Section I – placements & EOTIS, and Section 19 provision

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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 does the law say about the naming of a school or college in an EHC Plan?

Naming a setting in an EHC Plan

- Section I of a finalised EHC Plan must set out:

'*- the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I)'* – **Regulation 12(1)(i) Special Educational Needs and Disability Regulations 2014.**

- Exception: EOTIS – Section I must be left blank (case law including *Derbyshire CC v EM and DM [2019]*; *NN v Cheshire East Council (SEN)* [2021]).

- A draft EHC Plan must not name a specific institution or a type of institution – **Section 38(5) Children and Families Act 2014**.
  - NB//this applies to drafts of a first EHC Plan – reviews of EHC Plans following a different process. It will be expected that amendment notices set out the setting/type of setting to be named.

- When issuing a draft EHC Plan (first Plan) or a proposed amended EHC Plan (following review) – parent or young person must be informed of their right to request a particular school or other institution named in the EHC Plan.

Parental/Young Person Preference

- Parents/the young person has a right to request that a particular setting ('school or other institution') is named in the EHC Plan.
- This is a broad right although not completely unfettered.
  - Applies to a setting that falls within the list described at Section 38(3) Children and Families Act 2014

(a) a maintained school;
(b) a maintained nursery school;
(c) an Academy;
(d) an institution within the further education sector in England;
(e) a non-maintained special school;
(f) an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval).

- Starting point: where a request is made for a setting listed above to be named in the EHC Plan – the Local Authority must secure that the EHC Plan names this setting.
- Limited statutory exceptions (next slide).
- Evidential bar is set quite high

Statutory exceptions

- Where a request is made for a setting (which falls within the list at Section 38(3) Children and Families Act 2014) is be named in the EHC Plan – rebuttable presumption that the Local Authority must secure that the EHC Plan names this setting.
- 'Conditional Duty to Name'. **Section 39(3) Children and Families Act 2014**

- The Local Authority does not need to name parental/young person's preference where it can show that one of the exceptions in Section 39(4) Children and Families Act 2014 applies:
    I. The school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned ('suitability exception')

The attendance of the child or young person at the requested school or other institution would be incompatible with—

II. The provision of efficient education for others; or

III. The efficient use of resources.

- For the Local Authority to show that one of the statutory exceptions applies.
- Role of setting consulted very important: robust evidence required to establish an exception applies – often this evidence can only come from the setting itself.

What is the suitability exception?

‘Suitability Exception’

The school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned (‘suitability exception’)

- In all cases where there is disagreement as to which setting should be named, the Tribunal’s first assessment will be of the suitability of each of the settings proposed.
- Is each of the settings proposed appropriate to meet needs?
- As with Section F, no requirement for optimum available provision – threshold is appropriateness.

Assessment of appropriateness: evaluate what the child or young person needs (Section F) and what the setting can offer.

Evidence from setting is key – LA should be careful to ensure comprehensive consultation undertaken.

‘Suitability Exception’

- Sometimes parents put forward a setting that is not appropriate to meet the child’s needs.
- Assessment of appropriateness should be holistic.
- Broader than an ability to meet special educational needs although education is the primary driver.
- Need to consider impact of naming setting on health and on social care needs.

- Is naming the setting in the child/young person’s best interests?

What does the (in)efficient education of others exception mean?

Incompatibility with the 'Efficient Education of Others'

The attendance of the child or young person at the requested school or other institution would be incompatible with the provision of efficient education for others (S.39(4)(b)(i) Children and Families Act 2014)

- 'Efficient education' not defined in the legislation.

'- *providing for each child or young person a suitable, appropriate education in terms of their age, ability, aptitude and any special educational needs they may have.'* (Paragraph 9.79, 2015 Code of Practice

- 'others': the children and young people with whom the child or young person with an EHC plan will directly come into contact on a regular day-to-day basis (Paragraph 9.79, 2015 Code of Practice).

- Helpful guidance on what this means in practice contained within *NA v London Borough of Barnet* [2010] UKUT 180 (AAC).

