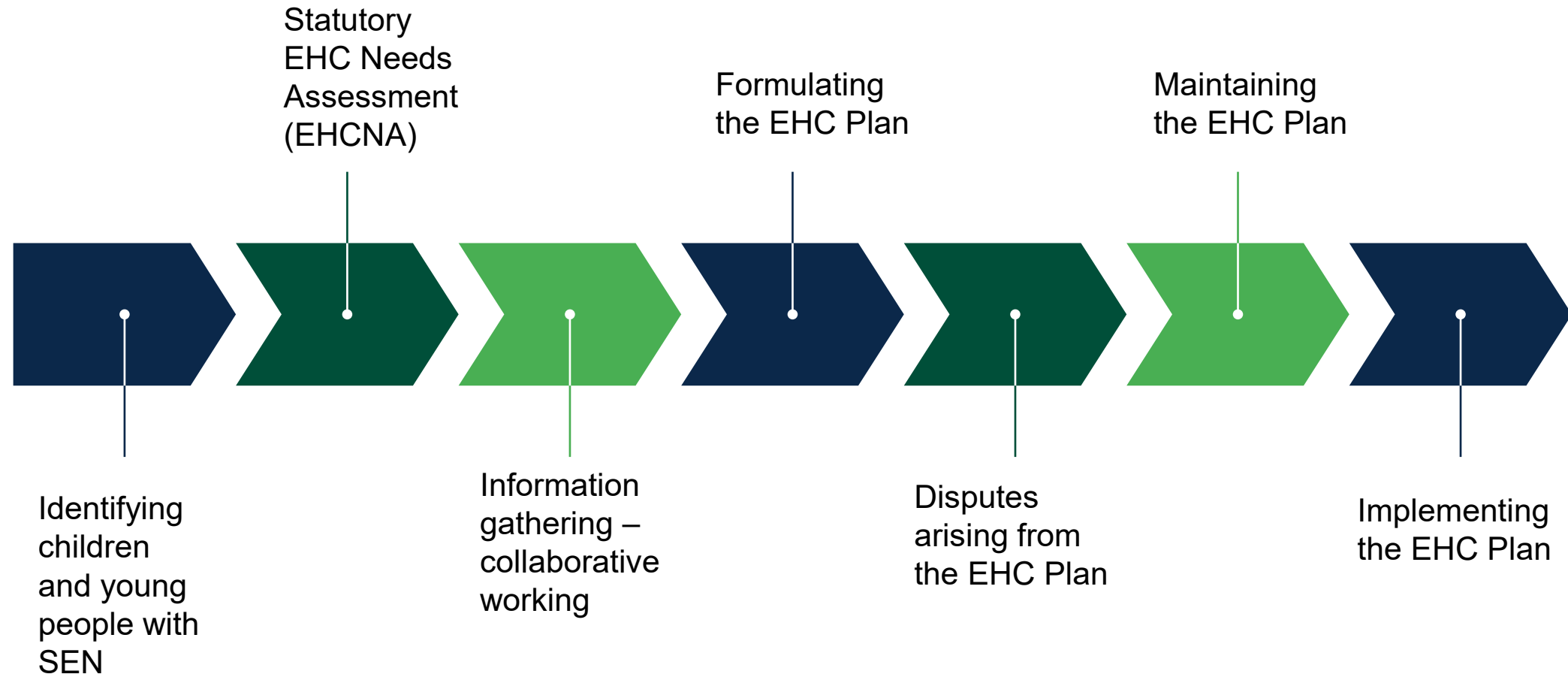


Fundamentals of SEND, and provision within an EHC Plan

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16 October 2025

The EHC Plan Road Map

From needs assessment to finalising the Plan



What are the key sources of 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.	-> Expectation is that will be followed.	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	2015 Special Educational Needs and Disability Code of Practice: 0 to 25 ("the SEND Code of Practice")	Equality Act 2010
Other relevant factors incl. School Transport still underpinned by EA 1996.	Rights of appeal are codified in the CAFA 2014	-> Relevant for 'extended appeals'	Intention: to help ensure consistent approach across the country.	Tribunal Procedure Rules

What are Special Educational Needs?

20 When a child or young person has special educational needs

- (1) 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.
- (2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she—
- (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
 - (b) 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.
- (3) A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).

What is Special Educational Provision?

What is Special Educational Provision?

