

**Statements of Special Educational Needs,
Education, Health and Care Plans
and a bit more**

“The Noddy Guide”

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INTRODUCTION – THE MARCH ~~2019~~2020 NODDY GUIDE

This is the March ~~2019~~2020 version of the “Noddy Guide” (as it has come to be known) which David Wolfe first produced over 10 years’ ago. Disregard older versions. This version covers both the Education Act 1996 (**EA1996**) (and its regulations (**Regs2001**¹) and Code of Practice (**COP1996**)) relating to Statements of Special Educational Needs (Statements) as well as the Children and Families Act 2014 (**CFA2014**) (and its regulations (**Regs2014**²) and Code of Practice (**COP2015**)) relating to Education and Health Care Plans (**EHCs**); also DfE Guidance “SEND: 19- to 25-year-olds’ entitlement to EHC plans” published on 21 February 2017 (**Guidance19-25**) (which must be read alongside and be applied in accordance with **CFA2014** and **COP2015**: **IPSEA v Secretary of State [2003] EWCA Civ 7 [2003] ELR 393**). In Wales, the EA1996 provisions still apply, albeit with a different Tribunal (**SENTW**), and Welsh regulations (**WRegs2012**³) and the Special Educational Needs Code of Practice for Wales (~~**WCOP2004**~~**WCOP2013**). The Additional Learning Needs and Education Tribunal (Wales) Act 2018 has been granted Royal Assent, but is not yet in force. The most recent indication provided by the Welsh Assembly is that this piece of legislation will take effect in September 2021. This version of the guide sets out the law as it applies in England, and *currently* applies in Wales.

In many respects the new framework essentially replicates the former (and in many respects **COP2015** directly reflects case law arising from the **EA1996**). So it is likely that High Court and Upper Tribunal decisions dealing with the former can be read across to the latter. We have identified some areas where that may not be the case. Cases marked ** are currently unpublished.

~~This version of the Noddy Guide applies to England and Wales.~~ Thanks to Kevin McManamon of [SinclairlawGeldards LLP](#), we have set out where the law diverges in Wales (~~where **EA1996** is still the applicable legislation~~). Our aim here is to bring together the relevant legal provisions, the COPs, Government guidance and case law (principally from the High Court and, latterly, the Upper Tribunal). However, the Guide is not intended to be a substitute for direct consideration of the legal materials or relevant COP.

¹The Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (SI 2001/3455)

²The Special Educational Needs and Disability Regulations 2014 (SI 2014/1530)

³ The Special Educational Needs Tribunal for Wales Regulations 2012 (SI 2012/322)

This document is a public resource so please feel free to download⁴, use, circulate and quote from this document. But please don't adopt it as your own, let alone in an edited or amended form (as some people have done in the past with earlier versions). We would be happy to provide a version in another font or colour on request.

The March 2017 edition was the first to include the law in relation to CFA2014, which this edition is based on. We are grateful to Judge Jane McConnell, Douglas Silas (Douglas Silas Solicitors), Ali Fiddy & Julie Moktadir (IPSEA), Nigel Pugh (Education Advocacy), Tracey Eldridge-Hinners (Sinclairlaw), Helen Gill (John Ford Solicitors), Nick Graham (Oxfordshire CC), Cathryn Tillman (~~East Sussex CC~~), & Mathilda Goodchild (East Sussex CC) and Victoria Federico (~~Access-Legal~~ Shoosmiths) for their comments on the March 2017 draft.

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We welcome comments on any aspect of this Guide, particularly if you think we have missed something out or got something wrong: davidwolfe@matrixlaw.co.uk, lglenister@landmarkchambers.co.uk

THE EA1996 AND CFA2014	
Relationship between the Acts	In light of “substantially common features around the very building blocks of the special educational needs regime”, the UT has “proceed[ed] on the basis that the legislative intention was in general terms for a continuity of approach, except where the 2014 Act provides a specific reason to conclude otherwise. Subject to that note of caution, authorities on concepts common to both regimes will continue to be relevant”: Devon CC v OH [2016] UKUT 292 (AAC), [2016] ELR 377.
THE SEN CODE OF PRACTICE	
SEN Code of Practice COP1996	The Secretary of State has an obligation to issue “a code of practice giving practical guidance in respect of the discharge by local authorities and the governing bodies of maintained schools and maintained nursery schools of their functions under this Part”: EA1996 s313(1). Such bodies (and those exercising functions on behalf of such bodies) have a duty to

⁴ <http://www.matrixlaw.co.uk/member/david-wolfe/>

	<p>have regard to the provisions of the Code: EA1996 s313(2). And the FTT shall have regard to the code where it is relevant to an appeal: EA1996 s313(3).</p> <p>In Wales, the obligation falls upon the Welsh Assembly Minister to issue the WCOP2004WCOP2013. This code is separate and independent to the theCOP2015 issued for England. The version currently in force is dated January 2004.</p> <p>The Tribunal must identify and correctly understand the relevant provisions of the Code and apply them unless it has and states clear reasons for not doing so: W v Blaenau Gwent [2003] EWHC 2880, [2004] ELR 152.</p> <p>Guidance or a statutory code can only be departed from for good reason: Munjaz v Mersey NHS Trust [2005] UKHL 58, [2006] 2 AC 148.</p>
CFA2014	<p>The Secretary of State’s duty to issue a code requires guidance to be given to a much wider range of bodies than for EA1996 including academies, CCGs, NHS trusts and PRUs: CFA2014 s77(1). Those bodies (as well as anyone exercising functions on behalf of such bodies) “must have regard to the code in exercising their functions” and the FTT “must have regard” to provisions relevant to an appeal: CFA2014 s77(4)-(5). The Secretary of State must consult such persons as are thought fit at the draft stage, and the Code must be approved by both houses of Parliament: CFA2014 s78.</p> <p>The Code cannot override the statute: Devon CC v OH [2016] UKUT 0292 (AAC), [2016] ELR 377, Staffordshire CC v JM [2016] UKUT 0246 (AAC), [2016] ELR 307.</p> <p>See COP2015 Introduction</p>
<p>THE GENERAL DUTY OF THE LOCAL AUTHORITY (LA) WHEN IT COMES TO SPECIAL EDUCATIONAL PROVISION (SEP)</p>	
<p>What must the LA provide? EA1996</p>	<p>The LA is under a duty to secure provision which meets the child’s SEN but is <i>not</i> “under an obligation to provide a child with the best possible education. There is no duty on the authority to provide such a Utopian system, or to educate him or her to his or her maximum potential. ...”: R v Surrey CC ex p H (1984) 83 LGR 219. See also “... this does not oblige the local education authority to make available the best possible education, Parliament has imposed an obligation to meet the needs of the child and no more”: S v SEN Tribunal [1995] 1 WLR 1627; and Stanley Burnton J in Hammersmith & Fulham v Pivcevic & SENDIST [2006] EWHC 1709 (Admin), [2006] ELR 594 [51].</p> <p>The paramountcy principle under Children Act 1989 s1 does not apply to SEN proceedings – a child’s needs are not</p>

	<p>thereby elevated above all other considerations including cost, provided that the LA provision was suitable: LB Richmond upon Thames v AC [2017] UKUT 173.</p> <p>“what would be required by a local authority is advice as to the provision which is <u>appropriate</u> for a child”. Per Thorpe LJ in C v Buckinghamshire CC, [1999] ELR 179, at p189E-H, appropriate is not the same as adequate, and the assessment must be of what is appropriate, not just what is adequate”: NM v Lambeth [2011] UKUT 499 (AAC), [2012] ELR 224.</p> <p>In respect of placement, the duty is to select “an appropriate school There is nothing in the statutory scheme which requires the local education authority to specify the optimum available provision....”: R v Cheshire CC ex P C (1996) 95 LGR 299. The issue is whether the child’s needs can be appropriately met in a particular school, not whether they could be better met in another school: S v SENDIST [2005] EWHC 196, [2005] ELR 443.</p> <p>“Needs” (as in what a child “needs”) means “what is reasonably required” and calls for a decision on whether what was proposed for inclusion in a statement was reasonably required or whether it went beyond that. Such a decision was pre-eminently a matter for the expert judgment of the SENDIST: A v Hertfordshire CC [2006] EWHC 3428; (2007) ELR 95.</p> <p>Exceptional ability is <i>not</i> an SEN (whether on an ordinary reading of EA1996 s312(2) or by application of ECHR Article 2 Protocol 1): S v SENDIST [2005] EWHC 196 (Admin).</p>
<p>CFA2014</p>	<p>That the LA must provide what is “reasonably required” per A v Hertfordshire [2006] EWHC 3428; (2007) ELR 95 applies to the CFA 2014 - “Achiev[ing] the best possible educational and other outcomes” is not a duty on the LA (or even directly a mandatory consideration): Devon CC v OH [2016] UKUT 0292 (AAC), [2016] ELR 377.</p> <p>In exercising its functions, the LA must have regard to (1) the views, wishes and feelings of the child and parent, or the young person, (2) the importance of child and parent, or young person, to participate as fully as possible in decisions, (3) the importance of the child and parent, or young person, being provided with information and support to participate in such decisions, (4) the need to support child and parent, or young person, to facilitate development and to achieve the best possible education and other outcomes: CFA2014 s19</p> <p>COP2015 #6.1: “All children and young people are entitled to an appropriate education, one that is appropriate to their needs, promotes high standards and the fulfilment of potential. This should enable them to:</p> <ul style="list-style-type: none"> • achieve their best

