EDUCATION HEALTH AND CARE PLANS

REQUESTS FOR ASSESSMENT AND THE ASSESSMENT PROCESS E-BOOKLET

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ABBREVIATIONS

CFA	Children and Families Act 2014
CoP	Special Educational Needs and Disability Code of Practice: 0-25 - January 2015
EHC	Education Health and Care
EHCP	Education Health and Care Plan
FE	Further Education
FtT	First-tier Tribunal
ICB	Integrated Care Board
LA	Local authority
LSA	Learning Support Assistant
OT	Occupational therapy/therapist
SALT	Speech and language therapy/therapist
SEN	Special Educational Needs
SENCo	Special Educational Needs Co-ordinator
SEND Regulations	Special Educational Needs and Disability Regulations 2014
SENDIST	Special Educational Needs and Disability Tribunal
TA	Teaching Assistant
UT	Upper Tribunal
WD	Working document

Note: in general we have tended to refer to the child and/or parent in this booklet for convenience. Unless stated otherwise, such references include young people over statutory school leaving age. Likewise, where we have referred to schools, this includes education institutions of all types, including nurseries, colleges, and the like.

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Where do we find the law and guidance?

The legal foundation for the current SEN system is Part 3 of the Children and Families Act 2014.

The **Special Educational Needs and Disability Regulations 2014** put some flesh on the bones of the Act: the regulations have been amended subsequently by the **Special Educational Needs and Disability (Amendment) Regulations 2015.**

Further detail is given in the **Special Educational Needs and Disability Code of Practice: 0 to 25 years – January 2015**, particularly Chapter 9. The Code of Practice (CoP) is guidance and does not have the force of the Act and Regulations, but local authorities must normally follow it unless there is a good reason not to. Guidance which is expressed using the word "must" in particular is derived directly from the legislation and normally means that this is compulsory.

Note in particular ***Section 19 Children and Families Act*** which requires local authorities (LAs) to have regard in particular to the following:

(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.**

We highlight s19 because it is particularly useful for parents and carers to bear in mind and cite if they feel that their views are being ignored, or if calls, emails and other communications are not being replied to.
S19(d) is important because it reflects the spirit behind the legislation and a major emphasis on the importance of outcomes throughout the law and the Code of Practice: in effect, it is saying that it is of paramount importance to help children and young people with SEN to realise their potential and to be helped to achieve to the best of their ability, and that short-changing them in terms of SEN support is simply not an option.

Children and Young People

The legislation distinguishes between children and young people, primarily on the basis that, once a child becomes a young person, then all relevant rights (e.g. rights to request amendments to EHC Plans, right to be consulted on school or college placement, right to appeal) pass to them provided they have the required mental capacity to make decisions of this nature.

A “young person” is defined as someone past school leaving age, i.e. someone who is over 16 by the end of the summer holidays who is therefore able to leave school on the last Friday in June.

Young people can of course access support and it is expected that parents and carers will continue to be the main source of support. They can specifically ask their parents to take decisions of this nature for them. It is advisable to record this in writing; for young people over 18 it may be worth arranging for them to execute a Power of Attorney, provided again that they have the ability to understand what they are doing. For some young people unable to make decisions for themselves, it is possible to arrange Deputyship, which gives the Deputy power to make decisions over a wide range of issues concerning care, education, finances and related matters.

The advice of a specialist solicitor with the required expertise should be sought on this.

For young people who do not have the required capacity to make decisions about their education, an adult will have responsibility to do so for them, taking into account at all times their best interests and, where possible, their views and wishes. In most cases, this will be the young person's parents.

Mainstream schools and SEN funding

This is a complex topic and space does not permit us to go through it in detail here. In brief, funding for maintained schools is via a formula which is revised by the Department for Education each year, and which is partly dependent on the number of children in school the preceding year, but there are three main elements to SEN funding:-

1. A notional sum (currently in the region of £4000 a year) for each pupil, with or without SEN, which covers the basic costs of running the school, e.g. salaries, maintenance, books, equipment, insurance, etc. The figure is never precisely £4000, and in practice more funding is allocated for pupils in secondary schools.

2. A notional sum (currently £6000 a year) for each pupil on the SEN register, whether they have an EHC Plan or not. This is a complex calculation, again dependent in part on the pupils with SEN in school the previous year, and means in practice that a lump sum is delegated to the school for them to use in order to meet SEN in the most efficient and economical way possible: it assumes that schools will be able to make savings by, for instance, investing in IT software, training for staff,

employing specialist staff such as mentors and Educational Literacy Support Assistants, group work for children with similar difficulties, sharing teaching assistants, etc. Delegated funding may therefore in practice work out at considerably less than £6000 per year per pupil, and this means that having a large number of pupils with a high level of needs imposes a considerable burden on schools if they need support costing at or close to £6000 but their delegated funding is at much lower levels.

3. The further sum required to meet the child's SEN over and above the notional £6000 a year. If, for example, the actual sums required are in the region of £10,000 a year, then this third tranche will be £4000 and must be supplied by the LA. If the child is in a specialist independent school costing, say, £80,000 a year, then the third tranche will be £74,000.

Although Academies and Free Schools are technically independent and funded through agreements with the Department for Education, funding arrangements for them are based on essentially the same calculation.

Some LAs tell parents, or tell them via schools, that they do not fund EHCPs. This is simply not true. They have a statutory duty under section 42 Children and Families Act 2014 to secure all the special educational provision specified in the EHCP, and if it costs more than standard delegated funding they have no choice but to provide the necessary funding.

