

## Negotiating an EHCP

This factsheet deals with the process to be followed when a local authority (LA) has agreed to issue an Education Health and Care Plan and serves a draft copy on the parents or young person for consultation purposes. A “young person” (YP) is someone past official school leaving age, i.e. 30<sup>th</sup> June in the academic year the child reaches the age of 16, and under 26. Provided they have the required capacity to understand the process, it is young people who have the right to be consulted and make decisions about SEN provision. Parents should still be closely involved and the YP can delegate decision-making etc to them.

The draft should include copies of any proposed appendices, i.e. the evidence relied on in drawing up the EHCP.

See our separate factsheet on EHCPs for details of what is to be expected of an EHCP and what to look out for.

The Children and Families Act 2014 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 a very collaborative one, with the parents and child, and/or YP if he is over 16, at the heart of the process with their views taken fully into account. Section 19 of the CFA states as one of the headline principles of the new legislation that:

In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—

- (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.

When a draft EHCP is served, the parents or YP will be asked to provide any comments and must be given at least 15 days for that purpose. Many LAs put a 15-day time limit on receiving responses, and you should normally try to keep to that deadline as otherwise it will delay finalisation of the Plan. They can also ask for a meeting with the LA.

The parents or YP must also be notified that they can during this period ask for a particular school or other placement; the draft EHCP must not contain the name of the school the LA proposes, although they can state in the accompanying letter which school they have in mind. The LA must give advice as to where they can find information about schools etc, and should seek agreement of any Personal Budget specified in the draft.

Some EHCPs are inadequate because the LA has not arranged the assessments that they should under **Article 6 of the Special Educational Needs and Disability Regulations 2014**. This requires them to seek advice and information as follows:

- (a) from the parent or the young person;
- (b) educational advice and information—
  - (i) from the head teacher or principal of the school etc that the child or YP is attending, or
  - (ii) where this is not available, from a person who the LA is satisfied has experience of teaching children or YP with special educational needs, or knowledge of the differing provision which may be called for in different cases to meet those needs, or
  - (iii) if the child or YP is not currently attending a school or post-16 or other institution and advice cannot be obtained under sub-paragraph (ii), from a person responsible for educational provision for the child or YP.
- (c) medical advice and information from a health care professional identified by the responsible commissioning body;
- (d) psychological advice and information from an educational psychologist;
- (e) advice and information in relation to social care;
- (f) advice and information from any other person the local authority thinks is appropriate;
- (g) where the child or YP is in or beyond year 9, advice and information in relation to provision to assist them in preparation for adulthood and independent living; and
- (h) advice and information from any person the child's parent or young person reasonably requests that the local authority seek advice from.

This means that if, for instance, there is a clear indication that the child may have communication problems, it is obviously appropriate for the LA to obtain a speech and language report and reasonable for the parents to request it. The same applies in relation to occupational therapy evidence where a child has sensory or motor skill problems. However, many LAs do not bother to ask for these or, if they do, they accept a response that the relevant service does not now the child. That is not adequate – the obligation is to carry out a proper assessment, irrespective of whether the child is known to the department in question. The LA should also instruct their experts to advise on specific and detailed provision to enable them to fulfil their own obligations properly.

Likewise LAs often ignore the need for a social care report. It may well be that this is irrelevant for many children, but if it is required then they should ensure that a proper report is obtained. It is particularly relevant for older children as consideration will have to be given to social care help to assist them in achieving independence in adulthood, and it may be necessary to consider something in the nature of supported housing

If inadequate assessments have been obtained by the LA, there is a difficulty in that, if parents insist on the LA's failures being rectified, they will not be able to do so in time to meet statutory deadlines. If that is the case, it may be worth asking them to finalise the EHCP as it is but to proceed to obtain the necessary information and amend the EHCP later.