Section 21, Children and Families Act 2014

- 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—
 - (a) mainstream schools in England,
 - (b) maintained nursery schools in England,
 - (c) mainstream post-16 institutions in England, or
 - (d) places in England at which relevant early years education is provided. (Section 21 (1))
- For a child aged under two, means educational provision of any kind. (Section 21(2))
- Special Educational Provision is set out within Section F of an EHC Plan.

What is Special Educational Provision?

[London Borough of Bromley v Special Educational Needs Tribunal and others \[1999\] ELR 260](#)

- Some provision ‘unequivocally educational’; some ‘unequivocally non-educational’.
- Between is ‘a shared territory of provision which can be intelligibly allocated to either’.
- Court adopted Oxford English Dictionary’s definition of education: ‘systematic instruction, schooling or training given to the young ... in preparation for life’.
- The ‘shared territory’ is a grey area of provision which might, on the particular facts of a case, be either: a question of fact for the decision maker i.e. the Local Authority (on appeal, the First-Tier Tribunal) – [R \(A\) v Hertfordshire County Council \[2007\] ELR 95](#)

What does Post-2014 Act case law tell us?

[DC & DC v Hertfordshire County Council \(SEN\) \[2016\] UKUT 0379 \(AAC\)](#)

- ‘Systematic instruction, schooling or training’.
- Little doubt that a form of provision relating to a matter within the curriculum is educational.
- Even provision requiring the adaptation of a school’s physical environment may constitute educational provision.
 - An example would be the provision of a low noise or low distraction environment for a pupil with a sensory disorder.
- Provision should, of course, be directly related to the pupil’s learning difficulty or disability – ‘additional to or different from’.
- Upper Tribunal contrasted some examples for a hypothetical pupil with an anxiety disorder.

DC & DC v Hertfordshire County Council (SEN) [2016]

- Mindfulness training: Special Educational Provision
 - Objective is to enable the pupil to remain calm, keep focussed in class and relate to other children at playtime. Mindfulness is based on principles and practice to secure what is learned.
- CBT: Special Educational Provision
 - Teaching pupil how to deal with anxiety that pops up suddenly.
- Hypnosis: Not Special Educational Provision
 - The pupil is being practiced upon in order to change their behaviour. Their behaviour is affected subliminally. 'It may be thought unlikely that this would be educational provision any more than taking an anti-biotic for a sore throat'.
- Judge went on to describe common factors of SEP provision – 'the educational markers' they display:
 - Input needed.
 - Identification of what a programme is meant to develop in the pupil.
 - How this development is to be achieved.

What is the 'grey area' of provision?

- OT – almost always treated as SEP
- Physiotherapy – usually but not always
- Counselling – sometimes
- What about provision from nurses, doctors and other medical staff?
 - Older case-law: nursing care unequivocally a non-educational need.
 - *DC and DC*: question is not whether provision is medical, but whether the learning disability (SEN) calls for that provision.
 - 'Support of a psychiatrist' might amount to special educational provision.

What does health and care provision look like in an EHC Plan?

[Section 21, Children and Families Act 2014](#)

(3)“Health care provision” means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.

(4)“Social care provision” means the provision made by a local authority in the exercise of its social services functions.

But what about health or social provision which educates or trains?

What about health/social care provision which educates or trains?

[Section 21, Children and Families Act 2014](#)

(5) “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).”

What is the dividing line between education and health/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).
- 'Deemed' special educational provision c.f. 'direct' special educational provision.
- Why does this matter?
 - Changes where the provision is included in the EHC Plan.
 - As a consequence, changes which public body has the responsibility for securing the provision.
 - Impacts on parent/young person's rights of appeal to Tribunal.

What is the dividing line between education and health/social care provision...

- Health 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.
- Social Care provision which might ordinarily be included in Section H1/H2 of an EHC Plan is included in Section F.
 - Remains the responsibility of the Local Authority.
 - Alters a parent/young person's right of redress including appeals to the Tribunal.
- Speech & Language Therapy, Occupational Therapy, and Physiotherapy are most common examples of deemed special educational provision.
 - Speech & Language Therapy should be treated as educational unless there are “exceptional reasons for not doing so” X&S v Caerphilly Borough Council [2004] EWHC 2140