Why ask for an EHC plan?

Ideally the needs of all children should be met in schools without the need for extra support. We know however that for a small proportion of children that that is not the case.

The benefits of an EHCP are essentially these:

- **The Plan provides a reasonably accessible and readable holistic document** which brings together all the child's education-related needs, including those that relate to health and social care. It is recognised that children with SEN may not simply have educational difficulties, but they may well be disabled and have related health and social care difficulties, which it would be artificial to separate out. A good EHCP should therefore be a document which summarises for a busy teacher, supply teacher, TA, therapist etc. the available information about what the child's difficulties are and what they and others should be doing to meet their needs. It should also in theory avoid the need for repeated assessments for different purposes, as most of this should be covered in the assessments done in preparation of the EHCP.

- **Money:** as indicated above, LAs must secure the provision set out in section F (and health authorities must secure the health provision set out in section G) and therefore must provide funding for it if necessary.

- **Enforceability:** the duties imposed on the LA and ICB are statutory and therefore are enforceable through such means as the LA complaints system and the Local Government and Social Care Ombudsman and, in particular, an application to the courts for Judicial Review (see SOS!SEN's website for further information on this). Since, in the main, rights to education and to SEN provision are the child's rights, any legal action is in the child's name and it is very likely that any legal action can be funded by legal aid, which means that the threat of judicial review is one that LAs normally take very seriously. However, provision can only be enforced if it is properly specified and detailed – if it is vaguely phrased (e.g. X may benefit from speech and language help, Y should have access to small group sessions, Z will have regular occupational therapy help) it may not be possible to enforce it in practical terms.

Practical steps

Before you start the process of applying for an Education Health and Care Needs Assessment, which is the first stage in the process of applying for an EHC Plan:

Sort out and file all relevant documents in a lever arch file (or several!). This should include documents such as:

- medical and school reports
- documents used to record the support given to your child, such as Individual Education Plans, Provision Maps etc
- minutes of meetings
- **relevant** copies from home/school book – e.g. notes by staff of difficulties in school, or notes from parents about problems with homework or that child was upset on return from school
- work samples, e.g. pieces of writing/maths etc demonstrating the difficulty your child is having and/or progress made. Keep these fairly limited
- records of assessments, standard assessment tests (SATs), etc
- social services reports
- DLA documents
- **relevant** correspondence with the school, LA and others

Keep a paper trail

If you attend a meeting, ideally take someone with you who can take notes, and produce and circulate your own minutes. If you are participating fully in the meeting, it is difficult to take full notes, and it is useful to produce your own minutes to ensure that comments and decisions that you feel are important are included.

If you can't take anyone with you, think about recording the meeting. This is legal and you do not need prior permission, provided that you keep the recording solely for your own purposes and do not forward it to anyone or publish it online or elsewhere. In limited circumstances, if there is a genuine dispute, a recording can be used in a court or tribunal hearing if the judge agrees. You can use the recording for the purposes of drawing up your own minutes.

If you have an important telephone or face to face discussion with someone, email them afterwards confirming what was discussed and anything they or you agreed to do.

How do I start the process?

This can be done either by a parent, carer or young person, or by the school or other placement.

It is obviously helpful to discuss this with the school beforehand, not least because it will strengthen your case if the request is supported by the school. However, this is not essential. Sometimes schools are slow in submitting requests due to SENCOs' heavy workloads and the amount of information some LAs demand, and it may therefore be preferable to avoid delay by submitting the request yourself. This is also helpful because all deadlines in the assessment process (see below) start with the date the assessment request was received from the council, and you will thus know exactly what date that was. If you do enter the request yourself, in general you should warn the school, not least because they will be asked by the LA on receipt of the request to provide further information so it is helpful to give them a chance to gather this together.

The process is commenced by a written request for an Education, Health and Care Needs assessment. This can be done by a simple letter – there is a sample letter at http://www.sossen.org.uk/information_sheets.php on our website. However, it is likely that your LA will have a form for this purpose on its Local Offer website, and it may save time and argument to use this. Some LAs also require documents to be filed via an online hub: check your LA's website in case this applies to you. As a matter of law, you do not have to use either the LA form or an online hub, but it may save unnecessary problems if you do so. If you cannot answer any questions on LA forms (for example, about what support your child has been receiving in school, full details of assessment results etc.) leave the relevant section blank or refer them to the school/medical authorities etc. to obtain the information from them. Don't delay in sending the form whilst you try to gather information yourself – delay may be harmful to your child.

Send copies of all relevant documents with the request, including any medical and school reports and correspondence from the school. However, it is not necessary for either you or the school to have obtained expert reports before entering a request: if your local authority insists on this, ignore it and/or point out that this is not a precondition that they are entitled to impose under the relevant law.
Make sure you have a record of when you sent the request in.

If posting the request, send it by recorded delivery, if emailing, ask for a read receipt, and if hand delivering, ask the person accepting the document to sign a receipt. It is important to have a record of the date when you started the process as time limits for completing it are calculated from this date, and it is not unknown for requests to become lost, buried or delayed.

What happens next?

The LA should acknowledge ledge receipt of the request - if you do not receive this, chase them up to ensure that they are duly processing it.
They may request further information from you, and will in any event contact your child's school for further information.