	<ul style="list-style-type: none"> • become confident individuals living fulfilling lives, and • make a successful transition into adulthood, whether into employment, further or higher education or training” <p>Obtaining qualifications is not an essential element of education (i.e. the fact that a child/young person will not obtain qualifications does not mean that they do not need, or are not entitled to, education). Per Buckinghamshire CC v SJ [2016] UKUT 254 (AAC), [2016] ELR 350, the FTT was entitled to direct the LA to issue an EHC plan following assessment in circumstances where SJ (who was 20 years old) functioned at a pre-school level and it was accepted “further achievements would be small”, because those achievements would be valuable in SJ’s adult life.</p> <p>“To the extent that it is to be hoped in appropriate cases that this results in young people moving near employment that is of course a good thing and if economic benefits on a national level flow from that, that too is one of the positives to be derived, but it cannot of itself provide a basis for overturning the finely balanced legislative framework”: Devon CC v OH [2016] UKUT 0292 (AAC), [2016] ELR 377.</p> <p>Higher education courses do not fall within the CFA2014 regime: CFA2014 s83(4). However, just because a course is provided by an institution in the higher education sector does not mean it is a course of higher education for the purpose of section 83(4) (one example may be certain modules provided by the Open University): Gloucestershire CC v EH (SEN) [2017] UKUT 0085 (AAC), RBKC v GG (SEN) [2017] UKUT 141 (AAC).</p>
<p>Over what time period? EA1996</p>	<p>When considering what is “appropriate” (for Parts 3 or 4), the LA/Tribunal must, where it arises as an issue, have regard to the curriculum presently being followed by the child and the impact of disrupting that curriculum: W v Gloucestershire CC [2001] EWHC Admin 481.</p> <p>The LA/Tribunal should not simply look at the short term needs of a child in drawing up a Statement: Wilkin & Goldthorpe v Coventry CC [1998] ELR 345 (error in only looking at the one term the child had at primary and not at what would happen at secondary too). This also applies to the question of whether to assess: Buckinghamshire v HW [2013] UKUT 470 (AAC), [2013] ELR 519.</p> <p>A statement of SEN is a “living instrument’. It is as much – if not more so – a forward-looking rather than a historic document. In that context, it was important for the tribunal to be informed of the impending change in the school’s status.”: LS v Oxfordshire CC [2013] UKUT 135 (AAC), [2013] ELR 429</p> <p>Southampton CC v G [2002] EWHC 1516; [2002] ELR 698 error of law in not looking at cost of whole GCSE course.</p>

<p>EHCP</p>	<p>“EHC Plans should be forward looking – for example, anticipating, planning and commissioning for important transition points in a child or young person’s life, including planning and preparing for their transition to adult life”: COP2015 #9.61</p> <p>If the child or young person is beyond year 9, the EHC plan must include within the SEP, health care provision and social care provision specified, provision to assist the child or young person in preparation for adulthood and independent living: 2014Regs r12(3). At Year 9 “at the latest” LAs should start to plan successful transition to adulthood: Guidance19-25.</p>
<p>Budget reduction</p>	<p>Where the LA is making significant and sufficiently rigid cuts in SEN spend as part of budget setting, it has to have due regard to the public sector equality duty; has to consult under CFA2014 s27 and common law; and has to have regard under the Children Act 2004 s11: R (KE, IE, CH) v Bristol CC [2018] EWHC (Admin) 2103.</p>

ASSESSMENT AND ISSUING OF A STATEMENT/EHCP

<p>When the LA is required to assess?</p> <p>EA1996</p>	<p>EA1996 s323: The LA is required to assess the child where:</p> <p>“(a)— he has special educational needs, and</p> <p>(b) —it is <u>necessary for the authority to determine the special educational provision</u> which any learning difficulty he may have calls for.”</p> <p>So, on the face of it, the question posed by the statutory test (although, as it happens, not the focus of COP1996) is who (i.e. LA or someone else) is to “determine” (i.e. decide upon) the SEP.</p> <p>However, particularly in conjunction with its consideration of whether (following assessment) a Statement must be made and maintained, the UT has required a wider approach which also focusses on the practical question of whether, without the Statement in place, the child would receive the SEP they require – i.e. a focus on delivery and enforcement of delivery of the SEP.</p> <p>In Buckinghamshire v HW [2013] UKUT 470 (AAC), [2013] ELR 519 the UT rejected Buckinghamshire’s argument that the FTT had been wrong to order an assessment without identifying the SEP the child required – that was the point of the assessment! [12]. As to what is ‘necessary’, the UT stated it is a standard that is “somewhere between <i>indispensable</i> and <i>useful or reasonable</i>” [16]; “Whether something is <i>necessary</i> assumes a reason and a purpose. The reason and purpose</p>
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	<p>is obviously to identify whether a child needs further educational provision and, perhaps, a statement of special educational needs” [18].</p> <p>To put it another way, there is a duty to assess (1) where the LA is of the opinion that the child for whom it is necessary to determine SEP, and (2) where the LA is of the opinion that the child is “probably” a child for whom it is necessary to determine SEP; the answer to that question “has to be informed by the wider legislative scheme of which the statementing provisions are part”; “a statement generates certainty and stability in educational provision”; “parliament decided not to rely on general statutory obligations, including a governing body’s section 317(1) “best endeavours” duty, to secure an appropriate education for the child”: SC & MS v Worcestershire CC [2016] UKUT 267 (AAC), [2016] ELR 537.</p> <p>Even if provision for the child exceeds School Action Plus, if in the particular case the child had access to provision required then it may be lawful for the authority not to assess: see e.g. MC v Somerset CC [2015] UKUT 461 (AAC), [2016] ELR 53.</p> <p>The question of progress is relevant as to whether an assessment is “necessary”, however is not the only test or even the principal issue in every case. The Tribunal’s consideration of whether an assessment is necessary should not be determined by the fact a statement may not be required or likely to result: **O v Hampshire CC HS/5350/2014</p> <p>An assessment may be necessary where there is insufficient awareness of the SEP a child requires, or where a child needs a statement to access relevant provision. It follows that the result of applying the “necessary” test may be affected by financial arrangements in different LA areas (i.e. because in some areas those arrangements will ensure that the child will get the SEP without a statement, whereas in others that is not necessarily so): **C v Somerset CC HS/718/2015</p> <p>In Wales, WCOP2004WCOP2013 #3:18 addresses the issue of pupil participation: Schools and professionals need to “provide clear and accurate information about the child’s special educational needs and the purpose of any assessment.. [and] explain clearly what additional support or assessment arrangements are being made and how the pupil can contribute to them.” Additionally, LEAs should also seek to ascertain the views of children and young people as part of the assessment” (#7.85),(WCOP2013 #7.85). As to language see WCOP2013 #1:10 “<u>When assessing a child’s SEN it would not be appropriate to assess the Child in a language other than the preferred language of either English or Welsh and steps should be taken to ensure that all those involved in this process are made aware of the Child’s language needs.</u>”</p>
CFA2014	CFA2014 s36:

“(1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child’s parent, the young person or a person acting on behalf of a school or post-16 institution...

(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan...

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.”

So the statutory focus is now (consistently with the earlier case law) more directly on the question of whether an EHCP is required as the means to secure the SEP which the child or young person requires.

The structure of s36 is not clear. It appears to provide for a 2-stage process where a request is made:

- The first stage is for LA to determine whether it may be necessary for SEP to be made in accordance with an EHC Plan (s36(3)) in consultation with the child’s parent or young person (s36(4)). At this stage the statutory provisions do not provide for a duty to assess. Where it is determined it is not necessary the child’s parent or young person is notified (s36(5)).
- The second stage arises where the LA has determined it may be necessary for SEP to be made in accordance with an EHC Plan (s36(6)). It requires the LA to notify the parent or young person that it has a right to express views and submit evidence (s36(7)). If after considering this, there is a duty to assess where the LA considers the child or young person may have SEN and it may be necessary for SEP to be made in accordance with an EHC Plan (s36(8)).