Examples of what might/might not be Section F provision

- Is a hearing aid special educational provision?
 - Yes - [EAM v East Sussex County Council \[2022\] UKUT 193 \(AAC\)](#).
 - A school has installed a loop system for a pupil with a hearing impairment and the class teacher uses a microphone. With their hearing aid on the 'T setting' – pupil can hear the lesson.
 - The microphone and the loop system are both educational provision. But they do not themselves educate the pupil. The hearing aid may be both an educational provision and a health care provision, but again it does not educate the pupil. The teacher and the contents of the lesson educate the pupil.
- What about a powered wheelchair?
 - The Upper Tribunal considered this in [East Sussex County Council v JC \[2018\] UKUT 81 \(AAC\)](#).
 - Held: if use educates or trains, no rule excluding it from being educational training provision – judgment emphasised importance of evidence and the Tribunal (or Local Authority when not in an appeal) making adequate findings.
- Need for adequate findings => importance of robust evidence.

Examples of what might/might not be Section F provision

- Is mentoring support special educational provision?

“A will have up to 5 hours per day with a specialist worker from an organisation such as I-support and/or autism mentors and/or a personal assistant/companion to assist A in accessing her education and travelling independently, helping her with her organisational and planning skills including management of her educational commitments and homework and helping A put into practise strategies she learns as part of her SALT and OT, as well as other independence and communication skills”

- Potentially - something which supports (or even facilitates) education can lawfully be educational provision, such as mentoring support: [*Westminster City Council v FTT* \[2023\] UKUT 177 \(AAC\)](#).
- Is an internet connection special educational provision?
 - Potentially - [*EAM v East Sussex County Council* \[2022\] UKUT 193 \(AAC\)](#)

What to consider when deciding if provision is Special Educational Provision

- It is unquestionably a difficult area – each instance will turn on its own facts including the wider needs profile of the child or young person for whom the provision applies.
- You will need to think carefully about your rationale and you should document this.
- Development from *LB Bromley* [1999] – ‘unequivocally educational’ vs ‘unequivocally non-educational’.
- *EAM* [2022]; *Westminster CC* [2023] decisions suggest that the line is now even more blurred.

Can a local authority require a parent to secure special educational provision?

Duty to secure special educational provision

‘Section 42 Duty’ – Section 42(2) Children and Families Act 2014

- (1) This section applies where a local authority maintains an EHC plan for a child or young person.
- (2) The local authority must secure the specified special educational provision for the child or young person.
- (3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.
- (5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.

Can a local authority require a parent to secure special educational provision?

- No unless the LA satisfies itself (and can demonstrate) that the **parents have voluntarily made suitable alternative** arrangements.
- Remember: Section 42(5) - subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.
- *A v Cambridgeshire County Council* [2002] EWHC 2391.
- *TW and KW v Hampshire County Council* [2022] UKUT 00305 (AAC) –
provision funded by e.g. a PI payment.

*How long does a local authority have to
secure Section F provision?*

Time limits on securing provision

- *ZK v London Borough Redbridge* [2020] EWCA Civ 1597
 - Considered the meaning/weight of the LA's duty to 'secure'.
- What about following a First-Tier Tribunal appeal?
 - Bulk of provision within 5 weeks i.e. the period within which the LA has to amend and (re)issue the EHC Plan following a decision notice.
 - *R (BA) v Nottinghamshire County Council* [2021] EWHC 1348 (Admin).
- Threat of public law challenge in event of failure to secure.
 - Not a 'best endeavours' obligation.

Does a local authority need to secure the best possible provision for a child or young person?

Is there a duty to secure the 'best' provision for a CYP?

- Duty on the LA is to secure what is reasonably required.
 - *L v Clarke and Somerset County Council* [1998] ELR 129
- Only educational provision which is **reasonably required** to meet a child or young person's special educational needs can be permissibly named within provision being specified in Section F.
- (Older) Case law talks about there being no right to 'Rolls Royce' provision i.e. best possible provision.

Summary – what factors should I consider when deciding if provision is Special Educational Provision?

- **Where to start:** education, although it may be very wide ranging in concept, is about instruction, schooling or training, so one or more of these factors is likely to be discernible in provision which is asserted to be educational.
- **Remember:** the provision should be directly related to the pupil's learning difficulty or disability – Special Educational Provision is provision that is 'different from' or 'additional to' provision made generally for others of the same age in a mainstream setting.
- **Guiding principles:**
 - Direct educational provision need not itself educate or train – examples: hearing aid (*EAM v East Sussex*) ; mentoring support (*Westminster CC*).
 - Contrast with deemed special educational provision – need to show that it 'educates or trains'.
 - Ultimately it is a decision for the Local Authority decision maker (and on appeal, the Tribunal).
 - Document your rationale.
 - Duty is to secure what is reasonably required.