The LA must complete its consideration of the original request and notify you of the outcome within six weeks from the date it received the request for an EHC Needs Assessment. In doing so, it must comply with the criteria set out in the Children and Families Act 2014.

Legal criteria for deciding whether to carry out an assessment

The criteria are set out in

Section 36(8) Children and Families Act 2014:

The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted … the authority is of the opinion that –

- The child or young person **has or may have special educational needs**, and
- It **may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.**

Note that this is therefore a very low threshold, a fact which does not necessarily seem to be fully understood by LAs - hence the very high success rate (over 90%) of appeals to the Special Educational Needs and Disability Tribunal against refusals to assess.
Note also that **both** elements need to be satisfied, and in practice if an LA refuses assessment it is more often on the basis of (b), when they argue that it will not be necessary for special educational provision to be made because all the child's needs can be met via SEN Support in schools.

The term "special educational needs" is defined in

S20(1) Children and Families Act 2014:

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

S20(2):

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

1. has a significantly greater difficulty in learning than the majority of others of the same age, or
2. 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.

"Special educational provision" is defined in

S21(1) Children and Families Act 2014:

"Special educational provision", for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in –

1. mainstream schools in England;
2. maintained nursery schools in England;
3. mainstream post-16 institutions in England, or
4. places in England at which relevant early years education is provided.

This means provision available for mainstream schools throughout the country, not simply provision available in the child's school or the local area. Some LAs, for example, have High Needs Funding or similar schemes where schools can apply for extra funding for pupils with particular needs without the need to go through the EHCP process. These are purely local and non-statutory, and, in particular, they are not enforceable and therefore may be withdrawn at any time. An LA cannot lawfully refuse assessment on the grounds that the provision the child needs is notionally available through this process without the need for a formal EHCP, because this is not provision available to mainstream educational institutions throughout the country. In fact, simply by allocating such funding the LA is implicitly acknowledging that the child does have needs which cannot be met within normal

mainstream resources and therefore that they qualify both for assessment and for an EHCP to be issued.

If a school is telling a parent that their child cannot have extra help which the school agrees is necessary because they do not have adequate funding, on the face of it that is a straightforward admission that the child's needs cannot be met within normal mainstream resources and that an EHCP is very likely to be needed.

It is worth trying to get this in writing from the school; if they do not put it in writing, email them with confirmation that that is what you have been told. If they do not deny it, it is reasonably strong evidence.

The SEN Code of Practice sets out further matters to be considered, but they do not outweigh s36(8). These are:-

Paragraph 9.14:

LAs should consider whether there is evidence that, despite relevant and purposeful action to identify, assess and meet the SEN, the child or young person has not made expected progress, taking into account a wide range of evidence, particularly:

- evidence of the child or young person's academic attainment (or developmental milestones in younger children) and rate of progress;
- information about the nature, extent and context of the child or young person's SEN;
- evidence of the action already being taken by the early years provider, school or post-16 institution to meet the child or young person's SEN;
- evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided;
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies, and

- where a young person is aged over 18, the local authority must consider whether the young person requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete their education or training. Remaining in formal education or training should help young people to achieve education and training outcomes, building on what they have learned before and preparing them for adult life.

The CoP gives further information on what is regarded as “less than expected progress” in

Paragraph 6.17 :

Teachers should assess progress regularly and identify pupils making less than expected progress given their age and individual circumstances. This is progress which:

- is significantly lower than that of their peers starting from the same baseline
- fails to match or better the child’s previous rate of progress
- fails to close the attainment gap between the child and their peers
- widens the attainment gap

Note:

- Progress is not limited to academic progress - it will include progress in such areas as communication, co-ordination, behaviour, and social, emotional and mental health. **It is perfectly possible for an academically able child to have SEN and qualify for an EHCP.**

- The CoP is very clear that progress must be **adequate**: it is not good enough to suggest that the fact that the child has made minimal progress indicates that they can learn and will never need an EHCP. At the very least, progress must be such that the attainment gap between the child and their peers is not widening: if a child has made, say, three months’ progress within a year whilst their peers have made a year’s progress, the gap must be widening.

- If a child has made progress but this is only because they have received support well above what is normally available in mainstream schools, that has to be taken into account. Therefore if a child has made progress because they have had a home tutor or therapies outside school, or because the school has in practice devoted an unusual amount of resources to them, this should be set out in the application for assessment.

Unlawful requirements and common myths

Some LAs set various preconditions before they will consider requests for assessment, such as -

- a requirement that a child must have spent a specified amount of time on SEN Support;
- the school should have applied for specified funding by other means, e.g. local high needs funding;
- the school must be able to demonstrate that it has spent all the funding delegated for SEN support (i.e. approximately £6000 per year);
- the child must be behind their peers by a specified amount of time, e.g. a reading age four years behind that of their peers;
- it will not assess if the child is not behind academically;
- it will not assess if the child is not in school;
- the school must obtain an educational psychologist's report;
- the child's needs must be particularly severe.

None of these criteria are required under section 36(8) and a number are unlawful. LAs have to consider the case of each child or young person individually.

In particular, there is now considerable case law that says it is not sufficient for an LA to say that support is theoretically available in the mainstream placement if the reality is that the child is not receiving it - for example where several hours a week teaching assistant support is allocated but in practice the TA is regularly taken away for other purposes such as exam invigilation, accompanying other children on trips or supplementing support for other pupils.

