



Responding to EHCP Consultations

Academies and Maintained Schools Sector (AMS)

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Agenda

- Introduction
- AMS webinar - independent schools need to exercise caution as there are some differences in the law
- Legislative framework relating to pupils with SEND
- Caselaw developments
- Preparing a response to an EHCP consultation
- Considerations for schools when named in Section I of a pupil's EHCP when need cannot be met
- EOTAS
- Management of EHCP placements at risk of breakdown
- How can we help?
- Q&A





The current landscape

Special educational needs in England

- Well documented increase in numbers of pupils with SEN support and EHCPs.
 - **EHC plans/Statements of SEN:**
 - 355,566 pupils in schools at January 2021
 - 517,049 pupils in schools at January 2023
 - Decrease in number of cases dealt with on time
 - **Source:** [Education, health and care plans, Reporting year 2023 – Explore education statistics – GOV.UK \(explore-education-statistics.service.gov.uk\)](https://www.gov.uk/explore-education-statistics)
- Demand and need continue to increase
- SEN Green Paper – political uncertainty
- Safety Valve Agreements – political uncertainty
- LA deficits
- Issues arising
- Why is this important?

Legislative Overview:

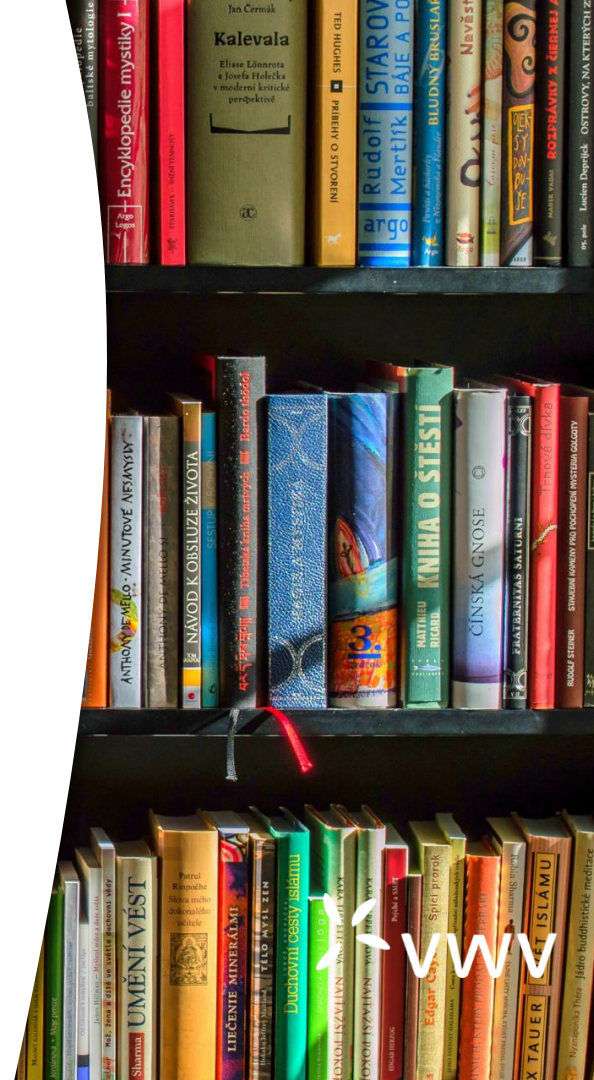
Duties to pupils: 2 statutory regimes

1. Statutory regime relating to pupils with SEN
 - Children and Families Act 2014 (CFA 2014) Part 3
 - The Special Educational Needs and Disability Regulations 2014 (SEN Regs 2014)
 - SEND Code of Practice January 2015 (COP 2015) – statutory guidance.
2. Statutory regime relating to pupils with a disability
 - Equality Act 2010 (EqA 2010)
3. Caselaw – old regime Education Act 1996 – cases may be applicable (Statements) and post CFA 2014 decisions.
4. Some of the areas of overlap between SEN law and disability law of relevance to children and young people in education.

Legislative Overview:

Duties to pupils: parallel duty

- Also overlap between pupils who have SEN, EHCP, meet definition of a disability and those pupils with medical needs
- s100 CFA 2014 **Duty to support pupils with medical conditions**
'(1)The appropriate authority for a school to which this section applies must make arrangements for supporting pupils at the school with medical conditions.'
- DfE 2015 statutory guidance [Supporting pupils at school with medical conditions](#)
- If EHCP provision made, this is likely that the school will meet this duty also.
- If pupils meet the statutory definition of having a disability, the school will have those EqA 2010 duties, including duty to make reasonable adjustments.