What does the law say about the child/young person's wishes?

- Section 19 Children and Families Act 2014

[...] a local authority in England must have regard to the following matters in particular—

- (a) the views, wishes and feelings of the child and his or her parent, or the young person;
- (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
- (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
- (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes

*What about the views, wishes, and feelings
of the child/their parent?*

What does the law say about parents' wishes?

- Starting point: the concept of parental responsibility within the Children Act 1989.
- Section 3(1): all the rights, **duties**, powers and **responsibilities** and authority that, by law, a parent of a child has in relation to the child and their property.
- Not boundary-less – there will be a tipping point where the parent's wishes do not accord with their using PR in the best interests of the child.
- As long as a young person has capacity, can make decisions of their own.

What does the SEND framework(s) say re: parents' wishes?

- Section 19 Children and Families Act 2014
 - LA must have regard to views, wishes and feelings of parent and child.
- Section 9 Education Act 1996
 - [-] the Secretary of State and **local authorities shall 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.
- Particular significance when naming a setting in Section I.

How should views, wishes and feelings feature in the EHC Plan?

- Regulation 7, Special Educational Needs and Disability Regulations 2014 - when securing an EHC Needs Assessment, a local authority must:
 - consult child (and parent) or young person;
 - take into account views, wishes and feelings
- Regulation 11 - when preparing an EHC Plan, a local authority must take into account evidence received during Needs Assessment – as above, by virtue of Reg 7, - should include views, wishes and feelings.
- Regulation 12(1)(a) – when preparing an EHC Plan a local authority must set out— the views, interests and aspirations of the child and his parents or the young person (section A)
- EHC Plan is a living document – views, wishes and feelings should be canvassed during annual review.

What is the impact on the naming of a setting/Section I?

- (Conditional) Duty on a local authority to name the school/setting requested by the child's parent/young person.
 - List of settings in Section 38(3) Children and Families Act.
 - Starting point: setting within this list must be named in Section I.
 - Statutory exceptions recorded within Section 38(4) – suitability; incompatibility with efficient education of others; incompatibility with efficient use of resources.
- Section 9, Education Act 1996 must also be considered even where a statutory exception established –or- where request for independent setting made.
- No equivalent right to request EOTIS but parents' wishes to be taken into account when considering if a[ny] school would not be suitable.

How will the Tribunal take into account views, wishes and feelings?

- Like the local authority, the Tribunal is obliged to take into account a child/young person's views.
- The Tribunal is required to expressly deal with these views in its decision notice - [**M & M v West Sussex County Council \(SEN\) \[2018\] UKUT 347 \(AAC\)**](#).
- When appropriate, parental evidence can be used to adduce a child's views [**BB v London Borough of Barnet \[2019\] UKUT 285**](#).
- The older and more mature the child, the greater the weight to be given to their views [**West Sussex County Council v ND \[2010\] UKUT 349 \(AAC\)**](#)
 - Principle applies to both local authorities and the Tribunal.

What if the parent(s)'s views conflict with those of the child/young person?

- Age and capacity determining factors.
- Even where CYP is deemed to lack capacity, efforts should be undertaken to canvas (and record) their views.
- Young person holds right of appeal (if has capacity).
 - In instances where Tribunal has concerns that parent is not acting in the best interests of the young person, can appoint a replacement litigation friend ('Alternative Person').

What happens if the parents disagree?

- Check position around Parental Responsibility.
- One parent's wishes should not override the other where both have Parental Responsibility.
- In all cases - the child should be kept central.
- Either parent can apply to the Family Court in private proceedings for a Specific Issue Order.
 - But would hope that a way forward can be agreed without need for recourse to Family Court.

Has the MM decision changed anything?

MM (as alternative person for C) v Royal Borough of Greenwich (Special Educational Needs) [2024] UKUT 179 (AAC)

- Upper Tribunal decision of June 2024 – provides guidance on:
 - Mental capacity.
 - **The role of alternative persons/litigation friends in SEND appeals.**
 - The First-tier Tribunal's jurisdiction (essentially powers) to make health and social care recommendations.
 - Exercises an inquisitorial jurisdiction in the same way as relates to SEN.
 - Burden on parties to put forward the evidence necessary to make out their respective cases.
 - What about if evidence is sparse?

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