Note that **COP2015** (following the tradition established by **COP1996**) identifies additional considerations and factors which bear little resemblance to the statutory test – see thus **COP2015 #9.14** (with its focus on progress made and related matters).

Per **Cambridgeshire CC v FL-J [2016] UKUT 225 (AAC)**, the two questions to be asked are (1) has the child/young person a learning difficulty or disability, and (2) is it one that ‘calls for’ SEP? The question of whether SEP is “necessary” is at a

	<p>later stage. The initial question on assessment is a “provisional and predictive” one.</p> <p>The Tribunal will err if it asks itself “<u>was</u> special educational provision necessary” rather than “whether it <u>may</u> be necessary for special provision” to be made: RB v Calderdale MBC (SEN) [2018] UKUT 390 (AAC).</p>
<p>The need to make and maintain a Statement</p> <p>EA1996</p>	<p>EA1996 s324(1): “If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.”</p> <p>As to “necessary” under s324, the reasoning in Buckinghamshire CC v HW [2013] UKUT 470 (AAC), [2013] ELR 519 applies.</p> <p>Manchester CC v JW [2014] UKUT 168 (AAC), [2014] ELR 304: the questions to ask are (1) whether the provision identified as necessary for the child in the assessment was available within the resources normally available to a mainstream school and (2) could the school reasonably be expected to make such provision from its own resources; the answers to those questions will usually require the Tribunal to consider financial resources.</p> <p>A third question is whether SEP is secure, as if not a statement may be necessary: LS v Oxfordshire CC [2013] UKUT 135 (AAC), [2013] ELR 429.</p> <p>Alternatively, to simplify matters and avoid detailed evidence about local school financing arrangements, the Tribunal can just ask itself “whether, without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered”: SC & MS v Worcestershire CC [2016] UKUT 267 (AAC), [2016] ELR 537.</p> <p>MC v Somerset CC [2015] UKUT 461 (AAC), [2016] ELR 53: it might be necessary to make a Statement because “there was insufficient awareness of the special educational provision which a child requires. It might be if the child needed to have a statement of SEN to access the relevant specific provision.”</p> <p>If there appears to be good progress at the current placement, that must be placed in context when deciding whether to issue a statement or not. For example in JS v Worcestershire CC [2012] UKUT 451 (AAC), [2013] ELR 138 it was relevant there was a high level support at the current placement which may not be available at the school he would attend when he left his current placement.</p>

CFA2014

CFA2014 s37(1):

“(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.”

Note that the CFA2014 statutory focus is now explicitly on what had – through case law – become the EA1996 focus, namely on the simple and practical question of whether an EHCP (previously a Statement) is required in order that the child/young person gets the SEP they require (rather than on any particular level of functioning or progress by the child/young person which had in some sometimes - but wrongly - become the focus before).

Note that **COP2015** introduces an additional focus on progress made **COP2015 #9.55**

What is “necessary” is not defined by **CFA2014** and allows for flexibility, which is not overridden by the **COP2015**. Whether it is “necessary” is to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment”: **Hertfordshire CC v MC and KC [2016] UKUT 0385 (AAC)**.

Obtaining qualifications is not an essential element of education. Per **Buckinghamshire CC v SJ [2016] UKUT 254 (AAC), [2016] ELR 350**, the FTT was entitled to direct the LA to issue an EHC plan following assessment in circumstances where SJ (who was 20 years old) functioned at a pre-school level and it was accepted “further achievements would be small”, as those achievements would be valuable in SJ’s adult life.

The LA and Tribunal should generally consider whether, without an EHC Plan, “can the child’s special educational needs be met through provision from the resources normally available to a mainstream school and will they actually be met?”: **JP v Sefton MBC [2017] UKUT 0364 (AAC), DH & GH v Staffordshire CC [2018] UKUT 49 (AAC)**.

“There is a clear, albeit rough and ready resource line to be crossed before an EHC plan is considered to be necessary. It is based on the kinds of provision a school could make from its own notional SEN budget”; the local offer is relevant as to what the school may provide, but a party may “show that it does not represent what is expected to be available, or that a particular school will not be able to make the provision expected under the local offer”: **CB v Birmingham CC [2018] UKUT 13 (AAC)**. However, the UT did not refer to or appear to apply the decisions above as to the “can” and “will” questions – it proceeded on the assumption that if schools can, then they will; indeed that if all schools in the area can, all will. It is also hard to reconcile the suggestion that a parent could set out to show that a particular school could not

deliver what the LA set out in the local offer, with the suggestion that the LA need not show that the provision would be available at all schools in the area. If no particular school is in the frame at the time, then the questions must indeed relate to all schools in the area since the parent is entitled to express a preference for them all, so all must be assessed by reference to the EHC plan trigger.

The Court of Appeal approved **HW, JW, and MC and KC** (referred to above) as to the approach to considering what is “necessary” **Nottinghamshire CC v SF and GD [2020] EWCA Civ 226**. The Court of Appeal considered that what is “necessary” is a “an evaluative judgment [for the FTT] using its specialist expertise” which “will depend on the nature and extent of the provision required for the child concerned”. It also recorded that the provision made for the child has to be compared with that available nationally in mainstream (c.f. EA1996 which compared the educational provision provided generally for others in the mainstream schools in the area, which appeared to be the position in **CB** above). In other words: would a child or young person need an EHCP to secure their SEP given the general pattern of provision in mainstream schools across the country (i.e. regardless of the position within that local authority’s area or within the actual placement they are to attend). The question of whether an EHCP is necessary may include whether there is a shortfall in provision currently, or if there is not, whether there may be in the future upon a change to a different school or resources.

A Tribunal can find a plan for a young person is “necessary” in the absence of a clear educational programme, particular where the young person has suffered educational anxiety: **Gloucestershire CC v EH (SEN) [2017] UKUT 85 (AAC)**.

In respect of young people specifically, the definition of SEP is to “identify those young persons for whom standard educational provision will not suffice”. In determining what provision is made generally by mainstream post-16 institutions, the FTT need not look at every mainstream post-16 institution but should exercise professional educational judgment to fix the typical nature of provision made for that particular age group. Once that is done, then the FTT can determine whether the provision required for a particular young person is additional to or different from that made generally in England (although a particular LA area is likely to be representative) and therefore is SEP: **RBKC v GG [2017] UKUT 141 (AAC)**.

Where a child is about to transfer to secondary school, that is a matter to be considered in whether an EHC Plan is necessary: **Wilkin v Goldthorpe [1998] ELR 345, DH & GH v Staffordshire CC [2018] UKUT 49 (AAC)**.

THE LOCAL OFFER (CFA2014 ONLY)

<p>General</p>	<p>The LA must publish information on the education, health and care provision it expects to be available in its area for children and young people with SEN: CFA2014 s30; COP2015 Chapter 4. It should be noted the inclusion of a service within the local offer does not mean it will necessarily be available to any particular child or young person.</p> <p>When preparing and reviewing the local offer, the LA must consult children, young people, schools and others: Regs2014 r55. However, the consultation is on a “compendium of information” and will only be successfully challenged where something went “radically wrong”: L&P v Warwickshire [2015] EWHC 203 (Admin), [2015] ELR 271 [54-57].</p>
<p>STATEMENTS OF SPECIAL EDUCATIONAL NEEDS AND EHC PLANS – GENERAL</p>	
<p>Statements EA1996</p>	<p>Statements have to be intelligible to people who have to read them and not just to their authors. The parties have to be able to reach a good understanding of what the words mean. It is no good if they are ambiguous: T v Hertfordshire [2003] EWCA Civ 1893.</p>
<p>EHCP CFA2014</p>	<p>EHCPs should be “clear, concise, understandable and accessible to parents, children, young people, providers and practitioners. They should be written so they can be understood by professionals in any local authority”: COP2015 #9.61</p>
<p>In what order to consider the parts?</p>	<p>Part 4 specifies the placement at which the SEP in Part 3 which is required to meet the SEN in Part 2 will be made. The decision-maker (LA or Tribunal) must thus develop Part 2, then Part 3A then 3B then 4. See A v Barnet [2003] EWHC 3368; “It is important... to identify or diagnose the need before going on to prescribe the educational provision to which that need gives rise, and only once the educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it.”</p> <p>The Learning Trust v MP [2007] EWHC 1634 (Admin), [2007] ELR 658 [42]: The Tribunal had erred in law in deciding on Part 4 and left it to the parents to “agree some amendments with the LEA to reflect our decision that [P] should be placed in a residential school.” That was “putting the cart before the horse” in that Part 4 should only be decided after Part 2, then 3 had been resolved. See also T v Neath Port Talbot [2007] EWHC 3039.</p>