Legislative Overview:

Remedies open to schools - complex

1. Statutory regime relating to LA
[Education Act 1996](#) (EA 1996) s495 and s496
2. Judicial review –
 - Principles of administrative law:
 - All decisions of public bodies, including schools, Trusts and LAs must be lawful, rational, reasonable, fair and proportionate – complex area
3. Caselaw

The EHCP Consultation Process

Points to remember:

- CFA 2014 Part 3 sections 37-50
- EHCP: Sections B,F and I
- EHCP Section I – sets out the name of the school/ institution or type of school/ institution to deliver that provision.
- Section F is a prior consideration to placement Section I
- S38(2)(b)(ii) CFA 2014: section generally sets out the duties of the LA when preparing the draft EHCP including giving notice to the 'parent' they have a right to request the LA name a particular school.
- Where the draft EHCP is sent to the child's parent or young person, it must not name the school or institution, or specify a type of school or institution.
- Effect: law favours parental preference.
- Schools need to be thorough and robust.

The EHCP Consultation Process

Requirements of the consultation process:

2 scenarios:

- (i) s39 CFA 2014 Finalising EHC plans: request for particular school or other institution
- (ii) S40 FCA 2014 Finalising EHC plans: no request for particular school or other institution

Similarities:

- LA **MUST** consult with the school before finalising any plan
- Legal test applicable to the school's response
- SEN COP para 9.80 LA must '***very carefully***' consider comments in response
- Timescales para 9.78 – 15 days

Differences:

- Parental preference



The EHCP Consultation Process

Legal test when responding to the consultation:

s39 CFA 2014 Finalising EHC plans: request for particular school or other institution

'(3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.

(4) This subsection applies where—

(a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or

(b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
(i) the provision of efficient education for others, or
(ii) the efficient use of resources.'

Caselaw

- Caselaw pre and post CFA 2014 statutory regime
- Context: Appeals by parents/ judicial review
- Key cases prior to 2023 include:
- **NA v Barnet LBC** [2010] UKUT 180 (AAC) (EA 1996 regime)
 - Upper Tribunal Case context appeal by a parent.
 - Decision about part of wording in the current legal test and the meaning of "would be incompatible with the provision of efficient education for the children with whom he would be educated".
 - S39(b)(i) CFA 2014

Caselaw

An example of challenge to LA

Judicial review

R (An Academy Trust) v Medway Council [2019] EWHC 156 (Admin)

Application for judicial review by Trust regarding decision of LA

Relevant points:

- (i) LA had acted unlawfully when finalising the EHCP for a pupil with ASD by removing, without any change in the evidence, large parts of the section F which addressed the special educational provision which was required to meet each of his needs.
- (ii) LA had failed to engage in proper consultation and **give conscientious consideration to the school's response**
- (iii) Arguments whether s496 EA 1996 should be pursued before a judicial review – complex interaction.



Caselaw developments

Placement:

[OO v Bexley LBC | Westlaw UK](#) [2023] UKUT 223 (AAC)

[R. \(on the application of Swalcliffe Park School\) v](#)

[Wokingham BC | Westlaw UK](#)

[2023] EWHC 1451 (Admin)

Human Rights:

[TH v Bulgaria \(2023\) 77 E.H.R.R. 18.pdf.pdf](#)

[R. \(on the application of ZB\) v Croydon LBC | Westlaw](#)

[UK](#) [2023] EWHC 489 (Admin)



Caselaw developments

Case of most significance to schools

[R. \(on the application of Swalcliffe Park School\) v Wokingham BC | Westlaw UK](#)

[2023]EWHC1451(Admin)

- Context: pupil with ASD, original consultation, an Appeal to SENDIST by parent, backlog in Tribunals, ongoing discussions with the LA, family and school, and a decision made ‘at the door of the Court’ to agree Section I despite the school’s objections.
- Judicial review of the LA and SENDIST by a residential special school.
- Chronology included a residential assessment.
- 3 claims but succeeded on Ground 1 and what comprised ‘conscientious consideration’ – Court referred to para 9.80 of COP and the ‘*Gunning* Principles’.
- The s39 consultation duty required proactive engagement before decisions were taken and the requisite standard of conscientious consideration had not been met. The local authority should have done more to respond to the school and engage in dialogue before coming to its decision.

