The EHCP Journey – and what makes a good EHCP

07 October 2025

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Outline of the session

Setting the scene for Education, Health and Care (EHC) Plans and key duties for public bodies

- Wider context/The story thus far…
- Underpinning law
- The EHC Plan ‘roadmap’
- Mediation and legal challenges
- Safeguarding

The session will have discussion points and breaks for reflections.

Context/The current state of play

1. More children are not attending school- 51,836 children and young people are **NOT** attending school, or further education.
2. Increasing number of children with EHCP are not in education, employment or training ('NEET')
3. EHCPs are delayed –50.3% issued within 20 weeks (slight improvement from previous year, 20+ weeks - unlawful).
4. Appeals continue to rise (6 types of appeal available) all to the First-Tier Tribunal.
5. Tribunal hearings are delayed – anecdotally we are hearing of appeals being listed for December 2025 (i.e. > 12 months).

Looking ahead…

We have a National Improvement Plan from the previous government…new government now in …

- Bail out for Local Authorities – but with conditions?
- New professional qualification for Special Educational Needs Co-ordinators ('SENCo').
- (Political) Changes at the Department for Education – new ministers and the policy direction appears to be to boost mainstream offer and promote inclusivity.

The current state of play - challenges

- Repeated challenges at Tribunal by families.
    - Using the appeal process to attack perceived under provision of health and/or to seek private care or bypass the exceptional funding processes.
- Challenges of provision under complaints around provision including to the Ombudsman and not demonstrating sound local resolution approach – try and resolve at first stage complaints stage.
- Lack of governance – lack of staff in designated roles; polices and investment in managing this area well.
- Judicial Review- late legal advice and health unable to evidence / audit trial decision making.
- Transition cases- lack of planning and dialogue.
- Inspections do not tell a happy story….

Underpinning Law

Education Act 1996	Children and Families Act 2014 ('CAFA')	'The SEND Regulations'	Statutory Guidance	Other Key Legislation
As relates to SEND - not completely replaced by CAFA 2014. [Link]	Established the EHC Plan system. [Link]	Special Educational Needs and Disability Regulations 2014	2015 Special Educational Needs and Disability Code of Practice: 0 to 25 ("the SEND Code of Practice")	Equality Act 2010
Underlying duties on provision of education.	Sought to join up services.	-> Adds detail to CAFA provisions		Human Rights Act 1998
Can be relevant to questions of parental preference (Section I)	Extended scope of 'statements' (now EHC Plans) to post-16	Special Educational Needs and Disability (First Tier Tribunal Recommendations Power) Regulations 2017		Tribunal Procedure Rules
Other relevant factors incl. School Transport still underpinned by EA 1996.	Rights of appeal are codified in the CAFA 2014	-> Relevant for 'extended appeals'		

Key Principles

- Section 19, Children and Families Act 2014
  - the local authority must have regard to the voice of the child and also ascertain and listen to the wishes and feelings of parents.
- Where possible the child/young person should participate in decisions and requests on provision.
- In reality it can sometimes be challenging to hear from the child directly.
- When dealing with SEN professionals should seek to empower the child/young person and seek to increase their agency.
- Co-operation and collaboration between public bodies – Courts take a dim view on squabbling public bodies.

Mainstream Provision

- The CFA 2014 anticipated that most children and YP with SEN should have their needs met within local mainstream early year settings, schools or colleges without an EHC Plan.
- *If an EHCP is issued, specific educational entitlements open up that are not otherwise available to other children or YP.*
- The EHCP provides a certain amount of certainty and stability being of statutory status.
- The CFA 2014 changed the SEN landscape but perhaps not in the way intended.

