JR is only available against public bodies.

12. The LA has sent a really poor quality draft EHCP which does not comply with legal requirements for specificity and detail, and they won't agree to any of my amendments. Can I JR them?

No. The rule is that JR is not available if you have a suitable alternative remedy, and in this case you do, via the Special Educational Needs and Disability Tribunal.

Similar principles apply in relation to, for instance fixed term and permanent exclusions from school (use the official review procedure), and transport disputes (use the internal review procedure unless it is too slow – see below).

13. My LA is refusing to arrange to get advice and information from a speech and language therapist for the purposes of an EHC needs assessment, although it is clear that my child has communication needs. Can I use JR?

Probably not, because you can probably remedy this through the tribunal who can order the LA to obtain reports provided it does not incur extra expense – e.g. if the cost of the relevant report is covered by something like a standard service agreement between the LA and the NHS.

However, if getting the report would incur extra expense then the tribunal won't order it and JR may be the only option. You would need to show that it is reasonable to ask for it, i.e. that there is evidence that your child may have difficulties of the relevant type that gives rise to a need for the report in question in order that all their learning difficulties can be properly described in the EHCP and provision made for them.

14. My LA didn't issue an EHCP until 10 weeks past the deadline/my child didn't receive the help set out in section F for two terms but it is in place now. Can I take JR proceedings?

No. JR isn't a claim for past failures, it's a complaint that the LA has made an unlawful decision and/or is acting unlawfully or wholly unreasonably, and in the education context is used to remedy the situation for the future. As your EHCP has now been issued, there is nothing that JR

could do to help you. You need to use the complaints process and take the issue to the Local Government and Social Care Ombudsman if necessary.

15. The school is refusing to provide my child with a fidget toy as provided for in the EHCP and says I must send one in. Can I threaten JR?

In theory yes, but in practice no, unless you want to pay the JR costs. The Legal Aid Agency has a duty to preserve public funds, and uses a rough rule of thumb along the lines of “Would a person of moderate means bring this claim if they had to pay the costs themselves?” In a case such as this, it is fairly obvious that someone of moderate means would simply pay for the toy.

16. But where would you draw the line on this? What about, say, a laptop?

It would depend on the circumstances. Some families simply could not conceivably afford a laptop so, even though the cost of a laptop is considerably less than the cost of legal proceedings, the threat of JR could be absolutely appropriate. Further, it is likely that the LA would rather pay for the laptop than risk JR. But they would be well aware that the threat of JR for something trivial would be an empty threat.

17. I wrote to the LA about the school’s failure to arrange Section F provision, threatening JR, and they have suggested a meeting to discuss it. Do I have to go?

Probably yes. You need to show you have taken all reasonable steps to resolve the problem. If you refuse, the LA will argue that you could have sorted it out at the meeting, therefore JR is inappropriate or premature.

18. My child’s EHCP says that he would benefit from some 1:1 speech and language therapy, but he hasn’t had any. Can I go for JR to enforce this?

Not with this wording: it’s too vague and doesn’t say your child has to have SALT, let alone how much and in what form. There are similar problems with wording like:

Regular
Support from an adult
Up to
Contacts with
Access to
Might be helpful
Might like to try
As appropriate/as required

19. The EHCP says my child should have 25 hours a week support, but much of the time his TA is shared with other children. Can I use JR to enforce 1:1 support?

Probably not with this wording as it does not specify 1:1 support. For 1:1 support to be enforceable, the EHCP needs to provide for something like “25 hours a week of 1:1 support dedicated to X from a TA with experience and training in working with children with ...”

20. My child's EHCP says that he should have occupational therapy, and I have a report that says he should receive 1:1 direct OT once a week. The LA is refusing to arrange this. Can I JR?

Not unless the report recommendation is written into the EHCP. Consider asking for an early annual review with a view to getting the EHCP amended to include this.

21. The LA says it's not their fault that my child isn't receiving therapy and I should take it up with the NHS. Therapy is detailed in section F of the EHCP.