How to prepare an effective EHCP Consultation Response

How to prepare an appropriate and effective response to consultation on being named in an EHC plan by a child's home Local Authority
Practical considerations

1. The legal test in s39 CFA 2015 – most important aspect to address.
2. Ensure you send your response within 15 calendar days (not school days) – it is essential it is sent in time (9.83 SEN COP 2015)
3. Provision in Section F must be specified and set out in detail for each and every need specified in Section B analyse this carefully – analyse carefully.
4. Preparation – do you have all the documents referred to in the draft EHCP? Is there other information e.g. safeguarding information that you require? Ask the LA promptly.
5. You are not necessarily restricted, in our view, to the information the LA provides, especially if this is inadequate.
6. You may want to refer to this at a later stage.

The EHCP Consultation Process

How to prepare an appropriate and effective response to consultation on being named in an EHC plan by a child's home Local Authority

Practical consideration

The legal test in s39 CFA 2015 :

- The school must consider whether the placement meets the legal criteria and provide a considered response as to why the school:
 - would be unsuitable for the age, ability, aptitude or SEN of the child or young person, OR
 - the attendance of the child or young person there would be incompatible with the efficient education of others, and / or the efficient use of resources
- Representations should be as detailed and comprehensive
- Individual facts of each case.
- Can be in relation to both of the bullet points above.
- Should include evidence e.g. risk assessments, documents or relevant extracts, meeting minutes, photographs and examples of events, specific costings.

The EHCP Consultation Process

How to prepare an appropriate and effective response to consultation on being named in an EHC plan by a child's home Local Authority

1. LA may provide its own 'forms' – not a requirement to use
2. Each response will need to be specifically tailored to the individual needs and provision of that individual child
3. **NA v Barnet LBC** [2010] UKUT 180 (AAC) (EA 1996 regime) and **OO v Bexley LBC** [2023] UKUT 223 (AAC) – think about which other children would be educated alongside that pupil
4. SEND CoP para 9.79: 'others' is intended to mean the C & YP with whom the EHCP prospective pupil will come directly into contact with
5. Successful challenges
6. Example considerations
7. Recommend the SENDCO should be appropriately trained in the statutory consultation process, including how to complete any response and how to communicate with parents before, during and after this process
8. Parental complaints

Legal duties of schools named in Section I

- **s43 CFA 2014 - Schools and other institutions named in EHC plan: duty to admit**
- Effect: once a school is named in Section I it has a **duty to admit** that child
- LA has final decision s42 CFA 2014 duty on LAs
- Once admitted school has a 'Best endeavours duty' s66 CFA 2014
- Significant risks if school does not admit: Breach of statutory duty, disability discrimination, judicial review, parental complaint

What can schools do where they believe they have been named in an EHC plan but cannot meet the needs of the child?

1. No right of appeal for school to SEN Tribunal (FTT)
2. Parents – if they disagree with Section I placement can appeal to FTT
3. Duty to admit however: Individual facts
 - May not need to admit pupil straight away
 - Request further information from LA in order to plan admission/ support
 - Any delay would need to be for the shortest possible time.
 - Communicate with LA and parent
4. LA s495/496 Education Act 1996
5. Judicial review



Legal avenues: school named Section I and cannot meet need:

1. Education Act 1996

- Complex - before any action: write a letter of intention to the LA
- EA 1996 Part IX Chapter 1 – ancillary and general powers of the Secretary of State for Education (SoS)
- **S495 EA1996: Determination of disputes.**
 - *‘(1) Except where this Act expressly provides otherwise, any dispute between a local authority and the governing body of a school as to the exercise of any power conferred or the performance of any duty imposed by or under this Act may be referred to the Secretary of State (despite any enactment which makes the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the governing body).*
 - (2) The Secretary of State shall determine any dispute referred to him under subsection (1).*
 - (3) Any dispute between two or more [F1local authorities] as to which of them is responsible for the provision of education for any pupil shall be determined by the Secretary of State.’*

Legal avenues: school named Section I and cannot meet need:

1. Education Act 1996

Points to remember:

- CFA 2014 Part 3 sections 37-50
- EHCP: Sections B,F and I
- EHCP Section I – sets out the name of the school/ institution or type of school/ institution to deliver that provision.
- Section F is a prior consideration to placement Section I
- S38(2)(b)(ii) CFA 2014: section generally sets out the duties of the LA when preparing the draft EHCP including giving notice to the ‘parent’ they have a right to request the LA name a particular school.
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- Effect: law favours parental preference.
- Schools need to be thorough and robust.