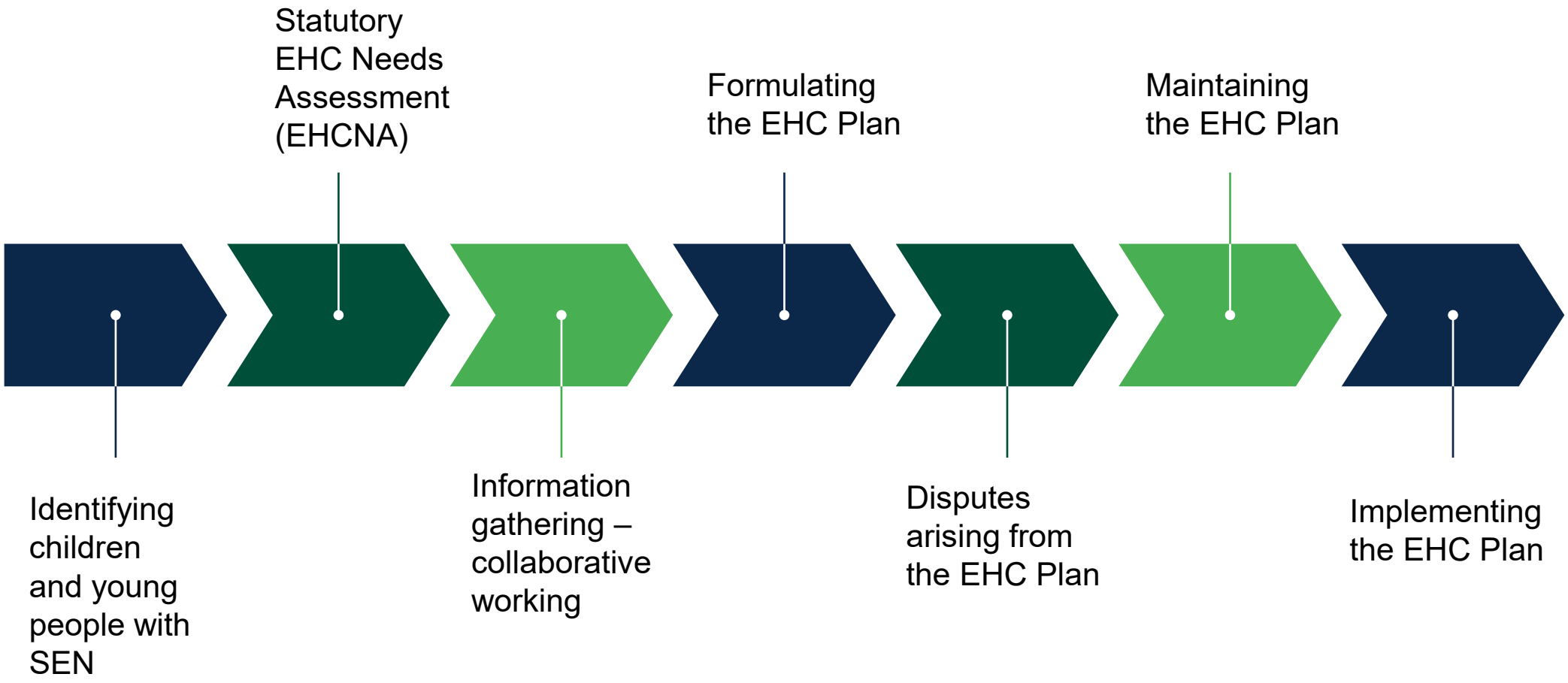
Break/Discussion

- Any questions thus far?
- Reflections on the SEN system.
- Challenges arising within your area?
  - Has that changed over time?

EHC Plans

The EHC Plan Road Map

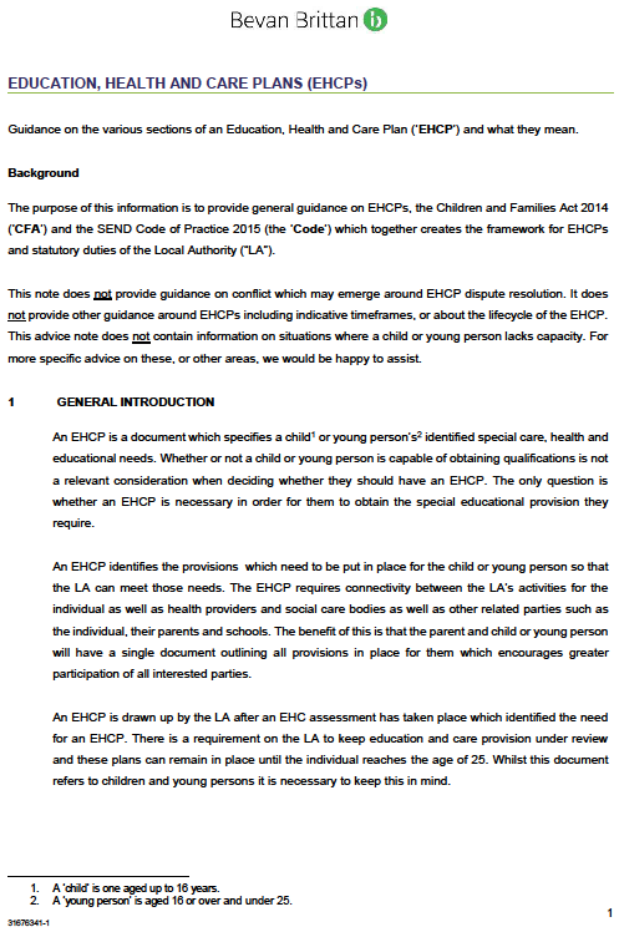
From needs assessment to finalising the Plan