The £6000 requirement is a particularly prevalent one. It is not wholly irrelevant, because of the need to consider whether the child's needs can be met within normal mainstream resources. The LA must of course consider what support the child has already had, whether they have made progress, and whether there is more the school can do within its normal resources. However, the fact that a school cannot show that it has been spending £6000 a year on the child in question cannot in itself be a conclusive reason for refusing to assess because:

- There is nothing in the law, regulations or Code of Practice saying so.

- Until a child is assessed, the LA cannot know what the child actually needs. It may well be, for instance, that assessment reveals that the child has a serious language processing problem which has not been detected before, and which means that specialist speech and language therapy bringing overall costs to well above £6000 a year was required all along.

- Unfortunately some schools simply do not recognise, or refuse to accept, that a child has SEN, and therefore they may fail to make provision under SEN support that they obviously need and never come anywhere near spending £6000 a year to support them. The child should not be yet further prejudiced by reason of the school's failure in this regard, not least because it will be

near-impossible for the parent to persuade the school to start putting more support in place so as to tick the £6000 box.

Parents are unfortunately regularly put off from applying for EHCPs by schools which tell them (usually in perfectly good faith because that is the training their staff have received from the LA) that there is no point in applying because their LA applies these and similar criteria and therefore the application stands no chance of success.

It should always be borne in mind that local LA policy never trumps the law; if a parent really believes that their child needs to be assessed and/or may need an EHCP, they should not be put off by this because, even if it is virtually inevitable that the LA will refuse to assess, it really is relatively easy to appeal and appeals against the refusal to assess have an extremely high success rate (over 90%). The Special Educational Needs and Disability Tribunal considering such appeals focuses rigidly on the requirements of section 36(8) Children and Families Act 2014 which are set out above.

Timescales

The LA must send its decision whether it is going to assess or not within six weeks of the date it received the request to assess.
The only exceptions to the six week time limit are:

- The LA has requested advice from the school or other institution during the period beginning a week before the beginning of the summer holidays to one week after it reopens
- Exceptional personal circumstances affect the child or parent within the six week period
- The child or parent are absent from the LA area for a continuous period of at least four weeks within the six week period

Internal LA problems such as short staffing, caseworker illness etc. are not a valid reason in law for failing to meet this deadline.

If the LA goes past the six week deadline, it is worth starting at least to send polite reminders. If it goes far past, consider exerting further pressure up to and including a threat of a judicial review claim (see information on enforcement at the end of this booklet and on SOS!SEN's website). However, bearing in mind that the easiest way for a caseworker to avoid such action is simply to send out a refusal, this is probably a tactic to be used primarily if the parent is fairly sure the request is going to be refused anyway, so that they can move on to exercising the right of appeal.

What if the LA refuses assessment?

The letter refusing assessment should give at least basic details of the reason for refusal. It should also give notice of the right to appeal with details of how to do so; and details of mediation advisers, as parents are required to be given information about mediation as a possible means of resolving the issue before they consider appealing.

Some LAs offer a meeting to discuss the decision, generally called something like a "Way Forward" meeting. It is usually a good idea to attend the meeting, not least so that parents can ask precisely why the LA say their child does not meet the criteria set out in s36(8) and what support they think the child needs in school. It is worth parents taking a copy of s36(8) to the meeting with them to make it very clear what the legal test is.

If, as is frequently the case, the reason LAs are refusing assessment is because they contend that all the support required can be delivered by the school without an EHCP, the meeting can be used to go through precisely how they contend this will be done.

Parents should take careful notes, and it is also useful to have this in the minutes, both so as to persuade schools to put any further agreed help in place, and also possibly as evidence for any later appeal – if, for instance, the LA is claiming that support can be put in place but subsequently the reality demonstrates that it cannot.

Sometimes LAs tell parents that they will reconsider the request at a later stage, for instance once they have obtained further information from the school. This should not be necessary given that they have had six weeks to obtain such information, but if it is realistically likely to lead the LA to change its mind, obviously there is nothing to lose from the parental point of view.

If a meeting or further consideration by the LA is going to happen, make sure that this does not lead you to miss any time limits for appeal. There is no reason why further meetings or reconsideration cannot happen whilst the appeal process goes on.

Brief information about the appeal process is given at the end of this booklet; for more detailed information, please see our separate booklet on appeals and our webinars.

Parents can enter a new request for assessment at any time after refusal; the only exception to this is where an assessment has taken place within the last six months. However, in general it is likely to be sensible to leave a gap, if only to ensure that any missing evidence is in place or that you have further evidence demonstrating that the child's needs are not being met and they are not making progress.

What happens if the LA agrees to carry out an assessment?

The assessment process varies between authorities, but it is generally along the following lines:

- Parents, children and young people will be asked for their specific views which may form part of section A of an EHCP.
- The LA should instruct experts for reports and assessments. Their duties in this respect are set out in

Regulation 6 SEND Regulations 2014:

The LA must obtain advice and information from -

- the child's parent or the young person;
- education advice from the head teacher or principal of the school or post-16 or other institution; if that is not available, e.g. if the child is not at school, LA must get advice from the person teaching them (which could include the parent) or someone with experience of teaching children or young people with special educational needs, or knowledge of the SEN provision which may be called for in different cases to meet those needs;
- medical advice and information from a health care professional identified by the responsible commissioning body;
- psychological advice and information from an educational psychologist;
- advice and information in relation to social care;
- **advice and information from any other person the local authority thinks is appropriate;**
- where the child or young person is in or beyond year 9, advice and information in relation to provision to assist the child or young person in preparation for adulthood and independent living;
- advice and information from any person the child's parent or young person reasonably requests that the local authority seek advice from;
- possibly advice from a specialist visual or hearing impairment professional if relevant.