Sometimes it may be worth parents considering whether to arrange their own experts' reports during the assessment process. However, it should be borne in mind that such reports will begin to go out of date after six months, and that up to date reports will be needed if it becomes necessary to appeal to the Special Educational Needs and Disability Tribunal. Therefore if it appears clear that a tribunal appeal will be almost inevitable - for example if the parents want a school placement to which the LA is strongly opposed - it may be worth holding back on arranging expensive assessments.

LAs will not normally include any information or provision in the plan unless there is evidence for it, for example from reports from the school and experts, including medical experts, and social services. If reports have been obtained by the parents or YP during the assessment process or for other purposes, copies should be provided. During the assessment process the parents will also have had the opportunity to ask the LA to take into account specific reports or to request that they consult particular experts.

The LA is not required automatically to accept the advice of independent experts, but if there is conflicting advice, they are required to give their reasons for preferring one source of advice over another. Perhaps not surprisingly, LAs regularly prefer the evidence of their own and experts over independent ones, but if they do so wholesale whilst ignoring independent evidence they should be challenged on this.

When a draft EHCP is received, we strongly recommend that you check it carefully bearing in mind all the points set out in our separate factsheet and with particular reference to paragraphs 9.61 to

9.69 of the Code of Practice, particularly the table set out in paragraph 9.69 which sets out what should be in each section of the EHCP. Check the draft against all the evidence available, especially expert evidence, and if you consider anything relevant has been omitted or misrepresented, make a note of it. It is often helpful to ask the LA to provide an electronic copy of the EHCP so that you can type in the amendments you are asking for – it will be helpful if you do this in a different font or font colour, or using tracked changes. But bear in mind that the LA will not consider substantive amendments unless there is evidence for them, e.g. in expert's reports, and it will therefore be helpful to show, e.g. through footnotes, where they come from.

If you attend a meeting with the LA, we also strongly recommend taking with you a copy of paragraph 9.69, in particular to counter any suggestions that there is no need for specific provision in section F. We also suggest that, if possible, you go with someone else who is able to take notes. Ideally, type up your own minutes of the meeting immediately afterwards and send them to the LA case officer. If you have any discussions about the EHCP over the telephone at any stage of the process, email the LA officer afterwards with confirmation of the matters discussed and agreed. Having a full paper trail can be extremely useful!

Parents should however consider carefully how much time and worry they are going to expend arguing with the LA about the EHCP. The important thing from the child or YP's point of view is usually to ensure that the EHCP is finalised without delay, because it does not take legal effect until it is signed by the LA. It may be worth using the opportunity of a meeting with the LA not only to negotiate but also to gain some sense of how willing they are likely to be to compromise. However, in our experience the reality with some LAs is that, if they are prepared to make changes at all, the changes are only very minor and cosmetic. In particular some LAs can be reluctant to specify provision properly or to include support which will lead to extra expense.

If the reality is that the parents/young person and the local authority are poles apart - particularly if there is likely to be radical disagreement as to school placement – or if it is evident that the LA is not going to compromise on anything other than minor wording changes, it may well be worth avoiding fruitless negotiations and stress, and simply asking the LA to finalise the EHCP immediately so that an appeal to the Special Educational Needs and Disability Tribunal can be started without delay. If you do this, simply tell the LA that you do not agree the draft but you want them to finalise the EHCP without delay.

Some LAs put pressure on parents to sign the EHCP. There is no requirement in law for this to happen, nor indeed is there a requirement for the parent to agree the EHCP at all. Even if the parent has said that they agreed it (which sometimes happens when the parent has been unable to obtain proper advice) that does not prevent a tribunal appeal.

More detailed information about the process can be obtained from the 0-25 SEND Code of Practice, available at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/398815/SEND\\_Code\\_of\\_Practice\\_January\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND_Code_of_Practice_January_2015.pdf)

Note:

- We regularly run interactive workshops/webinars where we discuss this process in more detail and with particular reference to your own circumstances
- We offer 1:1 meeting to help with this and all other aspects of SEN provision
- We can help with specific EHCP checks.

Check our website - <http://www.sossen.org.uk/> - or contact [admin@sossen.org.uk](mailto:admin@sossen.org.uk) for details.