What is an Education, Health and Care (EHC) Plan?

- Defined under Section 37 Children and Families Act 2014.
- An EHC Plan specifies the child's or young person's special educational needs and the **special educational provision** required… as well as, inter alia, any **health provision** and **social care provision** reasonably required by the learning difficulties and disabilities which result in the child or YP having SEN…
- Form is prescribed by law – 11 sections A to K.
  - Regulation 12 of the Special Educational Needs and Disability Regulations 2014 and the 2015 SEND Code of Practice (See in particular table at paragraph 9.69).
- Common misconceptions.

What is an Education, Health and Care (EHC) Plan? (Supplementary Handout – please click image below)



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EDUCATION, HEALTH AND CARE PLANS (EHCPs)

Guidance on the various sections of an Education, Health and Care Plan ('**EHCP**') and what they mean.

Background

The purpose of this information is to provide general guidance on EHCPs, the Children and Families Act 2014 ('**CFA**') and the SEND Code of Practice 2015 (the '**Code**') which together creates the framework for EHCPs and statutory duties of the Local Authority ("LA").

This note does not provide guidance on conflict which may emerge around EHCP dispute resolution. It does not provide other guidance around EHCPs including indicative timeframes, or about the lifecycle of the EHCP. This advice note does not contain information on situations where a child or young person lacks capacity. For more specific advice on these, or other areas, we would be happy to assist.

1 GENERAL INTRODUCTION

An EHCP is a document which specifies a child[1] or young person's[2] identified special care, health and educational needs. Whether or not a child or young person is capable of obtaining qualifications is not a relevant consideration when deciding whether they should have an EHCP. The only question is whether an EHCP is necessary in order for them to obtain the special educational provision they require.

An EHCP identifies the provisions which need to be put in place for the child or young person so that the LA can meet those needs. The EHCP requires connectivity between the LA's activities for the individual as well as health providers and social care bodies as well as other related parties such as the individual, their parents and schools. The benefit of this is that the parent and child or young person will have a single document outlining all provisions in place for them which encourages greater participation of all interested parties.

An EHCP is drawn up by the LA after an EHC assessment has taken place which identified the need for an EHCP. There is a requirement on the LA to keep education and care provision under review and these plans can remain in place until the individual reaches the age of 25. Whilst this document refers to children and young persons it is necessary to keep this in mind.