When seeking advice, the LA must provide the person from whom advice is being sought with copies of—

1. any representations made by the child's parent or the young person, and
2. any evidence submitted by or at the request of the child's parent or the young person.

Note: The local authority must not seek any of the advice referred to 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 satisfied that it is sufficient for the purposes of an EHC needs assessment.

Practical considerations:

Advice from parents may be used to complete section A of the EHC Plan if a Plan is issued. Some LAs use forms for this purpose, which may be useful as a prompt about what sort of information would be helpful; however, there is no need to be constrained by the form and if you feel, for instance, that there is not enough space there is no reason why you cannot cross-refer to a separate document.

It makes sense for parents to give their views reasonably fully, unless of course this has already been done by way of the request for assessment. However, over-long submissions should also be avoided – the reality is that busy teachers and others are not going to plough through long essays!

There is some helpful guidance in paragraph 9.69 of the Code of Practice (page 164) as to the information to be included in section A.

When you are informed that the LA has agreed to assess, **contact them immediately with details of the up to date advice and information you feel they need to obtain**, and explain in each case why you feel this is needed – for example, cite evidence that the child has problems requiring a specialist report, or give details of people such as therapists, CAMHS etc. who are working with your child already.

Bear in mind that the obligation imposed on local authorities is only to obtain advice and information, not to arrange full assessments. It may well be, for instance, that the professional concerned has worked with your child for some time and they do not need to carry out a new assessment to provide a full and up to date report. However, if the professional has not had any previous dealings with your child and there is no up to date information on record, there is a strong argument that they must assess in order to provide an adequate and full report that describes all your child's needs in the relevant area, and advises on the provision required in detailed and specific terms.

The proviso requiring LAs not to seek up to date advice if it has previously been provided for any purpose only applies if the LA, the parent and the person concerned consent. Too often, LAs seek to use this proviso as a reason for not obtaining relevant advice without bothering to ask for the parent's agreement. If the parent refuses to give the agreement then the LA must obtain up to date advice. By the same token, parents cannot use this proviso to seek to prevent the LA from getting its own advice if, for instance, they already have good professional reports: the LA is equally entitled to disagree that the reports are sufficient for assessment purposes.

Once you have requested assessment you have in effect given consent for all necessary assessments: you cannot prevent the LA from assigning someone to assess whom you do not want, or prevent any particular type of assessment such as an assessment or observation in school (except in the relatively rare case where there is medical evidence that the child cannot cope with it). This implied consent however only lasts till the end of the assessment process, i.e. when you receive a formal decision whether the LA is going to issue an EHC Plan or not.

The requirements of Regulation 6 are unfortunately too often ignored or misinterpreted by LAs. In deciding what advice is appropriate or reasonable for the parents to request, the LA should take notice of information from the school and elsewhere – e.g. if the school or educational psychologist has flagged up social communication or sensory problems, it would be very appropriate for the LA to obtain speech and language or occupational therapy advice. Again, this is something that is frequently ignored by LAs and they should if necessary be reminded that it is a statutory requirement.

Some LAs refuse to obtain advice such as SALT or OT advice if the child has not previously been known to the relevant services within the local NHS; this is **not** lawful; equally, they accept too readily a

response from the local service to the effect that the child is not known to them, or that they have been discharged.

Obviously this is not an adequate response to a request for advice, and LAs should (but rarely do) point out that that is not adequate, and that if the service in question does not know about the child they should arrange an early assessment to ensure that they can give an adequate report.

Some do not obtain this because they state there are long waiting lists and/or a shortage of local Educational Psychologists or other experts; again, this is not a valid reason - if the required evidence cannot be obtained via NHS services, the Local Government and Social Care Ombudsman has made it very clear that the LA should obtain it from independent experts.

When LAs do ask for advice, they should instruct the expert to advise in detail on **all** the child's special educational needs (or other needs relating to education) and should advise in detailed and specific terms on the support required to meet those needs. This is because, if they issue an EHCP, they will have to detail the child's needs and set out provision in detailed and specific terms. It may do no harm to remind the LA of this requirement and ask them to confirm that they will comply – you could even ask for copies of their instructions to experts.

If you have the opportunity, you could also point this out to the relevant experts and remind them that they will be helping the LA to fulfil its legal duties if it advises on that basis. If you have the opportunity, you could also point this out to the relevant experts and remind them that they will be helping the LA to fulfil its legal duties if it advises on that basis.

If your child has or needs help from **social services**, it may be sensible to ask separately for a care assessment under section 17 Children Act 1989 or, for a young person over 18, the Care Act 2014. S17 provides that LAs have a duty to carry out care assessments on children in need, which is defined as including children with disabilities – and the great majority of children who qualify for EHC Plans will meet the legal definition of disability.

The duty is mandatory, and the LA cannot refuse; frequently they seek to do so by reference to internal criteria, and If you encounter this response you should point out that the law trumps internal policies and that the LA has no choice. This may result in recommendations for a wide range of support both in and outside the home, including respite care in appropriate cases.

Having a care plan will improve your chances of having useful provision in the care section of any EHCP, and may result in the issue of a Care Plan which can be enforced separately through the courts if necessary. We would in particular suggest that a care assessment should be sought for young people over 16 and above, because as they approach adulthood they may well need social services support in terms of accessing independent living, employment, the local community and health services, etc.