Incompatibility with the 'Efficient Education of Others' (ii)

NA v London Borough of Barnet (SEN) [2010] UKUT 180 (AAC)

The Local Authority (and on appeal the Tribunal) is entitled to consider the impact on all or any learners at the placement.

- Where a placement is nominally full, admitting pupils over this number **might** be incompatible with the efficient education of others but not enough on its own.
- Reasons for decision must give a clear identification of just what difference the child or young person's admission would have, and on the efficient education of which others.

- The presumption of placing in line with parental/young person preference under the legislation only displaced by a positive finding of "incompatibility with the efficient education for others".

- Evidence of an impact on other pupils is insufficient : *Hampshire v R & SENDIST* [2009] EWHC 626.

- Again, evidence is key.

What constitutes an inefficient use of resources?

Incompatibility with the 'Efficient Use of Resources'

The attendance of the child or young person at the requested school or other institution would be incompatible with the efficient use of resources (S.39(4)(b)(ii) Children and Families Act 2014)

- Not merely a question of whether the setting of parental/young person's preference is more expensive than the Local Authority's proposed setting.

- Multi-stage test:
  - Is each of the settings proposed appropriate?
  - Is the extra cost 'inefficient'? Local Authority/Tribunal must balance the statutory weight given to parental/young person's preference against the additional cost c.f. cost of Local Authority proposed setting.
  - Even if found to be 'inefficient', the Tribunal must still then as a second stage balance the extra cost against any extra benefit that naming parental/young person's preference setting is said bring.
  - Only if the extra cost is 'significant' that the setting of parental/young person's preference is displaced.

Is the extra cost 'significant'?

- £4,000 (2006): Essex County Council v Sendist [2006] EWHC 1105 (Admin) (28 April 2006) - not inefficient – uplift to allow for inflation?
- £30,000 (2016): *Devon County Council v OH* [2016] UKUT 292 (AAC)
- £70,000+ (2017): *KE v Lancashire County Council (SEN)* [2017] UKUT 468 (AAC)

Also consider Section 9 Education Act 1996

- If it is determined that naming the setting is incompatible with the efficient use of resources, consideration must also be given to S.9 Education Act 1996.

[LAs] 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.

- Also, applicable where a request has been made for a setting not within the list at s.38(2)(b) Children and Families Act 2014 i.e. wholly independent settings.
- 'Conditional Duty to Name'/statutory exceptions not relevant.
- However, that does not mean that Local Authorities can ignore parental request for independent setting.
- Following *IM v Croydon* [2010] UKUT 205 (AAC), three stage for comparison of settings:

(1) Are both schools appropriate?

(2) If they are, which is the parental preference?

(3) Would naming the parent's preference be incompatible with the provision of efficient instruction and training **or the avoidance of unreasonable public expenditure**.

‘The avoidance of unreasonable public expenditure’

- No clear rules on what might constitute unreasonable public expenditure.

- Case law indicates that a modest difference in the costs of respective placements might be sufficient to rebut parental request.

- However, other decisions indicate that a parentally preferred placement which was 60% more expensive than the Local Authority’s preferred placement was not inevitably unreasonable.
- A difference of £70,000 in the context of two placements which both costs over £200,000 each not inevitably unreasonable although the Tribunal noted that it might require “quite exceptional circumstances” for the more expensive placement to be named.

- Clear and robust rationale needed.

How should consultations with settings be undertaken?

Consultations

- Insofar as possible, Local Authorities should be prepared to actively manage the consultation process.
- Is it necessary to make follow up enquiries with the setting consulted?
- Whilst it is the LA's responsibility to adduce evidence e.g. of (un)suitability, for the most part this evidence has to come from the setting itself?
- Tension: LA may wish to be firm in consultation process (and indeed naming a reluctant placement) but it will of course want to maintain the relationship with the setting.
- Trend: increasingly difficult to place children/young people who need a more secure learning environment/residential setting.

Summary – consultations with a potential setting/naming in Section I

- Evidence is key. Track decision making and rationale.
- Whilst it is the Local Authority's responsibility to collate and adduce evidence – support of setting consulted is key.
- Except for wholly independent placements, presumption that parental preference setting will be named in EHC Plan.
- Three statutory exceptions.
- When analysing issues of cost of respective placements, not enough to reject the parental/young person's preference on the basis that it is more expensive - especially when relying on 'efficient use of resources'

Education Otherwise Than In School

What is Education Otherwise Than In School/College (EOTIS/C)?