1. A 'child' is one aged up to 16 years.
2. A 'young person' is aged 16 or over and under 25.

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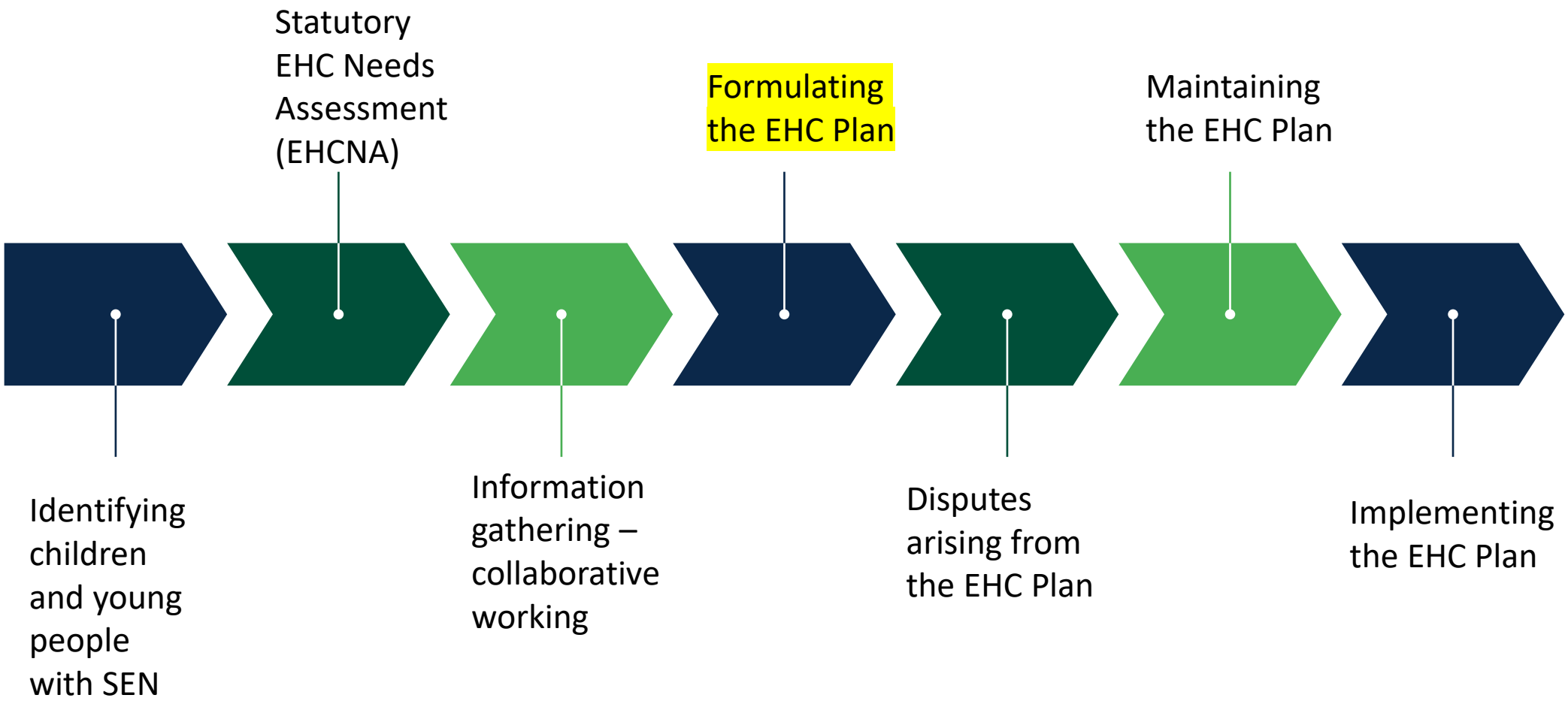
The EHC Plan Journey – key considerations

- To assess or not to assess? LA decides but health may have a key contribution to make – indeed duty on health ‘to bring to LA’s attention’
- EHC Plan to be formulated – evidence?
- Role of ICB
  - Health contribution to relevant sections – process and formulation
- Barriers to the child accessing education because of health need?
- Blurring of lines: education vs health vs social care provision.
- Mediation/Appeals.
- Is there safeguarding to consider?

The EHC Plan Road Map

From needs assessment to finalising the Plan



Parameters of the EHCP

- These are plans that can continue to 25 if special needs persist and the young person remains in education and/or training.
- Local Authority leads* the process (social care and education are separate functions for the LA).
- Typical EHC Plan pathway takes 20 weeks.
  - Important it captures all needs and it must be comprehensive.
  - This is a tight timetable.
- Premise that education, social care and health all have a part to play – duty to cooperate - each have sections of the EHCP where needs and provision documented accurately and fully.
- Problems can arise when LA/health do not engage well; provision ‘falls between’.
- Do not assume that things such as occupational therapy/physiotherapy and speech and language therapy at school are health provision– usually education (see next slide).

Dividing line between health and education/social care provision…

- Section 21(5) Children and Families Act 2014 has the effect of treating health care provision or social care provision which has an 'educating or training' effect as special educational provision (instead of health care provision or social care provision).
- This is so-called 'deemed' special educational provision c.f. 'direct' special educational provision.

> "Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)."

- Why does this matter? It changes where the provision is included in the EHC Plan, and as consequence, who has the responsibility for providing it.