EHCP	<p>As for the content of the EHCP overall, see CFA2014 s37, Regs2014 r12, and COP2015 #9.62-9.76.</p> <p>The LA must first specify all of the child’s needs in section B (COP2015 #9.69(B)), then specify provision in section F “for each and every need specified in section B” (COP2015 #9.69(F)). Placement is considered last, and a draft plan must not include a name or type of placement: CFA2014 s 38(5).</p>
<p>PART 2 / SECTION B – SPECIAL EDUCATIONAL NEED</p>	
Statement Part 2	<p>EA1996 s312: A child has SEN “if he [or she] has a learning difficulty which calls for special educational provision to be made for him [or her]”. He has a learning difficulty if “(a) he [or she] has a significantly greater difficulty in learning than the majority of children of his age, (b) he [or she] has a disability which either prevents or hinders him [or her] from making use of educational facilities of a kind generally provided for children of his [or her] age in schools within the area of the local authority, or (c) he [or she] is under compulsory school age and is, or would be if special educational provision were not made for him [or her], likely to fall within paragraph (a) or (b) when of that age.”</p> <p>Part 2 can include narrative description of a child as well as specifying SEN (cf R v Secretary of State for Education ex p E [1992] 1 FLR 377): W v Leeds CC [2005] EWCA Civ 988, [2005] ELR 617.</p>
EHCP Section B	<p>CFA2014 s20: a child has SEN when he or she “has a learning difficulty or disability which calls for special educational provision to be made for him or her”. He or she has such 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.”</p> <p>Note that this is a material change from the EA1996 test because the comparison is now between the provision this child/young person requires and what is generally provided to others in mainstream schools generally, rather than any comparison with what the particular local authority ensures is provided in its mainstream schools.</p> <p>Note also that the comparison with what is provided generally to others of the same age – i.e. with general mainstream provision and <u>not</u> with what mainstream institutions might provide to some pupils/young people.</p> <p>Not every disability (as defined by section 6 of the Equality Act 2010) amounts to a learning difficulty. A disability which</p>

	<p>falls within section 20(2)(b) must prevent or hinder the child or young person from making use of facilities, which are likely to be physical features rather than the way in which the school provides education for the pupil: Hertfordshire v MC & KC [2016] UKUT 385 (AAC).CFA2014 s21(5): SEN will include those needs for what would otherwise be health or social care provision that are treated as SEP because they educate or train the child or young person. It follows that the mere fact that the provision in question might be considered health or social care, or might in practice be provided by a social services department or the NHS, does not mean that it is not to be treated as SEN. The most obvious effect of this is that SALT is almost always SEN.</p> <p>When describing cognitive impairments, the learning difficulty can be categorised as severe, moderate, or mild; there is no category of ‘significant learning difficulty’: **LB Hillingdon v G HS/2241/2016</p> <p>Needs “may be accurately assessed without knowing their precise cause”: SG v Denbighshire CC [2018] UKUT 369 (AAC) (note this was a UT permission decision but it has been published by the UT itself nonetheless).</p> <p>See also COP2015 Introduction xiii-xxiii</p>
<p>Relationship between Statement Part 2 and Part 3</p>	<p>Each special educational need specified in Part 2 must be met by provision specified in Part 3: R v Secretary of State for Education ex parte E [1992] 1 FLR 377.</p>
<p>Relationship between EHCP Part B and Part F</p>	<p>“Provision must be specified for each and every need specified in Section B”: COP2015 #9.69(F)</p>
<p>PART 3 / SECTION F – SPECIAL EDUCATIONAL PROVISION</p>	
<p>Relationship between Part 3A (objectives) and Part 3B (provision)</p>	<p>Where something is identified as an “objective” in Part 3A, Part 3B needs to specify the SEP intended to meet that objective: C v East Sussex CC [2004] EWHC 3122 (Admin), [2005] ELR 367.</p>

<p>EHCPs: relationship between Section E (outcomes) and Section F (provision)</p>	<p>“It should be clear how the provision will support achievement of the outcomes”: COP2015 #9.69(F)</p> <p>If the Tribunal allows an appeal and recasts SEP in the EHC Plan, then it may make consequential amendments to the outcomes to fit with the SEP – notwithstanding there is no specific appeal right in respect of Section E: S v Worcestershire CC (SEN) [2017] UKUT 0092 (AAC).</p>
<p>EA1996 Relationship between SEP (Part 3) and non-educational provision (Part 6)</p>	<p>Note that, for the EA1996, the distinction was between “special educational provision” and what became known as “non-educational provision”. Neither was the subject of any statutory definition and the boundary was understood through the application of case law.</p> <p>“It is not the function of the special educational needs provision to provide for a child’s social needs (at least not those which are not also educational needs)”: The Learning Trust v MP [2007] EWHC 1634 (Admin), [2007] ELR 658 [43]</p> <p>The Tribunal can seek and consider evidence on a child’s non-educational needs as part of taking a “holistic” view, but must remember that it is an <i>educational</i> tribunal: W v Leeds City Council [2005] EWCA Civ 988, [2005] ELR 617.</p> <p>The question of whether any particular provision is educational or non-educational (or a mixture of both) is not a question of law; rather, it is a matter for the LA and, on appeal, the Special Educational Needs Tribunal. A Tribunal can lawfully give educational need a broad meaning, for example a child’s education can require day-long and year-round attention to many physical needs: LB Bromley v SENT [1999] ELR 260.</p> <p>A v Hertfordshire CC [2006] EWHC 3428, [2007] ELR 95: It is well established that there is no hard boundary between “educational” and “non-educational” – some things could be both – the LA, then Tribunal, decides. And, just because particular provision brings some educational benefit, it does not follow that there is a special <i>educational</i> need for it. Much less does it follow that a provision bringing some educational benefit beyond school hours automatically translates into a special educational need (and thus special educational provision) beyond school hours.</p> <p>Learned behaviour, such as sexualised behaviour, may not itself be a learning difficulty, but that does not mean that the provision required in relation to it (including a residential placement) is not SEP if it is directly related to a learning difficulty: H v A London Borough [2015] UKUT 316, [2015] ELR 503 [25-26].</p> <p>Psychiatric input is capable of being an educational need, but is a question of fact for the specialist tribunal (but not, like here, “vague well-being sessions”). Education 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”: DC & DC v Hertfordshire CC [2016] UKUT 379</p>

	(AAC).
EHCP	<p>CFA2014 provides for a three way split (with no need for the old concept of “non-educational provision”) namely (special) educational provision (SEP), Social Care Provision (SCP) and Health Care Provision (HCP). CFA2014 s21:</p> <ul style="list-style-type: none"> • SEP (for a child or young person aged 2 or over) 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”. SEP (for a child under 2) is “education provision of any kind”. • SCP means “provision made by a local authority in the exercise of its social services functions”. • HCP means “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”. <p>The previously wide approach to what is SEP thus applies.</p> <p>However, CFA2014 s21(5) is needed and operates to ensure that aspects of what were previously regarded as SEP which would otherwise also now fall within the definition of SCP or HCP remain treated as SEP (rather than SCP or HCP): “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).”</p> <p>There is no rule that SEP is provision which is “exclusively educational” and “there is no requirement of exclusivity in section 21(5): East Sussex CC v JC [2018] UKUT 81 (AAC). See also: LB Bromley v SENT [1999] ELR 260 and A v Hertfordshire CC [2006] EWHC 3428, [2007] ELR 95 in relation to “educational” generally.</p> <p>The task of the tribunal is different between ‘direct’, and ‘deemed’ SEP (i.e. provision falling in CFA2014 s21(5)). For direct provision it may add, amend or remove, it; but for deemed provision the tribunal’s only role is to classify the social care provision to filter out that part of the provision that is properly classified as SEP under 21(5): East Sussex CC v TW [2016] UKUT 528 (AAC).</p> <p>The fact that a placement cost includes both SEP and HCP elements does not mean that the FTT has jurisdiction over the HCP, and the LA is not obliged to (indeed cannot) secure/fund other HCP, even if that HCP is “essential for [the child] to be educated”. That part of the funding should come from the CCG: East Sussex CC v KS (SEN) [2017] UKUT 273 (AAC).</p> <p>To be SEP, the provision must “educate” or “train”. In East Sussex CC v KS, the UT approved of City of Bradford v A</p>

