SEN Seminar

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Education, Health and Care Plans

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**Structure and content of the EHCP**

The statutory material is quiet on the layout of the EHCP. That includes the SEND Code of Practice which has been prepared by The Department for Education (DfE) and Department of Health (DoH). Unlike the old SEN Code of Practice, there is no stipulation about how an EHCP should be organised. There is general guidance about how local authorities could ‘helpfully’ draft an EHCP.

The EHCP must contain the following:

A - Views, interests and aspirations of the pupil & family

B - The special educational needs (old Part 2)

C - The health needs (old Part 5)

D - Social care needs (old Part 5)

E - Outcomes sought (similar to Objectives in Part 3)

F - Education provision (old Part 3)

G - Health care provision (old Part 6)

H1 - Social care provision (under 18s) (CSDPA 1970)

H2 - Social care provision (other legislation)

I - School placement (old Part 4)

J - Personal Budget

K - List of advice (old appendices)

As each local authority is permitted to prepare its own template, we are seeing significantly different EHCPs. They all contain the above, but the manner and form of presentation varies greatly.

Each local authority should present on its Local Offer an example of its template for their EHCP. We are also seeing blank EHCPs being sent to parents before transition even starts. This seems to be a particularly helpful approach.

The statutory material governing the EHCPs is found at s37 Children and Families Act 2014 and Chapter 9 SEND Code of Practice (2015) – particularly Paragraph 9.61 onwards

**Section A – Views, hopes and aspirations**

This is the history, hopes and aspirations section.

The age of the child or young person (CYP) informs who completes Section A. For a young CYP, parents would normally inform the content of Section A. The older the CYP, the more input they will have. From 16 onwards, the CYP should have all the input into Section A, subject to their having capacity. They can be helped by their parents with this, but the CYP should be the primary input.

There is no clear rule about the level of involvement the CYP should have at a particular age. The local authority should carefully consider a CYP’s capacity and understanding at all ages and ensure that the CYP is given the opportunity to engage as much as possible (in line with s19 Children and Families Act 2014)

The clearest guidance about the content of Section A can be found at Page 164 of the SEND Code of Practice (2015 version).

This section can be very lengthy as parents try to put the CYP’s entire history into this section. This is not particularly helpful. Whilst the CYP’s history should be in Section A, it needs to be as concise as possible. Remember, the EHCP is a summary document. Equally, the operative elements of the EHCP are Sections B – I. Realistically, there is little benefit to having a very lengthy Section A.

**Section B – SEN**

This is the replacement for Part 2 for the Statement of Special Educational Needs. Section B must contain all of the CYP’s special educational needs (SEN).

There is a lot of uncertainty about whether something is an SEN, a Health need or a Social need. The way to work this out is to work out the support that is needed. If a need results in a provision which has the effect of educating or training, then that need is an SEN.

For example, speech and language therapy is specifically stated in the statutory material to be an SEN provision as it has the effect of educating or training. Therefore, any need that results in a requirement for speech and language therapy is an SEN rather than a Health or Social need.

There should not be repetition across the sections. If an SEN is contained in Section B it should not be repeated in Section C or D.

The caselaw that applied to Part 2 of the Statement of Special Educational Needs also applies to EHCPs. Two particularly helpful cases are:

***T v Hertfordshire [2003] EWCA Civ 1893*** - the content of the Statement should be clear and unambiguous

***A v Barnet [2003] EWHC 3368*** - Part 2 should inform Part 3, not the other way around

The clearest guidance can be found at Page 164/165 SEND COP 2015.

**Section C – Health needs**

This section should contain the health needs that a CYP has as a result of their SEND. Health needs which are not associated with SEND cannot be included here.

We are having significant problems with Section C because CCGs are not engaging with the EHCP process. There are either very brief and bland descriptions provided, or nothing at all.

Currently, there is no specific appeal route against Section C. The SENDIST is trialling a system of allowing the SENDIST Panel to make recommendations about the content of Section C, D, G, H1 and H2 but this can only be ancillary to an appeal about the education sections (B, F and I).

For example, a CYP who requires a wheelchair as a result of cerebral palsy – that is likely to be a health need. However, a CYP who has a tendency to have minor nosebleeds would not be required in this section.

The CCG can decide to include references to health needs which do not relate to the CYP’s SEND in order to ensure that a complete picture is achieved. There is, however, no way to compel the CCG to do this. The Code of Practice does confirm that Health Care Plans can be included into Section C.

The same caselaw which applies to Section B, above, would also apply to Section C. The statutory guidance can be found at page 165 SEND COP (2015 version)

**Section D – Social care needs**

The social care needs which arise as a result of the CYP’s SEND **OR** as a result of duties under s2 Chronically Sick and Disabled Person Act 1970 (CSDPA).

CSDPA is a very outdated piece of legislation. It uses almost impenetrable language, and makes references to services which would now be fairly redundant due to advances in technology. However, it is very precise in terms of the support that can be expected as a result of particular sickness or disabilities.

As with Section C, the big problem with Section D is that the necessary professionals are not engaging. We are seeing frequently comments like “this CYP is not known to our service”. This is simply not good enough. The EHC needs assessment must involve securing advice from social care. Saying that the CYP is not known is inadequate. Social care should, by the end of the EHC needs assessment, know the CYP and have taken a view in terms of whether any obligations have arisen.