They're wrong. If therapy is in section F, it is accepted that it is educational provision and therefore it is the LA's responsibility to arrange it. The fact that they do so through the NHS is irrelevant. If the NHS can't supply the relevant provision, the LA should source this through private suppliers.

22. The LA says they can't find a therapist who meets the requirements of the EHCP. What can be done about that?

If possible, find a therapist yourself – include private therapists in your search, consider investigating whether therapists attached to other schools might be available. Check lists maintained by the relevant professional bodies, try asking local SEN groups for recommendations. If you find one, write to the LA sending that person's details and say that, unless they have now found an alternative, they should make arrangements for this person to deliver the therapy and that you want confirmation within a week that they will do so failing which you will have to consider JR.

23. My LA says it has tried to secure the provision in the EHCP but it is absolutely impossible. Can we still pursue JR?

If it really is absolutely impossible, then no, you probably can't. The court won't order anyone to do the impossible.

However, you need to question closely whether it really is impossible, because the LA should think creatively about it. The following would not work as defences, for instance:

- The school can't provide a TA because it doesn't have to go through recruitment processes which will take time/we have so many staff off due to Covid
Why can't they source someone through supply agencies, if necessary employing a supply teacher temporarily?
- Your child can't come into school/travel on school transport because he is liable to seizures/severe allergic reactions/other medical conditions and we have no-one trained to deal with them.
Why can't they train someone/recruit from a nursing agency?
- We can't provide transport because your child is liable to try to escape and it's not safe for the driver

Why can't they use a secure harness/larger vehicle/vehicle where the driver is partitioned off?

24. My child's school is refusing to give my child a 1:1 even though it is clearly set out in my child's EHCP. Should I be pushing the school, the LA, or both?

Start with the school, pointing out that if it is detailed in the EHC Plan it is not an option. If they still refuse, alert the LA, reminding them that it is their duty to secure this under s42 Children and Families Act 2014 and asking them to liaise with the school. If that still doesn't work, threaten JR against the LA but alert the school that you are doing so.

25. The LA says that the school has enough money to arrange the provision in my child's EHCP but it still isn't happening. Should I threaten JR against the school, the LA, or both?

Write to both pointing out that you are not concerned with whose fault it is; the LA has a duty to secure provision, and the school has a duty to use its best endeavours to supply it. Suggest they sort it out properly between themselves as it would be a pity to have to involve the court. If that doesn't work, threaten JR against the LA, copying the school in.

26. Can I threaten JR to enforce the health and social care sections of my child's EHCP?

You can in relation to health provision provided that it is properly specified in section G. In that event you should be dealing with the Clinical Commissioning Group whose responsibility it is to secure it.

Social care is slightly more complicated, as the Children and Families Act 2014 doesn't say whose responsibility it is to supply it. If provision is in section H1, then the LA has accepted that it is provision to which your child is entitled under the Chronically Sick and Disabled Persons Act, and it may be enforceable on that basis. If it is in section H2, it would be difficult to enforce it. Generally if your child needs social care the LA should also have carried out a care assessment under s17 Children Act 1989 or, for over 18s, the Care Act 2014, and you should push for such assessments which should result in an enforceable care plan if it is accepted that your child has care needs.

27. The school/LA says they are allowed a reasonable time to put in place the provision in section F before I could consider JR or a complaint. Is that true? What is a reasonable time?

Yes and no. In strict legal terms all the provision in section F is enforceable from the day the EHCP is finalised, but the reality is that the LA would probably be allowed a short time to organise it. What is appropriate depends on what has been happening – e.g. if they agreed the relevant provision weeks before they finalised, realistically they should have arranged for it to be in place almost immediately. If they need to recruit, say, a TA, they should consider employing someone from a supply agency or similar in the meantime.

28. I am in the process of appealing but my child isn't getting any education/isn't getting the provision in his current EHCP. Can I threaten JR?

Usually yes, though LAs often like to suggest that you can't. The tribunal doesn't have power to order interim provision so the LA can't suggest it is an appropriate alternative remedy.