Dividing line between health and education/social care provision…

"Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)." (Section 21(5) Children and Families Act 2014)

- Effect: provision which might ordinarily be included in Section G of an EHC Plan – with responsibility for securing the provision resting with the ICB – is included in Section F, and it becomes the responsibility of the Local Authority to secure.
- There is no clear dividing line between education and health provisions; each provision is assessed on its own facts.
- Speech & Language Therapy and Occupational Therapy are the 'textbook examples' of deemed special educational provision.
- Equine-assisted learning and weekend trips are two examples of provision which (generally) are not special educational provision, but which a parent might seek to include in Section F.

Formulating and issuing an EHC Plan

- Responsibility of the Local Authority – once finalised all agreed provisions across the sections have a statutory basis so must be met.
- Has the parent/young person adduced private evidence?
- Has the LA scrutinised this?
- Rights to mediation and/or appeal become exercisable upon the Plan being finalised.
- Not the end of the matter – duty on the Local Authority to review the EHC Plan.
    - On at least an annual basis.
    - Every 3-6 months for pupils < 5 years.
    - Watch out for ‘Phase Transfer’ plans – prescribed deadlines.

Formulating an EHC Plan – health considerations

- If health provision included no EHC Plan should be finalised until signed off by health.
- Ensure that sections C and G are agreed as the main sections for health.
- Wording must describe provision to be made accurately.
- There may be some health input into some other sections but this would be minimal.
- The case law around what constitutes health care into schools continues to evolve so seek legal advice if unsure.
- If the matter has been at appeal and a 'Regulation 5 recommendation' is going to be issued by health then LA must not finalise the EHC Plan without first consulting the ICB.

Collaboration is key (and expected!)

- Duty of collaboration for health and assessment key. Health must have designated staff and resource to effectively engage in EHCP process.
- EHC Plan – statutory footing and so be thoughtful on what provision is offered and agreed. Based on evidenced need not diagnosis.
- Families can insist on amending health related sections - work with families to set expectations early – seek to avoid extended appeals.
- ICB duties around SEN – leadership is essential and a requirement at executive level.

Collaboration is key (and expected!)

- Where there are system/communication issues seniors in agencies should be speaking and navigating resolution.
- Provision can only be included in Section G with ICB's prior approval.
- This give an ICB an effective 'veto' over healthcare provision to be specified in an EHC Plan.
- Use of this veto should be 'approached with caution'.
  - Decisions must have process and rationale.
  - Consistency of approach important.
  - Inconsistent/irrational decision making by the ICB may subject to a public law challenge e.g. through Judicial Review.

Discussion point

- Questions?
- How effective is communication between partners when EHC Plans are being formulated?
- How is collaboration achieved in your area?

What makes a good EHC Plan?

What makes a good EHC Plan?

- Specified.
- Quantified – for how long?
- Child/young person – centred.
- Detailed but not verbose.
  - (NB//don’t forget about Section K – oft-overlooked section of the Plan.)

What is the importance of specificity when considering special educational provision?

- Regulation 12, Special Educational Needs and Disability Regulations 2014

12.—(1) When preparing an EHC plan a local authority must set out—

[…]

(f) the special educational provision required by the child or young person (section F)

[…]

- 2015 SEND Code of Practice

"The purpose of an EHC plan is to make special educational provision to meet the special educational needs of the child or young person, to secure the best possible outcomes for them across education, health and social care and, as they get older, prepare them for adulthood. To achieve this, local authorities use the information from the assessment to:

• […]

• **specify the provision required** and how education, health and care services will work together to meet the child or young person's needs and support the achievement of the agreed outcomes." (Paragraph 9.2, **emphasis** added.)

What do we mean by specificity?

- Section F must be so specific and so clear that there is ‘no room for doubt as to what has been decided is necessary in the individual case’.
  - *L v Clarke and Somerset County Council* [1998] ELR 129

- The contents of an EHC Plan have to be specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case.
- But…the Plan needs to be a realistic and practical document – a living document that cannot be fixed in time.
  - *London Borough of Redbridge v HO* (SEN) [2020] UKUT 323 (AAC)

- When devising/revising all provision, can be helpful to think:
  - Who?
  - What?
  - Where?
  - When?

How might this be improved?

AK should have intervention once a week for at least 1 hour or as advised by CAMHS with suggested strategies implemented across the school day by school staff for at least 10 minutes a day.

London Borough of Redbridge v HO (SEN) [2020] UKUT 323 (AAC)

[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties.

-and-

[C] shall have 1 x 1 hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment. This shall be subject to termly review.