If the LA fails to obtain the necessary advice, draw their attention to Regulation 6, and point out that, if they decide to issue an EHC Plan, they have a duty to ensure that full details of all the child's difficulties and the provision required to meet them are included in the Plan, and they will be unable to do so unless they source the right advice from the appropriate professionals. If necessary, escalate this to the Head of Department and your local councillor.

If they fail to obtain it, and you subsequently have to appeal, you can ask the tribunal to order the LA to obtain the necessary reports; however, they only have power to make such orders if it will not cause the LA extra expense, e.g. if they can obtain them from their own employees (such as educational psychologists) or via service level agreements with local NHS services. It might be possible to enforce this by way of an application for judicial review, but this has not to date been tested in the courts.

If as a result of the failure of the LA to obtain reports you feel that you have to obtain your own independent reports, it is worth entering a formal complaint with the LA and considering taking this to the Local Government and Social Care Ombudsman if necessary.

The LA should give the respective providers six weeks to provide their advice. It is worth asking the case officer to confirm who they are contacting or have contacted for this purpose; if a new assessment is needed but no-one has contacted you to arrange it within a reasonably short period, alert the case officer and remind them that you will expect them to meet the statutory deadlines so they need to ensure that steps are in hand to obtain reports without delay.

Once all the relevant advice is available, **the LA will need to decide whether to issue an EHC Plan.** Many in practice, have panels whose duty it is to make such decisions. For this purpose some LAs put the information into a document which has a format similar to a draft EHC Plan, essentially to summarise it and to help their panel to consider whether to issue a Plan. Therefore the fact that you receive something looking like a draft does not necessarily mean that a decision has been made to issue a Plan.

Should parents seek to obtain their own independent reports for assessment purposes?

It depends! The advantage of having an independent assessment is obviously that it is likely to be more thorough than the advice and information sought by the LA, and in particular (if the expert is experienced in this area of work) will include advice in detailed and specific form as to the provision required to meet the child's needs. If the LA fails to seek advice in the relevant area, your report will be the only evidence available on the relevant area of specialism and the LA should take it fully into account in making a decision and in any draft EHC Plan if it decides to issue one.

The disadvantages are that:

- Reports from reputable experts are expensive, generally well into four figures. Ideally you should go to experts with experience of tribunal appeals, in case this becomes necessary; good experts are in demand, producing a good report is very work-intensive, and prices reflect both those factors.

- Because good experts are in demand, they tend to have long waiting lists, generally months long.

- Reports have a limited shelf-life as children develop. It is difficult to give any definitive rule of thumb on this as children develop at different rates at different stages in their education, but in any event a report over 18 months old is not likely to be viewed as very reliable.

- LAs, with some honourable exceptions, tend to pay little attention to such reports; we have known case officers to admit this quite openly to parents. Excuses tend to be along the lines that they aren't viewed as reliable because they are paid for (don't LAs pay their experts?) or that they only accept reports from people within the NHS. These really do not hold water as experts are subject to professional standards regulation by the Health and Care Professions Council and, frequently their own separate professional bodies. The legislation is clear that the LA has to consider all evidence and cannot restrict it. Experts who cannot fully explain, defend and justify their reports to expert tribunals on a consistent basis simply will not last professionally.

Nevertheless, it would be a real shame to spend a lot of money on reports only to find they are totally ignored, and that by the time you want to use them at a tribunal appeal they have gone out of date.

Therefore, unless money is no object, it may be better to delay; expert evidence becomes most crucial once an EHC Plan is being drafted and, in particular, for appeals against contents and school placements. Alternatively, it may be worth limiting reports to one – generally this should be an educational psychology report, unless your child's difficulties are very clearly predominantly in another identifiable area, for example communication.

To find appropriate experts, a good starting point is other parents, particularly those who have gone through tribunal appeals; parent support groups, including online ones, may also be a good source of information. It may be worth asking to see an anonymised sample report to see how thorough the expert's approach is, whether the expert carries out full assessment tests, whether they fully take into account the views of all those working with the child, and whether they advise in detailed and specific terms. A report that is full of terms such as "X might benefit from …" or "X might be appropriate" would give cause for concern!

Criteria for issuing an EHC Plan

Section 37(1) Children and Families Act 2014:

Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC Plan.

Paragraph 9.54 CoP:

In deciding whether to make special educational provision in accordance with an EHC plan, the LA should consider all the information gathered during the EHC needs assessment and set it alongside that available to the LA prior to the assessment. LAs should consider both the child or young person's SEN and 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.

Paragraph 9.55 CoP:

Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the LA should consider what further provision may be needed. The LA 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 LA to make special educational provision in accordance with an EHC plan.