Legal avenues: school named Section I and cannot meet need:

2. Judicial review

- Similar to s495 EA 1996 test – reasonableness
- Application to the Administrative Court not the SoS
- Based in caselaw not a statutory route.
- Grounds: LA decision contravened principles of administrative law
- Lawful, rational, reasonable, fair and proportionate
- Difficult, costly, time limited, last resort
- Remedies are limited; can quash decision – effect LA looks again.

Case study

(ILLUSTRATIVE ONLY)

- *An academy is consulted by the LA in June 2022 to be named in Section I for a pupil with profound and multiple learning difficulties in area of cognition and learning.*
- *The academy has an SRP for pupils with mild or moderate learning difficulties.*
- *The consultation response states that the academy cannot meet need.*
- *The parent makes an appeal to the SENDIST.*
- *There has not been any further communication from the LA*
- *In February 2024 the academy receives a copy of a consent Order naming it in Section I.*
- **What are the legal issues for the academy to consider?**



Case study –

(ILLUSTRATIVE ONLY)

- Was adequate information provided by the LA?
- What was the legal basis of the response? S39(4)(a) – unsuitable for the SEN of the child.
- How was this evidenced?
- Was the response sent in time?
- Did the academy know that there was an appeal by the parent?
- What ongoing correspondence was there between the LA/ family/school
- Were there new reports and assessments?
- Where had the child been educated in the meantime?
- Had there been conscientious consideration?
- Possible legal challenges
- Next steps e.g. admission of pupil

Considerations for schools on admission of pupils with an EHCP

- Not necessarily pupil admit straight away
- Further information from LA
- Organise support – integration
- Consider a part-time timetable – caution
- Working Together to Improve School Attendance (updated version applies from 19 August 2024)
- Right to full-time education
- Pupil's best interests
- Shortest time possible
- Temporary
- Advise – agreement with parent, pupil and LA



Consultation where the pupil is a school refuser...

- Challenging
- Safeguarding duties once school named
- Reminder of LA duties - :
- S19 EA 1996 Exceptional provision of education in pupil referral units or elsewhere
- *(1) Each local authority in England shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.*
- LA remains ultimately responsible for making the provision if the school (or other party) fails to do so: **R. (on the application of Y) v Croydon LBC**
Queen's Bench Division (Administrative Court) [2015] EWHC 3033 (Admin)

Consultation where the pupil is a school refuser...

- s61 CFA 2014 Special educational provision otherwise than in schools, post-16 institutions etc (EOTAS)
- *(1)A local authority in England **may** arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.*
- Framed as discretion as to whether “inappropriate” or not, but effectively a duty with reference to section 42 CFA 2014
- Parents and child consulted
- Arguments may be relevant to school EHCP response on appropriateness- school related anxiety, refuses to attend school
- A school does not have to be named; Section I – blank if determined EOTAS appropriate



EOTAS

Caselaw developments 2023:

[AA v North Somerset Council | Westlaw UK](#) [2023] UKUT 52

(AAC) – the legal test for education otherwise than at school (or college) – is a general test.

The legal test is whether, in general, it would be inappropriate for the provision for that pupil to be made in ‘a school’.

[Camden LBC v KT.pdf](#) [2023] UKUT 225 (AAC)

EOTAS can be named in Sections F and I and in that case and it was not expressed in too vague a way.

Key take aways

- May apply to pupils already on the school roll; clearly evidence the engagement with the pupil/ provision made/attempted.
- Maintain dialogue with the LA/ consider legal advice.



Pupil behaviour and SEND

- Risks: Placement inappropriate, challenging behaviour, breakdown
- Regulatory requirements for managing behaviour
- (i) DfE February 2024
- [Behaviour in schools guidance](#)
- (ii) DfE September 2023
- [Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement](#)
- (iii) EqA 2010

Pupil behaviour and SEND:

(i) DfE February 2024 Behaviour in schools guidance

- Behaviour expectations and pupils with SEND
 - Schools should consider how a whole-school approach meets the needs of all pupils in the school, including pupils with SEND
 - Behaviour - considered in relation to a pupil's SEND
 - Importance of graduated approach Assess, Plan, Deliver, Review
 - Balance duties of CFA 2014 and EqA 2010
 - Provisions of EHCP must be secured; school must cooperate with LA
 - Importance of school requesting from LA:
 - an emergency review if pupil has EHCP – support and placement
 - A statutory assessment for an EHCP
 - As part of meeting duties, schools should, as far as possible, anticipate likely triggers of misbehaviour and put in place support to prevent these
 - Adapted to individual pupil