	<p>[1997] ELR 417 and OD v Gloucestershire CC [2013] UKUT 113 in finding that even if medical and nursing support is essential for the child or YP to be educated, that does not of itself make it SEP. The UT considered a powered wheelchair in East Sussex CCC v JC [2018] UKUT 81 (AAC): “If (and it might be a big if) the use of the powered wheelchair educates or trains, there is no rule excluding its provision from being educational or training provision, but the tribunal needs to make adequate findings about how a young person’s use of a wheelchair actually educates or trains him”. The UT set aside the FTT decision so the FTT could properly consider that question.</p> <p><u>In HN v South Tyneside Council (SEN) [2019] UKUT 380 (AAC), in considering whether parent/teacher meetings were educational the FTT was required to ask “what is it in the fact to face contact or telephone contact in contemplation that <i>provides</i> something of educational worth to the child?”. It considered that “meetings between parent and teacher <i>might</i>, on the correct set of facts, amount to SEP, if the child’s difficulties, arising from their disabilities or learning difficulties, in attending and integrating into the school or class on school days were such that they needed very close and regular liaison between the child’s parents and class teacher - for example, in the form of daily discussions about strategies the parents could put in place at home or on the journey to school - in order to enable the child to access their education” however such were “likely to be rare if not very rare”. That may turn out to be an overcautious assessment given that other sorts of meetings (such as Annual Review meetings) are often specified within section F SEP.</u></p> <p><u>In relation to the Tribunal’s powers on this issue, see below under heading ‘Relationship of CFA2014 and other statutory schemes’.</u> Any decision by a local authority after 3 April 2018 will fall under the Special Educational Needs and Disability (First tier Tribunal Recommendations Power) Regulations 2017, which give the Tribunal the power to make recommendations on health and social care need and provision. This is an extension of the pilot that has run since 2015 involving 17 local authorities.</p>
<p>Speech and Language Therapy</p>	<p>Speech therapy should be treated as educational (i.e. Part 3) unless there are “<i>exceptional</i> reasons for not doing so”: COP1996 #8.49; X&X v Caerphilly BC [2004] EWHC 2140, [2005] ELR 78. <u>For Wales see WCOP2013 #8.49.</u></p>
<p>EHCP</p>	<p>“Speech and language therapy and other therapy provision can be regarded as either education or health care provision, or both. It could therefore be included in an EHC plan as either educational or health provision. However, since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing so”: COP2015 #9.74.</p>

<p>“Waking day curriculum”</p>	<p>A waking day curriculum (which in practice is likely to lead to a requirement for a residential school placement) may be justified if the pupil needs to “translate into his home and social and indeed all areas of his life and functioning, the skill which he learns within the school and school room”: S v Solihull MBC [2007] EWHC 1139.</p> <p>Simply because a child needs consistency of approach is not necessarily an educational need which should be met beyond the school day in a residential setting: LB Hammersmith and Fulham v JH [2012] UKUT 328 (AAC) [18-19]. The question to be asked is whether the “need for a consistent program was such that [the child’s] education could not reasonably be provided unless accommodated on the site where [the child] was educated”: Hampshire v JP [2009] UKUT 239 (AAC); [2010] ELR 413. When finding an educational need for a residential placement, the FTT needed clearly to explain its finding that out of school hours SEP was required: Essex CC v DH (SEN) [2016] UKUT 463 (AAC).</p>
<p>EHCP</p>	<p>The FTT has acknowledged the imprecision of the term “waking day curriculum”, while noting that it generally means that “the person’s special educational needs are such that they call for special educational provision to be delivered beyond ‘normal hours’”. It may be linked with residential placement, but not necessarily so: East Sussex CC v TW [2016] UKUT 528 (AAC).</p> <p>It is not sufficient to say that SCP to help a child or young person “to generalise skills learnt at college in out of college time” becomes SEP by virtue of section 21(5) CFA 2014. The question is whether the SCP falls on the “education and training” side of the line or the “support” side of the line, which is a question of fact and degree for the FTT to determine in light of its own expertise: GL v West Sussex CC [2017] UKUT 414 (AAC). A reminder, as our comment, that there is no separate and freestanding “waking day curriculum” question, let alone one that is asked before considering the elements of the SEP (as was apparently to happen here). Rather, the first question is “what SEP is required, including any SCP which is to be treated as SEP by operation of s21(5)?”, then “is any of that out of school hours?”, then, “if yes, does that necessitate a residential placement?”. Those steps cannot be re-ordered or short circuited.</p>
<p>Requirement for specification of provision in Part 3</p>	<p>Following from the definition of SEP in EA1996 s312 and the Schedule to the SEN regulations (which prescribe the format for a Statement) Part 3 must describe all aspects of the provision which differ from the provision normally made in <i>mainstream</i> schools <u>in the area</u>. Thus for example:</p> <ul style="list-style-type: none"> • Placement in a different year group: AB v North Somerset [2010] UKUT 8. • Different class sizes: H v Leicestershire [2000] ELR 471.

	<ul style="list-style-type: none"> • Staff qualifications/experience: e.g. “teacher who is experienced in working with pupils who have significant learning difficulties and autism/communication disorders”: R v Wandsworth ex parte M [1998] ELR 424. • Where small group work is involved, the size of the group, the length and frequency of the sessions: L v Clarke and Somerset [1998] ELR 129. • The need for and amount of 1:1 work: L v Clarke and Somerset [1998] ELR 129. • Input from other professionals, such as sessions of speech therapy: R v Harrow ex parte M [1997] FCR 761 <p>It followed from the fact that the reference point was the provision normally made in mainstream schools <u>in the area</u> that what was SEP in one area might not be SEP in another. So if, for example, every child in mainstream schools in the area was routinely provided with a laptop, then provision of a laptop would not be SEP, whereas otherwise it would be.</p>
<p>EHCP Section F</p>	<p>Regs2014 r12(f) requires section F to set out “the special education provision required by the child or young person”, for which see CFA2014 s21(1) (extracted above). The same general principles will apply as under the EA1996.</p> <p>But the reference point is no longer what is provided in mainstream schools <u>in the area</u>, but now what is provided in mainstream institutions in England as a whole. It follows that what is SEP in one area will also now be SEP in every other; and also that, depending on how existing provision in an area compares to the national picture, things which were SEP in that area may no longer be SEP and vice versa. It follows that, in the migration from a Statement to an EHCP the SEP which is specified may not be the same (up or down) even if nothing else has changed.</p>
<p>SEP in Part 3 must normally be quantified in terms of hours, staffing, etc</p>	<p>COP1996 #8.37: Provision should be quantified in terms of hours (etc) except, exceptionally, by reference to the “changing needs of the child”.</p> <p>Think who, what, where and when?</p> <p>A child’s needs may be “changing” in that way because the child itself is changing or because of the interaction between the child and its environment; but not because of external factors or changes; it is not permissible to leave provision unspecified or unquantified simply to allow for flexibility in the school’s approach/arrangements: IPSEA v Secretary of State [2003] EWCA Civ 7 [2003] ELR 393.</p> <p>“The real question ... is whether [the statement] is so specific and so clear as to leave no room for doubt as to what has</p>

been decided and what is needed in the individual case”: **L v Clarke and Somerset [1998] ELR 129**.

Words like “as appropriate”, “as required”, “regular”, “periodic”, “subject to review” are all likely to illustrate illegality.

Example (of a child in a special school):

“LS needs direct involvement with speech and language therapy in the classroom, initially a visit once a week for a term, thereafter reducing to at least once a fortnight. This should involve joint planning and delivery with the class teacher.

The speech and language therapist also needs to manage a structured programme, which will include training, to support ‘out of school’ professionals in providing a consistent approach and assisting LS in developing and generalising his skills in different settings. Similarly LS’s parents and carers need support so they may embed more firmly the full range of communication methods used in school so he can apply them in other contexts, including home and respite provision. The speech and language therapist will visit the home at least three times a year.”

Held, **S v SENDIST [2007] EWHC 1139**, “much more detail” was needed.

See also **M v Brighton and Hove City Council [2003] EWHC 1722**, condemning as impermissibly ambiguous (especially the last sentence): “Opportunities for individual and/or small group support within class and a withdrawal basis as considered appropriate to target literacy difficulties and specific areas of the curriculum. J needs to be in a class setting with others who have similar severity of specific learning difficulty and work across the curriculum. He needs to be taught by specialist teachers trained in teaching pupils with severe specific learning difficulties.”

And per **S v SENDIST [2007] EWHC 1139** saying (for example) that the therapist should give “initially a visit once a week for a term thereafter reducing to once a fortnight” was too vague [e.g. How long is each session? What should each session consist of?]. Likewise, that the SALT “also needs to manage a structured programme, which will include training, to support out of school professionals in providing a consistent approach and assisting LS in developing and generalising his skills in different settings” [what sort of professionals?]. Similarly “LS’s parents and carers need support so they may embed more firmly the full range of communication methods” [what type and intensity of support?]. Nor should the Tribunal have relied on the LA’s assurance that it would flesh out the detail later [unless that led to amendment to the statement, how would the parents appeal?].