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

- 77 page judgment

- Analysis of c.25 years of case-law (authorities to which UT was referred) –

L v Clarke and Somerset [1998] ELR 129 – 'the classic formulation': 'whether [a statement] is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case' [27].

BB v. Barnet London Borough Council [2019] UKUT 285 (AAC)

*'In distinguishing between cases where provision is sufficiently specific and those where it is not**, it is important that the plan should not be counter-productive or hamper rather than help the provision that is appropriate for a child. The plan has to provide not just for the moment it is made but for the future as well.**'*

Principles at [74] of the *Worcestershire CC v SE decision*

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

I. ‘Classic formulation’ under *L v Clarke and Somerset* test still applies BUT

II. Specificity depends on what is appropriate in the particular case; and

III. Can’t be reviewed in the abstract.

‘A lack of particularity may allow less specific provision; a more detailed case may require more detailed provision.’

IV. Specification in terms of **hours per week ‘not an absolute and universal precondition** of the legality of any statement’

V. **Duty to specify =/= a requirement to ‘specify** (in the sense of identify or particularise) **every last detail** of the special educational provision to be made.’

VI. A failure to specify a level of support after a particular date may lack the required degree of specificity.

Worcestershire County Council v SE [2020] UKUT 217 (AAC)

VII. provision cast in the form of **recommendations as opposed to requirements *may* lack the requisite degree of specificity** – 'programmes tailored to need'; 'opportunities' (also).

However

VIII. **Some cases where flexibility should be retained** - degree of flexibility which is appropriate in specifying [SEP] is essentially a matter for the tribunal, considering all relevant factors.

And

IX.EHCP has to **provide 'not just for the moment it is made, but for the future as well'**.

X. EHCP contents have to be **as specific and quantified as is necessary and appropriate** in any particular (aspect of) a case => emphasis on **the EHCP** being realistic and practical 'which in its nature **must allow for a balancing out and adjustment**'.

XI. **Section I naming a special school/college is a relevant factor** - may in an appropriate case permit more flexibility than when a mainstream school is involved… 'Greater specificity might well be appropriate in the case of a mainstream school where staff have to be brought in, whereas in the context of a special school such staff may well in principle be available.'

What makes a good EHC Plan?

- Specified – think ‘Who/What/Where/When’.
- Quantified – frequency/duration.
- Child/young person – centered.
- Detailed but not verbose.
- Importance of the Annual Review process – not a mere ‘tick box’ exercise.

Finalising the EHC Plan

Finalising the EHC Plan

- This is the duty of the LA – once finalised all provisions across the sections have a statutory basis so must be met.
- Wording must describe provision to be made accurately.
- If health provision included no EHC Plan should be finalised until approved off by health.
- NB//if the matter has been at appeal and a Regulation 6 response is going to issued by health then LA must not finalise the EHCP.
  - More on appeals in due course...

- Issuing a finalised EHCP =/= the end of the journey; delivery of provision; the annual review cycle and/or legal challenge (appeals)

Dispute Resolution – what happens if the EHC Plan is not agreed by the parent/YP?

- Potential for legal challenge
- Most commonly – this will entail an application for Tribunal appeal and/or mediation
- May also be Judicial Review (more on that shortly)

Introduction to Judicial Review (JR)

- We are seeing more claims for Judicial Review brought in respect of SEND.
- Should be a ‘remedy of last resort’ – increasingly used as a means of applying pressure to public bodies?
- What is a Judicial Review?
- Bypassing the SEND tribunal system because of backlogs it seems.
- Any threat of Judicial Review needs immediate legal advice.
- Strict timetable for responses and delay can jeopardise a defence /resolution.
- Document steps taken - even after pre-action letter received.

Final thoughts – every journey should be safe

Every child and young person is entitled to be safe and protected.

Children and young people with SEND tend to be inherently vulnerable so please always look out for any safeguarding angles.

- Those who lack mental capacity will be especially vulnerable.
- Parents must permit those children and young people with mental capacity to be empowered to make choices.
- Parents must act in child's best interest.
- For up to 18 – some children with SEND - Child in Need under Section 17 Children Act 1989.
- Many children with SEN enter the care system.
- Be curious where families are declining care for their child.
- Have an 'open door' policy – parents/carers may try to (re)engage 'out of the blue'.
- Is the child seen and heard?

Any **questions?**

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