Pupil behaviour and SEND

(i) DfE February 2024 Behaviour in schools guidance

- Responding to the behaviour of pupils with SEND
- Because a pupil has SEND, should not assume affected their behaviour on a particular occasion – this is a question of judgement for the school on the facts of the situation.
- If SEND has contributed, consider whether it is appropriate and lawful to sanction the pupil.
- DfE 2014 [Equality Act Guidance](#)
- If reasonable adjustments need to be made to the sanction in response to any disability.
- Underlying causes of behaviour and support needed

Pupil behaviour and SEND

(ii) DfE September 2023 Suspensions and exclusions guidance

- SEND will be relevant to suspension and exclusion decisions
- DfE Behaviour Guidance – companion document
- SEND will be relevant at following points:
 - School policies
 - Whole school ethos
 - Preventative measures
 - Responses including sanctions – last resort suspension/exclusions
- Schools actions will be scrutinised – records of behaviour/ reasoned decisions
 - In Governors Disciplinary Meetings - GDM
 - Independent Review Panel Hearings – IRPH
 - Judicial review actions
 - Claims for disability discrimination
 - Parental complaints

Equality Act 2010 – legal duties

- Determines what is lawful for schools to do in relation to pupils with protected characteristics
- Even if no EHCP schools obligation can arise
- s6 EqA 2010 definition of disability – physical or mental impairment – diagnosis not required
- s85 EqA 2010 applies to pupils: admission and treatment (includes exclusion)
- Unlawful for a school to discriminate against a disabled pupil either
 - s13 EqA 2010: Direct discrimination
 - If, because of a protected characteristic, school treats a pupil less favourably than it treats or would treat others.
 - E.g. not admit because pupil has ASD
 - S19 EqA 2010: Indirect discrimination
 - If a school discriminates against a pupil if e.g. applies to pupil a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of the pupil.
 - E.g in the way that the school applies a PCP (provision, criterion or practice) e.g. application of behaviour policy



Equality Act 2010 – legal duties

- s15 EqA 2010 – specific prohibited conduct relating to discrimination arising out of a disability.
- s20 EqA 2010 – duty on schools to make reasonable adjustments – 3 requirements, 2 applicable to schools:
 - *s20(3) ... 'where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'*
 - *s20(5) ... 'where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.'*
 - 'Such steps as it is reasonable' - no guidance in EqA 2010

Equality Act 2010- in practice

Proprietor of Ashdown House School v JKL[2019] UKUT 259 (AAC)

Facts:

Independent school and centred on FTT power to order reinstatement

Pupil – ADHD and other difficulties

He had been excluded for repeated incidents of aggressive behaviour

School accepted that he was disabled for the purposes of the 2010 Act

School accepted he had been excluded because of something arising in consequence of his disability

School argued that the exclusion was lawful, had a duty to protect staff and pupils and was a proportionate means of achieving a legitimate aim.

The tribunal found:

His treatment **was not** a proportionate means of achieving the legitimate aim of ensuring the health and safety of staff and pupils.

The school had made **some** reasonable adjustments (all provision set out in EHCP), but should have made others.



[Technical guidance for schools in England | EHRC](https://www.equalityhumanrights.com)
[\(equalityhumanrights.com\)](https://www.equalityhumanrights.com) (updated September 2023)

1. Focus on practical implementation in schools
2. Case studies
3. What is the reasonable adjustments duty?
4. Who does the duty apply to?
5. What is 'substantial disadvantage'?
6. What does the duty cover?
7. What is meant by reasonable steps.
8. Ultimately decision for the Courts

How can we help?

Compliance Toolkits (CTKs)

Webinars

EHCP consultations

1. VWV template response
2. Advising on/drafting individual EHCP consultation responses
3. Advising on strategy/drafting correspondence to LA
4. Advising on strategy/conducting legal challenges

Pupil behaviour and SEND

1. Advising on risks and strategy
2. Advising on correspondence to the LA regarding EHCP emergency reviews
3. Advising on regulatory requirements related to suspensions and exclusions
4. Advising on Equality Act and disability
Advising on parental complaints regarding SEND

HELP

ADVICE

ASSISTANCE



Q&A





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