Important considerations therefore include:

- whether the child is making adequate progress, and again this is not limited to academic progress;
- whether their needs could be met within normal mainstream resources. Note that this relates to mainstream resources normally available in **any** school throughout England – if your child's school happens to be prepared to devote greater resources to supporting your child than are available at most schools, or if your local authority offers extra financial resources to support SEN, your child will still be entitled to an EHC Plan. As mentioned above, some LAs have systems whereby schools can apply for exceptional funding over and above the funds normally delegated to schools for LA support without having to apply for an EHC plan. There is obviously no guarantee that children will receive such support, and funding tends to be for a limited period only. There is a strong argument that, if a child qualifies for exceptional funding, the LA has tacitly accepted that their needs cannot be met from resources normally available in the mainstream and therefore they must qualify for an EHC Plan.
- LAs sometimes refuse to issue EHC Plans on the basis of support they claim is available to your child but which in practice is not available, or which is unreliable – for instance, a TA is theoretically available for your child but in practice is regularly diverted to support others, invigilate in exams etc. There is strong legal authority to the effect that this should result in the issue of an EHC Plan, because it is needed in order to give the power to enforce the child's legal entitlement to the support in question.
- If the child is only making progress because they are receiving support over and above what is normally available within normal mainstream resources – for instance, home tuition or therapy, or an unusually high degree of support in school – this should be taken into account and may well indicate the need for an EHCP, since there is no guarantee either that the school can continue to offer extra support or that the parent can continue to pay for private help.

Time limits for decision on whether to issue an EHC Plan

If the LA decides not to issue an EHC Plan, it must inform the parents of that fact within **16 weeks** of the date when the request for assessment was entered, and again must give notice of their right to appeal and information about mediation advice.

There is no specific time limit by which LAs must give notice of a decision to issue an EHCP, but logically it should be within 14-15 weeks of the request for assessment.

This is because they have to allow parents and schools 15 days each to consider drafts, and will need to allow time to consider any amendments and finalise and serve the EHCP within the time limit of **20 weeks** from receipt of the request for assessment. Usually LAs notify parents of this by issuing a draft EHCP for formal consultation (see below).

The exceptions to the time limits are the same as those that apply in relation to the assessment decision – i.e., essentially, where information is required from the school over the six week summer holiday break, exceptional circumstances relating to the parent or child, or the absence of the parent or child from the LA area for more than four weeks.

Note, however, that this is not automatic; LAs can only rely on, for instance, the summer holiday extension if they actually need information from the school at the relevant time – if they had all the relevant information before the end of the summer term, this is not a valid reason for extending time. They should also notify parents if they are relying on this exception.

There is a further practical extension that applies if the LA originally refused to assess and subsequently changed its mind, or the parent appealed against that decision and succeeded.

In that event the clock effectively stops at the point when the decision to refuse to assess was given, and starts again at the point when that decision has been reversed. Therefore, if the LA does reverse its decision, it is in effect at Week 6 of the process, and has a further 10 weeks in which to carry out the assessments and notify the parents of any decision not to issue an EHCP; if it decides to issue an EHCP, it should tell the parents within 8-9 weeks.

What happens when the LA decides to issue an EHC Plan?

1. If the LA decides to issue an EHC Plan, it must serve a draft on parents with the reports relied on for the purposes of producing it, and allow them at least 15 days to make comments on the draft. The name of the school should be left blank in the draft and parents should be invited to express a preference on this. More information on naming schools is given below.

2. In responding to the draft, it is helpful to refer to the information in paragraph 9.69 of the CoP as to what should be in each section of the Plan. More information is given in our booklet relating to EHC Plans, but it is particularly important to try to ensure that:

- All the child's educational needs are properly described and specified in section B. This includes health needs which relate to education, particularly in relation to communication, motor and sensory difficulties. The description should also give some indication of the severity of the relevant needs and how they affect the child's learning.

- There is provision to meet each and every one of the child's needs in section F.

- Provision is set out in section F in detailed and specific terms.

- Provision is framed in terms of meeting needs rather than outcomes. An outcome is the benefit or difference made as a result of an intervention – therefore in defining an outcome, it is necessary first to decide what the child's needs are and the provision required to meet them, before deciding what outcome is to result from that provision.

3. If you are considering arranging any of the provision your child needs yourself by way of a Personal Budget (e.g. if you want to arrange for your own therapist to continue working with your child), you should ask for this during the consultation process. You can only have a budget for provision that is in section F of the EHC Plan. The regulations on this are fairly complex, and the LA should signpost you to sources of help for this purpose.

4. You are entitled to request a meeting to discuss the draft, and if you do the meeting should take place within the 15 day period. If you attend a meeting, we suggest that, as a minimum, you take a copy of paragraph 9.69 of the Code of Practice along to refer to if there is disagreement as to what the relevant legal requirements are.

5. The LA will not agree to substantial amendments to the Plan unless there is evidence for them in the advice submitted to them. If you want amendments such as more detail in section F, it may be necessary to ask the LA to go back to their experts to obtain advice on detailed and specific provision.

6. It is not generally worth spending a lot of time arguing about the contents of the EHC Plan if it becomes obvious that the LA is simply not going to make any useful amendments, particularly if this results in delay in finalising the Plan.

7. The LA does not have to have parental agreement to the Plan before issuing it, and it does not have to have any signature from parents. Some ask parents to sign a form confirming that they agree to the Plan: again, there is no requirement in law for this. If you are asked to do this and do not agree to the Plan, amend the form you are signing to show that fact.

8. The deadline for serving a final signed EHCP is 20 weeks from the date the request for assessment is received (subject to similar exceptions to those described above). Parents and young people should again receive notice of their right to appeal against the contents of the EHCP, and details of mediation advisers.

Naming a school

1. If your preference is for any of the following types of placement, the LA must consult them -

- Maintained schools, colleges, nurseries etc.
- Academies and free schools
- Non-maintained special schools
- Section 41 schools. These are independent schools on a list maintained by the Department for Education: the principal criteria for being on the list are having satisfactory finances and Ofsted ratings. Many good schools choose not to be s41 schools in order to be able to limit admissions to their area of specialisation.