Further see **JD v South Tyneside [2016] UKUT 9 (AAC), [2016] ELR 118** which criticised: (1) the use of the term “it is recommended that the needs and objectives as previously outlined should be met by the following”, as it suggested nothing at all is *required*, (2) “individual programmes tailored to her needs. She will require a handwriting programme, a PE programme and a reading programme. These programmes can be provided on an individual basis or in a group situation as deemed appropriate by her school (SENCO)” added nothing as the content of programmes is not specified,

(3) “access to multi-sensory teaching may be helpful” was beside the point as Part 3 is to specify *required* provision, (4) “opportunities to encounter success in her work in order to increase her confidence and self-esteem” achieves nothing as the LA would not design opportunities for the child to encounter failure.

The requirement to specify is “not a bureaucratic purpose.... by that provision, local authorities ... and tribunals... are required to give full and adequate specific consideration to the needs of the child... the requirement for specificity outlaws ... a general statement in such broad terms that it could lead to specific needs being ignored or inadequately focussed upon.... the second purpose is that, once made in terms which are specific the purpose of the provision can be furthered and effected by enforceability....”: **E v Flintshire [2002] EWHC 388, [2002] ELR 378.**

The legislative purpose is “to require focussed and express consideration to be given to the specific needs of a child and then to provide for them in terms which will further and effect its enforceability as a provision...”: **IPSEA Ltd v Secretary of State for Education [2002] EWHC 504.**

An LA policy not to specify/quantify is unlawful.

Statements can refer to funding “bands” (see further below) but not as an alternative to specifying/quantifying provision nor so as to override or limit the specified/quantified provision.

Note also that the fact that the LA has a policy of delegating “all” SEN funds to schools independently of the statementing regime is *not* an answer to an appeal against a refusal to assess or make a statement; the test for those things remains grounded in whether (per the Code) the child requires provision beyond School Action Plus and whether (per EA 1996 s324) the child’s SEN is such that the provision needs to be “determined” by the LA. Funding follows that; not the other way round. The Tribunal is *not* bound by the LA policy.

In **K&K v The Authority [2013] UKUT 624 (AAC), [2014] ELR 295**, the UT had to decide whether “taught in small groups of less than 10 pupils” required small classes, or merely being within a small supported group doing differentiated work in a whole class setting. Recalling that the function of a statement is to “specify” the SEP: **EA1996 s324(3)(b)**, the UT said that the FTT should have resolved and made clear what was required and meant; and sent the case back to the FTT to decide.

A Tribunal should not “rubber stamp” an inadequately vague statement: **EC v North East Lincolnshire [2015] UKUT 648 (AAC), [2016] ELR 109**. The FTT is “empowered to take a much closer look at the content of the LEA's statement [than the judicial review court]. Indeed for many purposes it stands in the LEA's shoes, re-evaluating the available information in order if necessary to recast the statement”: **Bromley v SENT [1999] ELR 260** per Sedley LJ at 294.

“The specificity and flexibility of Part 3 is pre-eminently an area within the expertise of the FTT” – it is entitled to take a more flexible approach if it considers it to be appropriate and may delete provisions that are too prescriptive: **FC v**

	<p>Suffolk CC [2010] UKUT 368 (AAC), [2011] ELR 45. The Tribunal will be pragmatic, particularly in cases where a child is to start at a new school – the statement will be “realistic and practical” where adjustments will be made to provision and knowledge develops. The reference to an assessment that might take place was not an unlawful delegation of the FTT’s duty to specify SEP: CL v Hampshire CC [2011] UKUT 468 (AAC), [2012] ELR 110.</p>
<p>EHCP</p>	<p>“Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise, including where this support is secured through a Personal Budget”: COP2015 #9.69(F)</p> <p>The previous case law has been applied under the CFA2014. Where a child is at a special school or college, rather than a mainstream school, that may be a factor to be taken into account in allowing greater flexibility: East Sussex CC v TW [2016] UKUT 528 (AAC). However “even for a child in specialist provision, the requirement of specificity cannot be abandoned where detail could reasonably be provided”: B-M and B-M v Oxfordshire CC (SEN) [2018] UKUT 35 (AAC).</p> <p>B-M and B-M the following was found unlawful: (1) “support from a learning support assistant” said nothing about how much or their training or experience; (2) “programme to develop his social communication skills” failed to say anything about the nature/content of the programme; (3) “opportunities for” is “vague, meaningless and unenforceable”; (4) “the equivalent of 25 hours of support to be used flexibly across the school day to include individual, small group and whole class teaching to meet the outcomes described” is vague and lacks the required specificity; what is meant by “equivalent”? who is to provide the support?</p> <p>In SB v Herefordshire CC [2018] UKUT 141 (AAC) the UT (surprisingly) found that where neither party had advanced any argument on what size of teaching group was required, and where (per the UT) achievement of the aims of the EHC plan did not compel the FTT to specify group size, it was not an error of law for the FTT to order that a child would be taught in “small groups” without specifying the size of those small groups. The flexibility was justified as, although the EHC Plan did not specify an upper limit on size, it was clear that the groups must be small enough to allow effective delivery of other provision in the plan. As our comment, there was no mention of other key cases such as K&K v The Authority, L v Clarke and Somerset, E v Flintshire and IPSEA v SSE above. It is hard to see how the requirement of “small groups” could be enforced.</p>
<p>Can the Statement leave matters in Part</p>	<p>The Statement must actually set out what has been decided by the LA and, on appeal, the Tribunal. Recall: EA 1996 s324 refers to the LA “determining” provision. The Tribunal does the same. It cannot leave matters over for future</p>

<p>3 to be dealt with by a future assessment?</p>	<p>assessment, such as:</p> <ul style="list-style-type: none"> the extent of disapplication from the National Curriculum: C v SENT and Greenwich [1999] ELR 5. the nature or amount of other provision (say speech therapy) which is to be provided: Re A [2000] ELR 639. <p>Example: E v Rotherham MBC [2001] EWHC 432, [2002] ELR 266 condemning a statement which provided SALT detail but then said that it was to be “formally reviewed every 6 months by a speech and language therapist” and that “any change in the level [of] support will require a formal discussion between the LEA, the NHS Trust and one or both of [C]’s parents, but the above level of support is to remain at no less than the present level until June this year.”</p> <p>Although note that the Court of Appeal accepted as lawful a statement which made provision for future assessment of therapy needs where the statement was seen as necessary to get the child back into school and his therapy needs could not be assessed until he was back in school: E v Newham [2003] EWCA Civ 07; although presumably the results of the later assessment should then have been encapsulated in a fresh statement.</p> <p>Also see Hampshire CC v JP [2009] UKUT 239 (AAC), [2010] ELR 413: the Tribunal did not err simply because there was a risk that a place at a placement would not be available for 9 months. This is because there was a chance a place would open sooner, and to look for other placements may lead to disagreement and stress for the child.</p>
<p>EHCP</p>	<p>CFA2014 s36(3) continues the statutory language that the LA must “determine” whether SEP may be necessary reinforcing that the LA must determine rather than leaving matters for future assessment.</p>
<p>Can the Statement require parents to provide education?</p>	<p>A Statement cannot lawfully specify (in Part 3 or 4) provision which is to be made by parents: A v Cambridgeshire [2002] EWHC 2391, [2003] ELR 464.</p> <p>The Tribunal should look at what a statement requires of parents and ask whether it is “educational” or “special educational provision”: KW v Rochdale [2003] EWHC 1770. See thus for example, Fottman v Hertfordshire [2003] EWHC 1725 [2003] ELR 1725 CC [2004] EWCA Civ 927, [2003] EWCA Civ 1893, in which the Tribunal lawfully found that there was no need for educational provision out of school hours (there was merely a need for “consistency of approach”).</p>
<p>EHCP</p>	<p>CFA2014 s42(2): Where an EHC Plan is maintained, the “local authority must secure the specified special educational</p>