Section 61 Children and Families Act 2014

61 Special educational provision otherwise than in schools, post-16 institutions etc

(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.

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.

(3) Before doing so, the authority must consult the child's parent or the young person.

EOTIS

- Education Otherwise Than In School (EOTIS) – sometimes referred to as Education Otherwise Than At School (EOTAS).
  - What's the difference?
  - There is no difference – although the Tribunal is seemingly making a concerted effort to use EOTIS. *London Borough of Camden v KT* [2023] UKUT 225 (AAC)
  - *KT* decision also helpful confirmation that Section F provision **can** be provided in the child/young person's home
    - NB//remember Section 42(2) – non-delegable duty; must not be an expectation that parents will deliver provision unless voluntarily agreed to do so AND LA can be satisfied these are suitable arrangements.
    - Not the same as 'Elective Home Education' .

- Common myth: parents have right to request EOTIS in the same way they can request particular setting is named.
  - No such statutory right exists.
  - Presumption in favour of school based provision – *AA & BB v Bristol City Council* [2023] UKUT 52 (AAC)

EOTIS

- Whilst there is a presumption of school-based provision, Local Authorities should carefully consider representations for EOTIS where made by parents.

- Importance of robust and thorough consultations with a range of settings.

- Our experience: often a lack of firm/robust evidence – adduced in a timely manner – results in EOTIS being decided by Tribunal as ‘there is no viable alternative’.

- Consultations around phase-transfer years/over summer holidays can be particularly tricky.

What happens if a school says it cannot meet need/refuses to admit a child?

What happens if a school says it cannot meet need?

- Starting point: is the school under a duty to admit?
- Section 43, Children and Families Act 2014 sets out that a setting named an EHC Plan must admit the child or young person for whom the EHC Plan is maintained.
  - Same list of settings as relates to parental/young person preference.
  - Includes academies but note the terms of any funding agreements – the academy might have ability to seek determination of the Secretary of State.
  - This determination remains subject to a decision of the Tribunal.
  - An academy may not refuse to admit pending the determination.

- Practically: there can be a tension when naming a setting which (appears) unwilling.

- As with any dispute involving SEN, each case will have its own particular facts.
- Guiding principles:
  - Section 7 Education Act 1996: duty of parents to secure education of children of compulsory school age.
    - Often considered in the context of School Attendance Orders.
  - Section 9 Education Act 1996: pupils to be educated in accordance with parents' wishes.
    - Are the parents seeking to exercise their right to electively home educate their child? Even as a temporary measure pending the outcome of the appeal.
  - Stay in touch.
  - Keep the 'door open' – parents/families who withdraw from services may seek to reengage as circumstances change.
  - Are there safeguarding concerns? (There may not be, but the Local Authority should remain curious and investigate where concerns emerge.)

What happens if the family refuses to take the child or young person to the school named pending a Tribunal appeal?

- Is there evidence of a need (SEN or health) which might prevent the pupil from accessing the setting named?

- Section 19 Education Act 1996.

  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.

- Local Authority will need to explore the underlying rationale for the family's refusal.

When does the local authority have to make alternative arrangements?

- Section 19 Education Act 1996.

  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.

- Education Act 1996 provision – does not apply just in the context of SEND.

- Failure to ‘make arrangements’ might also mean LA is failing to secure provision which could lead to legal challenge for breach of Section 42(2) Children and Families Act 2014.

Factors in Section I appeals at Tribunal

Section I appeals

- Strength of the parental/young person's preference – conditional* **duty** to name#
  - *Conditional in that can be displaced by establishing one of the three statutory exceptions
  - # applies to settings that fall within list at Section 38(3) CFA 2014

- Evidence is key.

- Scrutinise settings' responses.

- Especially as relates to 'efficient education of others' exception, LA should not solely rely on the setting's consultation response.

- Does the setting requested to be named through appeal need to provide class lists (anonymised), floor plans, photos of the school environment?

Any **questions?**

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