2. If your preference is for a school in the categories listed above, LAs are required to meet parental preference as to a school/college etc. placement unless:

- it is unsuitable for the child concerned;
- the attendance of the child at the requested school would be incompatible with the efficient education of others;
- the attendance of the child at the school in question would be incompatible with the efficient use of resources.

3. If your preference is a non-s.41 independent school, the LA does not have to consult it, although many do.

4. The only legal provision that the LA has to take into account if you ask for an independent school placement is s9 Education Act 1996, under which LAs must have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. Therefore if an independent school is more expensive than maintained provision, it is only likely to be named in an EHC Plan if there is no maintained placement available that is able to meet the child's needs.

5. When considering your preferred school, you do not have to restrict yourself to local schools or maintained schools. Bear in mind, however, that if your preferred school is not the nearest suitable school, the LA will not have to provide home to school transport.

6. Some schools, particularly independent ones, require an assessment process before they will consider offering a place. As this may take time, it is worth starting the process of investigation early.

7. A residential placement is generally only likely to be named if there is a particular educational reason for needing one, or if there is no cheaper day placement available. In complex cases, a residential placement might be funded from a combination of the LA Education and Social Services budgets, and/or the ICB if there is a health element.

8. If you are asking for home tuition provided by the LA (sometimes known as EOTIS or EOTAS – Education otherwise than in/at school) – you can say so but you are likely to need to demonstrate why your child's needs cannot be met in school. You should also set out what provision you think your child will need.

9. You are entitled to state that you will take full responsibility for your child's education by home educating. You may need to demonstrate that you will be able to meet their needs, although you do not necessarily have to meet the exact requirements of section F.

10. The LA can consult other schools. For all schools consulted, they should send a copy of the draft EHCP, so that they can consider whether they are able to meet the requirements of the Plan.

11. If you cannot identify a suitable school you can ask for more time, but bear in mind the LA's duty to finalise the EHCP within 20 weeks.

12. If your preference is for a mainstream school placement, it must be met unless the placement is incompatible with the efficient education of other children, and unless there are no reasonable steps they can take to overcome that incompatibility. Case law indicates that this is a high barrier for schools and LAs and that the simple fact that "reasonable steps" would involve extra cost (so long as the extra cost is not too high) does not make them unreasonable.

If, for instance, placing the child in a mainstream school is more expensive than, for instance, a special school placement because they need much more individualised support in the mainstream, parental preference must still normally be met.

13. It is open to the LA simply to name a type of school. Normally this should only happen if they have been unable to identify a school by the final deadline; they should continue to look for schools with a view to naming one without delay, and will still have a duty to arrange to meet the child's needs in the meantime, for example by home tuition.

Time limits and their enforcement

The time limits referred to in this booklet can only be extended in very limited circumstances, as set out above.

If, as happens rather too often, they are not met, they can be enforced via the LA complaints system and, if that fails, the Local Government and Social Care Ombudsman. However, that in itself can be a long process. Usually it is more effective to threaten court action by way of an application for judicial review. This is an application based on the fact that a public authority is acting unlawfully where the court is asked to make orders to rectify that. Failure to meet time limits come within that category.

The advantage of this is that:-

- If there has been a clear breach of statutory time limits, the LA will have no defence and will not want to risk court proceedings for which it would have to pay not only its own costs but that of its opponents when it loses. It is therefore highly likely that the LA will concede quickly to avoid that risk.

- In the unlikely event that court proceedings do become necessary, the action would be brought in the child's name because it is the child's rights that are being infringed. In the vast majority of cases, the child will be entitled to legal aid. It is possible to obtain legal aid relatively quickly in an urgent case, and the Legal Aid Agency generally accepts that the fact that a child is not receiving special educational support is sufficiently urgent.

Judicial review proceedings themselves can be brought to court relatively quickly.

Judicial review is also a useful remedy for other breaches, notably the failure to provide support set out in section F of EHC Plans. However, it must only be used as a last resort, and in particular before commencing proceedings it is necessary to give the LA a final chance to resolve the matter by sending a formal pre-action letter under the Judicial Review Pre-Action Protocol set by the courts: this is not usually covered by legal aid unless the parents themselves qualify for it. If you need assistance with a pre-action letter, SOS!SEN may be able to help. Further information is available on our website.

Appeals against refusals to assess or refusal to issue an EHC Plan

It is a precondition of appealing against refusal to assess or refusal to issue an EHCP that you should have first contacted a mediation adviser, whose function is to tell you about what is involved in mediation. If you decide not to mediate, they must issue a mediation certificate within three days - you have to lodge such a certificate with any appeal. It will not count against you in any appeal that you have refused to mediate.

If you decide to mediate, the LA must arrange this within 30 days; however, if the mediation itself has not taken place within 30 days, you can ask for a certificate and proceed to appeal. The LA must pay for mediation. If mediation does not resolve matters, a mediation certificate will be issued at that point.

The time limit for appealing is two months from the date of the LA's decision letter, or 30 days from the date of the mediation certificate, whichever is later.

Information on how to appeal can be found at https://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability, and on the SOS!SEN website. We have also produced a more detailed booklet on that topic.

Appeals against refusals to assess are usually dealt with on the basis of the papers without a full hearing unless this is essential for any reason - normally only in an unusually complex case. The option of having a "paper hearing" is available for other types of appeals, but is usually inadvisable.