	<p>provision for the child or young person” (i.e. LA and not parents).</p> <p>However, where the LA has satisfied itself that the parents have made suitable alternative arrangements for SEP to be made then no duty falls on the LA to secure the SEP: CFA2014 s42(5), COP2015 #9.131-9.136.</p>
<p>Can the Statement require other bodies to arrange/fund the required provision?</p>	<p>The Statement must make provision in its Part 3 for <i>all</i> the SEP in question and cannot leave it to bodies other than the LA (such as the social services department or the NHS) to make such provision (whether identified in Part 5 or not): T v Hertfordshire CC [2004] EWCA Civ 927; FJ v Cambridgeshire CC [2002] EWHC 2391; N v North Tyneside BC [2010] EWCA Civ 135, [2010] ELR 312.</p> <p>A requirement for “an Occupational Therapy programme [to be] devised and implemented by Children’s Integrated Therapies, South Tyneside NHS Foundation Trust” was found unlawful by the UT as the obligation to arrange SEP is on the LA not the NHS: JD v South Tyneside [2016] UKUT 9 (AAC), [2016] ELR 118.</p>
<p>EHCP</p>	<p>CFA2014 s42(3): It is the duty of the LA to secure SEP and if (non-educational) health care provision is specified in the EHC Plan, the healthcare organisation who is responsible for arranging provision of that kind is under a duty to arrange the specified provision.</p>
<p>Can Part 3 make it the school’s responsibility to fund provision?</p>	<p>Part 3 can make reference to the arrangements for funding the provision (e.g. the balance between school and LA or health and LA): R v Cumbria CC ex parte P [1995] ELR 337.</p> <p>But, whatever the effect of such arrangements on the relationship between the LA and the school, they have no legal effect in terms of the child’s entitlement and the LA remains ultimately responsible for making the provision if the school fails to do so: R v Oxfordshire ex parte C [1996] ELR 153; R v Hillingdon ex parte Queensmead School [1997] ELR 331.</p> <p>COP1996 #8.6. “LEAs have a duty under section 324 of the Education Act 1996 to arrange the special educational provision in a child’s statement. LEAs may provide the facility in their funding agreements to intervene when a pupil is not receiving the provision in their statement and make the arrangements themselves, charging the costs to the school’s budget.”</p> <p>WCOP2013 #8.6: “...schools and LEAs have specific duties in relation to children with special educational needs which <u>funding for SEN should support. Community, foundation and voluntary school governing bodies are required under</u></p>

	<p><u>section 317 of the Education Act 1996 to use their best endeavours to see that pupils with special educational needs receive the help their learning difficulties call for...LEAs have a duty under section 324 of the Education Act 1996 to arrange the special educational provision in a child’s statement. LEAs may provide the facility in their funding arrangements to intervene where a pupil is not receiving the provision in their statement and make the arrangements themselves, charging the costs to the school’s budget.”</u></p>
EHCP	<p>CFA2014 s42 and COP2015 #9.131-132 “When an EHC plan is maintained for a child or young person the local authority must secure the special educational provision specified in the plan. If a local authority names an independent school or independent college in the plan as special educational provision it must also meet the costs of the fees, including any boarding and lodging where relevant.”</p>
<p>PART 4 / SECTION I – PLACEMENT – GENERAL</p>	
Relationship between Part 3 and Part 4	<p>“.... part 4 cannot influence part 3. It is not a matter of fitting part 3 to part 4, but of considering the fitness of part 4 to meet the provision in part 3”: R v Kingston upon Thames and Hunter [1997] ELR 223 p233C. Recall, after all, that a consultation draft statement contains the LA’s proposals for Parts 2 and 3 but must be silent on type and name of placement: EA1996 Schedule 27 para 2.</p>
EHCP	<p>It remains the case that provision (Section F) is a prior consideration to placement (Section I). Where the draft EHC Plan is sent to the child’s parent or young person, it must not name the school or institution, or specify a type of school or institution: CFA2014 s38(5).</p> <p>However, factors other than the specification in Section F may be relevant to placement, such as whether a particular course may be too demanding: S v Worcestershire CC (SEN) [2017] UKUT 0092 (AAC).</p> <p>In an appeal made only in respect of Section I, the Tribunal will look at placement more rigorously than the LA, and this may highlight a need to alter SEP in Section F: S v Worcestershire CC (SEN) [2017] UKUT 0092 (AAC).</p>
Evidence to support a	<p>The decision to name a particular school must be based on proper evidence. Before naming a particular school, the</p>

<p>placement</p>	<p>Tribunal should normally have <i>at the very least</i> the prospectus, or oral evidence or a written statement from a member of the school’s staff. Neither the fact of registration of an independent school nor the fact that other LAs place children there is evidence of its suitability for children in general let alone for the particular child in question: “a Tribunal may draw reassurance or comfort from those facts, but no more...”: LB Southwark v Animashaun [2005] EWHC 1123, [2006] ELR 208.</p> <p>The decision as to whether a particular child should be placed at a particular school must be based on the particular child and their particular needs. The fact that there are other children with greater SEN whose needs are being met by the school is irrelevant: MMB v Hillingdon [2004] EWHC 513.</p>
<p>EHCP</p>	<p>-</p>
<p>Must the school have the provision in place already?</p>	<p>The fact that a particular school does not have all the required facilities at the time of the Tribunal does not preclude it from being named provided that the Tribunal is properly satisfied by the assurances that it will do so by the time the child attends: Lawrence v LB Southwark [2005] EWHC 1210; and, of course, the provision specified in Part 3 can, in any event, be enforced by the child through judicial review proceedings: R v Harrow ex parte M [1997] FCR 761, VA v Cumbria [2003] EWHC 232, R (S) v LB Camden [2018] EWHC 3354 (Admin).</p> <p>In N v North Tyneside Borough Council [2010] EWCA Civ 135, [2010] ELR 312 N sought to compel delivery of that SALT in her Statement by judicial review. The Administrative Court refused to compel delivery. The Court of Appeal held that to be wrong. The obligation under the Education Act 1996 s324(5) on an LA to arrange the SEP specified in a statement of SEN was absolute. It was not merely a “best endeavours” obligation which was satisfied where the LA had arranged most of the elements of Part 3 of the statement and considered that the child did not require the others (despite the Tribunal having decided to the contrary). A provision in a statement which purported to allow an LA to change provision without amending the statement was unlawful.</p> <p>See also Hampshire CC v JP [2009] UKUT 239 (AAC), [2010] ELR 413 above showing that a place need not even be available at the time of the hearing.</p>
<p>EHCP</p>	<p>-</p>

<p>Specifying a type/name</p>	<p>Part 4 <i>must</i> set out the “type of school” which is considered appropriate (e.g. mainstream, special, residential, MLD, EBD, etc.). But, unless para 3(3) of Schedule 27 compels it, there is no absolute <i>legal</i> obligation to name a particular school: Richardson v Solihull [1998] ELR 319.</p> <p>Where, however, the LA/Tribunal has identified “mainstream” as the “type”, then it should normally name a particular school: MH v Hounslow [2004] EWCA 770 [2004] ELR 424 (see further below).</p> <p>Type includes “primary” or “secondary” which must be specified: R(M) v East Sussex [2009] EWHC 1651, rejecting an LA’s argument that it did not need to amend a statement to anticipate secondary transfer where the statement did not specify primary and where the school named made provision 5-16 such that (on its case) no amendment was needed, and thus no right of appeal would be triggered. The LA could not be permitted to rely on its own failure to properly specify the type of school in Part 4.</p> <p>Where two parents disagree on a choice of maintained school, the LA or Tribunal may not resort to naming only a type of school: SG v Denbighshire CC [2016] UKUT 460 (AAC).</p> <p>In Wales, “[t]he LEA is not required to specify the name of a school in part 4 of the child’s statement where they are satisfied that the child’s parents have made suitable arrangements but they must, in those circumstances, state the type of provision”: WCOP2004 #8:97</p>
<p>EHCP</p>	<p>Regs2014 r12(i): The EHCP 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 1)”.</p>
<p>Relevance of breakdown of relationship between parents and school</p>	<p>The Tribunal is entitled to take account of the breakdown in considering suitability of a placement and “give some weight to it” L v Wandsworth [2006] EWHC 694 (QB), [2006] ELR 376.</p>
<p>EHCP</p>	<p>-</p>

<p>Relevance of religion</p>	<p>The impact of religion can be relevant to the delivery of provision, for example how a child can access provision at a non-religious school where they have previously attended a religious school: A v SENDIST & LB Barnet [2003] EWHC 3368.</p> <p>In Wales, "[t]he LEA should consider very carefully a preference stated by parents for a denominational maintained mainstream school and representations made by parents for a denominational non-maintained special school or independent school. Denominational considerations cannot override the requirements of EA1996 s316": WCOP2004 WCOP2013 #8:65.</p>
<p>EHCP</p>	<p>-</p>
<p>Relevance of stress on a pupil</p>	<p>B v Vale of Glamorgan [2001] ELR 529: A 16 year old suffering from mental ill-health refused to attend the school specified in Part 4 of her statement of SEN. Her parents' appeal was allowed because there had been a failure to address how, notwithstanding her refusal, it concluded that the school could provide for her needs.</p> <p>MW v Halton BC [2010] UKUT 34 (AAC): If a tribunal were merely to find that a pupil, whilst attending or being expected to attend a school, experienced symptoms (from whatever cause) consistent with stress sufficient to be of evident concern to his medical advisers, it would need to be able to form a conclusion that the school proposed was nonetheless "appropriate". This implies a need to consider the impact, if any, of attendance at that school on the child and how, if at all, the condition could be managed in such an environment and (since the circumstances are unlikely to be entirely fixed, or necessarily clear-cut) monitored.</p>
<p>EHCP</p>	<p>-</p>
<p>Relevance of multi-agency assessment to a residential placement</p>	<p>COP1996 #8.74 provides that a residential placement will be appropriate where a multi-agency agreement identifies a listed specified circumstance but does <i>not</i> make the existence of one of those circumstances a pre-condition to such a placement: The Learning Trust v MP [2007] EWHC 1634 (Admin), [2007] ELR 658 [53].</p>

