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Personal Injury, Negligence and COP Lawyers Need to Understand Special Educational Needs (SEN) - Ed Duff, Boyes Turner



12/01/15. On 1 September 2014, the most significant change in special educational needs (SEN) law for 30 years took effect due to the Children and Families Act 2014. This has increased the scope of support for children and young people. It means that PI, Negligence and Court of Protection lawyers who work with children with learning difficulties will have to understand and work with SEN lawyers.

The law

A person is likely to have SEN if they have a greater difficulty in learning as compared to their peers. Examples range from dyslexia to cerebral palsy and acquired brain injuries. SEN, as with any disability or impairment, can be developed during a person's life following a traumatic accident or mistreatment.

Before 1 September 2014, support for children with special educational needs was provided through a staggered approach so that children were given increasing support with increasing need. The most severe were supported with a Statement of SEN. Roughly 20% of all children have SEN whereas only 2% of all children have a Statement.

The Statement of SEN is now being replaced, slowly, with Education, Health and Care Plans (EHCP). These provide support for the education, health and social care needs which result from the child's special educational needs. They can last until the child / young person reaches 25. The document is legally binding so that the provision within it must be made available and funded by the local authority and/or health services.

It is important to note that if the support is in an EHCP, there is no means assessment to decide funding. The only question is whether the support is necessary to provide for the child to help them achieve their 'best possible outcomes'.

Relevance to Personal Injury lawyers

Children are not immune to traumatic accidents which result in the development of a disability or impairment. Any physical or mental impairment which results in difficulty accessing learning could well be SEN.

When valuing a claim, it will be necessary to consider the educational implications of the injury and what entitlement the young person has to support. It will be likely that you have received reports that comment on future educational difficulties that the child may well have. These should be looked at closely for quantum as well as future needs. It will be important to understand that costs very probably will be needed to cover future expert assessments, and even litigation.

The content of Orders and settlements will also be highly important. Depending on liability, Orders and settlements may seek to restrict a child's ability to access public services. You will need to carefully assess to what extent your Order or settlement does this and the likely financial implications.

Relevance to clinical / medical negligence lawyers

A child with a brain injury, whether acquired at birth or during childhood, is likely to have SEN.

When valuing a claim, you will be considering the impact that the acquired brain injury will have on the child's life. To do this, it is likely you have already received advice about SEN, albeit in a form targeted at the negligence proceedings. At this stage, it is crucial not to forget that the child can seek the additional support of an EHCP and may need to seek specialist advice in order to secure that support.

Lawyers need to be aware of the new rules, the support that can be obtained and the process for doing so, including costs of challenging this at Tribunal. This will be particularly important when putting together a schedule of loss and agreeing any Order which limits your client's ability to access further services to support their needs.

As with Personal Injury claims, Negligence lawyers will need to pay particular regard to the wording of Orders, or settlements. It is likely that these will contain restrictions to the child or young person's ability to access public service. The impact and implications of these Orders and settlements need to

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be fully understood.

Relevance to Deputies

Deputies will need to be aware of what support is available via the EHCP, rather than using the child's fund.

Over the next 3 ½ years, children with Statements will transition to EHCPs. The transition is a golden opportunity to update the support, obtain reassessments and correct any deficiencies. Local authorities are currently struggling with the process of transition and are cutting corners. If a child you are acting for is going through transition, you need to be on top of it immediately.

The issue of capacity has been brought to the fore. At 16, children's wishes and feelings will take primacy over their parents, unless they lack capacity. This may well lead to local authorities looking to Deputies for advice. It may also mean that litigation about children's capacity become more common as parents and/or children challenge decisions taken by the local authority about capacity.

The EHCP can also carry with it a "Personal Budget". This gives a monetary figure to the support within the EHCP. Deputies may be expected to advise on, administer and control these budgets as part of their role.

Conclusion

The Children and Families Act 2014 introduces a system of support a young person's education, health and social needs from birth to 25 years through an EHCP. This combines the duties and obligations of three very separate departments.

The areas are complex, especially when introduced with the background of personal injury or negligence litigation and deputyship. However, for any of us to provide a full service to clients, understanding one another's practices and seeking advice where appropriate is absolutely necessary.

Ed Duff, Solicitor
Boyes Turner

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