However, if your appeal hearing is due to take place within a relatively short time (say a month) it may be better to wait, because realistically you aren't going to get anything via the JR process any more quickly unless the LA gives in early – which is unlikely with a tribunal appeal ongoing.

29. My child can't cope in school and hasn't been in for several weeks. The LA/school says they don't have to provide home tuition unless I produce medical evidence. Can we JR them? I thought they had to provide it automatically under section 19 Education Act for any child out of school for more than 15 days?

You do really need medical or other professional evidence – e.g. if the school accepts your child cannot cope or that it cannot meet needs, that may be sufficient. Although s19 says the LA must arrange education if the child is out of school due to illness, exclusion or otherwise, that does not mean the LA has to take the parents' word for it every time, particularly for long term illness. Separate DfE guidance says they can reasonably expect consultant-level verification for long term absence, but should recognise that it is not easy to access consultants quickly and should be prepared to accept evidence from GPs in the short term.

Be aware that a medical letter/report that is all written in terms such as "X's parents tell me that he is struggling to get into school" won't be sufficient. The medic will need to express this as their own medical opinion and explain why they say the child is unable to be in school.

30. I have paid for a pre-action letter through lawyers. Can I recover the costs?

You might be able to, if you have to go to court and if you win. However, the law on this is complicated and it would be unwise to assume that you will recover it.

31. The LA has withdrawn my child's transport, saying I have to arrange this. We live four miles away from the school. Can we take JR action to enforce it?

Possibly, provided that the school your child is attending is the nearest suitable school. All LAs should have an internal review process to deal with transport disputes and normally this should be used first. However, sometimes it is too slow, especially if you have no other way of getting your child to school. In that event, JR might well be appropriate. It is sensible to threaten JR but to say you will be prepared instead to use the internal appeal route provided that they arrange transport in the meantime.

32. The LA refuses to provide transport because it says my child isn't attending the nearest suitable school, but I know the school they say is suitable could not meet my child's needs. Can I use JR to sort this out?

It depends!

If section I of the EHCP says something like: "X's needs can be met at Red School which is the nearest suitable school. However, X will be placed at Blue School to meet parental preference

and on the basis that they will arrange transport” then JR isn’t possible and you would have to appeal to the tribunal against the statement that Red School is suitable.

However, if it just says something like “Blue School” or “Blue School at parental preference” the LA will have to provide transport as it hasn’t named the school or type of school it claims can meet needs, and JR would be appropriate if the other conditions are met.

33. My child is 17 and going into the 6th form. The LA has withdrawn all transport because he is beyond statutory school age. Can we challenge this by JR?

This is quite complex because at this age the LA has a discretion whether to provide transport which however must be exercised reasonably – so it all depends on the circumstances. However, if the position is that your child cannot get to school/college without transport being provided, this will presumably mean he is getting none of the provision in section F of the EHCP and you may be able to consider JR on the basis of breach of the duty to secure provision under s42 CFA.

34. My LA says it doesn’t have to comply with time limits/ provide SEN provision in section F because it is against its policy. Is it correct?

No. Local policy never trumps the law.

35. We started JR action and the LA has now conceded our original point and agreed to pay our costs. However, I want to continue so as to get a judgment against the LA and/or to punish them, but my solicitor says we can’t. Are they right?

Yes, they are. The Legal Aid Agency won’t continue to fund a claim that has become academic, and if you insist on proceeding you risk the judge ordering you to pay all the costs from the point when the LA conceded.

36. My local authority is changing its SEN/transport policies quite radically and I think this will prejudice my child and all others in our area. Could we bring a challenge against the change in policy, and if so how?

In theory, yes, though this is complicated. Ideally you should bring the challenge in the name of a number of children and parents who are eligible for legal aid so as to provide some shield against possible costs liability. However, LAs have a way of conceding their particular cases in order to leave the main policy in place.

You might be able to bring a more generic challenge, but really need to discuss this with solicitors who specialise in such claims including Irwin Mitchell, Rook Irwin Sweeney, SinclairsLaw and Simpson Millar.