It is worth noting that in almost all cases, there will be obligations that arise. Even if the CSDPA does not apply, s17 Children Act 1989 and Schedule 2 of that Act will likely apply.

S17 Children act requires a local authority to provide support for ‘children in need’. A child is ‘in need’ if they are, amongst other things, disabled and need support for those disabilities. It would seem likely that in almost every case of a CYP with an EHCP, they would be disabled, as defined within the Equality Act 2010 and, therefore, would qualify for some form of support in line with s17 and Schedule 2.

As with Section C, the SENDIST is trialling a power to comment on the content of Section D. Such comments are not binding. A stand-alone appeal to SENDIST about Section D is not possible.

For guidance see Page 165 SEND Code of Practice (2015 version).

**Section E - Outcomes**

Outcomes seemed like a big thing when they were introduced. However, as with many changes made by the Children and Families Act 2014, Outcomes have proven to be a missed opportunity.

The Statement of Special Educational Needs contained ‘Objectives’ which the special educational provision sought to achieve. That is more or less what the new ‘Outcomes’ section is. However, Outcomes should now be SMART, whereas Objectives tended to be a little more general.

The difficulty with the Outcomes is that there is no right to appeal against them and it is not very clear what should be in this section. The Outcomes should cover all three areas and should aim for short, middle and long-term outcomes for the CYP. It is also worth preparing the Outcomes considering the s19 duty of best possible Outcomes.

For guidance on Outcomes see Paras 9.64 - 9.68 SEND COP (2015 version)

Outcomes must target at independent living, employability, higher education and/or community engagement

**Section F – SEN provision**

This is the replacement for Part 3 of the Statement of Special Educational Needs. It should be written in the same way that Part 3 should have been. It should be specific, detailed and leave absolutely no question about the provision a CYP should be receiving, how it is delivered, who by, how often, for how long and how it is to be monitored and reviewed.

Part 3 was traditionally always a significant area of dispute and it seems Section F is going to inherit those issues.

A provision is a Special Educational Needs provision if it has the effect of educating or training a CYP. This will include;

* Speech and Language Therapy
* Learning to use a wheelchair or other supportive equipment
* Occupational Therapy
* (potentially) Physiotherapy

Helpful caselaw:

**T v Hertfordshire [2004] EWCA Civ 927** - must cater for all identified needs

**Re A [2000] ELR 639** - amount / nature of provision cannot be deferred for future assessment

**R v Wandsworth [1998] ELR 424** - staff qualification must be detailed if different from mainstream

**L v Clarke and Somerset [1998] ELR 129** - no vague words like “opportunity” “access” “regular” “as required”

Remember – Section F is enforceable. It is almost a contract and should specify precisely what is to be expected. If a provision is vague – e.g. “Access to a support assistant during the day” – it is almost impossible to enforce. This provision is almost meaningless as it actually required very little (if anything). A better version would be “1:1 or small group, with a ratio no higher than 3:1, in all literacy lessons. The support worker is to have either graduate equivalent qualification in autism or have at least three years direct work experience in supporting CYPs with autism”

There is some scope to lower the level of specificity if CYP is attending a special school. That is on the basis that the special school is likely to be able to modulate the support with more specialism than a mainstream school. As such, it is helpful for the EHCP to allow such flexibility.

**Section G – Health provision**

This Section is fairly often blank because CCGs are not engaging with the process of preparing an EHCP.

The principles regarding specification in Section F also apply to Section G.

It is important to remember that anything that has the effect of educating or training the CYP is an educational provision and should be contained in Section F.

There will need to be development of caselaw on the points of how far “educating and training” goes. For example, could physical training through physiotherapy be considered “training”? Currently, it seems so.

**Sections H1 and H2**

These are difficult sections because they draw on the Children Act, Care Act CSDPA and many other statutes which relate to the social services functions of local authorities.

For guidance about these sections see Para 9.69 (p168 – 169) SEND COP (2015) and Paras 9.137 – 9.140 (p186-187) SEND COP (2015). It is worth bearing in mind that a lot of the duties on the local authority are discretionary. It is up to social workers to exercise their expertise to determine what is necessary to comply with statutory obligations.

This section should be quantified and specified in the same way that Sections F and G should be.

If not happy with the content – the challenge is by way of Judicial Review. Again, as with Section G, the SENDIST can comment on the content of Sections H1 and H2, but these comments are not binding or enforceable.

**Section I – Placement**

The same principles that applied to Statements apply to EHCPs when it comes to placement. They are that:

* There is a statutory presumption that all CYPs, including those with SEND, will be educated in a mainstream school
* A special school would only be suitable where a CYPs needs are so complex that a mainstream school would not be able to manage those needs and/or the CYP would likely cause a detriment to the education, health and / or welfare of the other children already at the mainstream school
* There is a presumption that a CYP will be placed in a maintained placement as all provision should be delivered in the most cost-effective way, as long as it is adequate to cater for the CYP’s SEND
* A placement in a non-maintained or independent school will only be successful in where such a placement is not contrary to the efficient use of public resources. That generally means that the maintained alternative is inadequate to cater for the CYP’s particular SEND

There is a significant amount of caselaw which underpins the above general principles.

BUT remember, s19 Children and Families Act 2014 introduces the notion that all CYP with SEND should be supported in order to achieve their “best possible” outcomes. This could likely inform placement. If there is a ‘close’ case between a mainstream vs special school or a maintained vs non-maintained placement, these principles are likely to be important.