EHCP	There is no directly equivalent provision in COP2015.
Consultation with the school	<p>A school should be careful before refusing to admit a child or young person on the basis it was not consulted by the LA. Where a school is named in a statement, the refusal to admit due to a failure to consult can be challenged by judicial review and costs ordered against the school (even if the SofS has agreed with the school in a determination that the authority has unreasonably named the school): N v Governing Body of a School [2014] EWHC 1238 (Admin).</p> <p>A school can challenge the issuing of a plan where it is unsuitable. This occurred in R (An Academy Trust) v Medway Council [2019] EWHC 156 (Admin) where the Court found, when it was transferred the child's EHC Plan from RB Greenwich, Medway Council had irrationally removed provision from Section F in order to name a particular school.</p> <p>The school is also able to ask the Secretary of State to intervene pursuant to EA1996 s496 on the basis an LA has acted unreasonably.</p>
EHCP	<p>Maintained schools, academies, etc have a duty to admit where named in the EHCP: CFA2014 s43.</p> <p>Most academies have a clause in their funding agreement providing that the academy can seek the Secretary of State's determination as to whether the LA should have named the academy. However, that determination is still subject to an appeal to the FTT.</p>
PLACEMENT REQUEST GENERALLY	
EA1996	See EA1996 Schedule 27 para 3, EA1996 s316
CFA2014	See CFA2014 s33 and s39, COP2015 #9.78-9.94
Where parents ask for a particular <i>maintained</i> [school] placement	

<p>Parental request for a maintained school (mainstream or special)</p>	<p>If (per EA1996 Schedule 27 para 3(3)) the parent has requested that a particular <i>maintained</i> school should be named, then Part 4 <i>must</i> name that school as long as it is:</p> <ul style="list-style-type: none"> • suitable to meet his or her needs; and • his/her attendance would be compatible with the provision of efficient education for the children with whom he/she would be educated and the efficient use of resources. <p>As considered further below, that did not apply where a parent expressed a preference for an academy or free school, since they are independent schools and not maintained schools.</p> <p>Para 3(3) allows “a parent” to express a preference and therefore does not explicitly provide for where two parents disagree upon the choice of maintained school. When that happens, the Tribunal should determine which of the schools preferred would provide a better education. The Tribunal may not simply name a type of school, nor may it name two schools: SG v Denbighshire CC [2016] UKUT 460 (AAC).</p>
<p>EHCP</p>	<p>When a draft EHCP is prepared, the child’s parents or young person may request the LA name a particular school or institution of the type listed: COP2015 #9.78.</p> <p>Those listed are set out at CFA2014 s38(3) and are wider than simply maintained schools:</p> <p>“(a) a maintained school;</p> <p>(b) a maintained nursery school;</p> <p>(c) an Academy;</p> <p>(d) an institution within the further education sector in England;</p> <p>(e) a non-maintained special school;</p> <p>(f) an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval).”</p> <p>That extension beyond “maintained schools” has the effect of putting academies/free schools on an equal footing with maintained schools for the first time.</p> <p>The addition of “institution approved by ...” under CFA2014 s41 allows for individual independent schools to choose to</p>

	<p>be placed on that same footing, which creates a level playing field in terms of parent’s/young person’s preference in relation to such schools and maintained schools/academies/free schools while, of course, also bringing a level playing field for the purposes of admitting children (i.e. an independent school or specialist college which opts to be within that framework is considered equally alongside maintained schools by parents and young people, but must also, if then named by the LA, admit as would a maintained school).</p> <p>When a parent or young person has requested such a placement, the LA is then required to consult the school or institution (CFA2014 s39(2)), and must secure that the EHCP names the school or institution (CFA2014 s39(3)) unless (CFA2014 s39(4)):</p> <p>“(a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or</p> <p>(b) the attendance of the child or young person at the requested school or other institution would be incompatible with—</p> <p>(i) the provision of efficient education for others, or</p> <p>(ii) the efficient use of resources.”</p> <p>See also COP2015 #9.79</p> <p>Where parents disagree on the named school, SG v Denbighshire CC [2016] UKUT 460 (AAC) is likely to apply (see above for commentary). Like the 1996 Act, the right to request a school in section 38(2)(b) of the 2014 Act is given to “the parent” and does not therefore cater for any disagreement between parents.</p>
<p>Efficient use of resources</p>	<p>The mere fact that the parentally-preferred provision is a bit more expensive is <i>not</i> an automatic barrier under EA1996 Schedule 27 para 3(3) as above to placement in respect of efficient use of resources. The LA/Tribunal must balance the statutory weight given to the parental preference against the extra cost in deciding whether the extra cost is “inefficient”, and even if it is found to be “inefficient” the Tribunal must still then, as a second stage, balance the extra cost against any extra benefit it is claimed to bring for the child: L v Essex, Gibbs J [2006] EWHC 1105 (Admin), [2006] ELR 452 (upholding a decision in which the Tribunal had held that £4,000 extra was <i>not</i> inefficient, and thus did not even need to go on to consider whether that extra cost was justified by extra benefits to the child). It is only if the extra cost is “significant” that the parentally preferred placement is displaced Surrey CC v P [1997] ELR 516. See also C v Lancashire [1997] ELR 377.</p>

	<p>The “efficient resources” are those of the LA responsible (not LAs generally): B v Harrow (No 1) [2000] ELR 109 such that: the LA can take into account the cost of an out-of-area placement if that is requested; and the LA can take into account – in a special school funded on a place-led basis – the “wasted” cost of not placing the child at the school.</p> <p>But note that expenditure by a maintained school is by law LA expenditure such that increased (or reduced) school expenditure (i.e. depending on the child attending) is still taken into account in the resource balance even if the amount delegated to the school would not change the amount delegated to the school by the LA: X City Council v SENDIST, AB, MB & GB [2007] EWHC 2278, [2008] ELR 1.</p>
<p>EHCP</p>	<p>Given that the House of Lords’ reasoning in B v Harrow (No 1) [2000] ELR 109 was premised on particular funding arrangements in place at the time for mainstream schools and for special schools (something which has now changed) and the (flawed even then) notion that all children with Statements were educated in special schools, it is unclear whether consideration of “efficient use of resources” for CFA2014 s39(4)(b)(ii) would focus only (as the House of Lords held to be the case in EA1996) on the resources of the particular LA.</p> <p><u>In PD and AD v Stockton-on-Tees BC (SEN) [2019] UKUT 57 (AAC) the UT stated “section 39(4) requires the LA or the Tribunal standing in its shoes to look at the resources of the LA itself whereas section 9 requires the Tribunal to take a ‘holistic’ look and take a wide view of public expenditure rather than just the resources of the LA”. However this is unlikely to be the final word on this point, as it is (arguably) not binding (because it was not essential to the UT’s reasoning), the UT having stated that in the context of that appeal it was not necessary to provide a “detailed exposition of the well-known case law”.</u></p>
<p>Parents willing to pay transport costs</p>	<p>Where parents and LA both prefer maintained special schools, and the parental school incurs additional transport costs, the stages to consider are (1) the parental school should be named alone (pursuant to EA1996 Sch 27 para 3(3)) if the additional cost is not incompatible with the provision of efficient resources or such inefficiency is outweighed by educational benefit, (2) if there is no duty to name the parental school, the Tribunal should determine whether the extra transport costs are unreasonable public expenditure (EA1996 s9) – if not the parental choice of school should be named alone, (3) if the costs are unreasonable, is it still incompatible if the parents pay for transport – if not, then both schools can be named subject to parents paying travel costs to their preferred school: Dudley MBC v S [2012] EWCA Civ 346, [2012] ELR 206.</p>

EHP	-
<p>Incompatible with the efficient education of others</p>	<p>A preference under EA1996 schedule 27 para 3(2) was only displaced by a positive finding of “incompatibility with the efficient education of other children” and not merely by evidence of an impact on those other children: Hampshire v R & SENDIST [2009] EWHC 626, (2009) ELR 371.</p> <p>When considering the question (in EA1996 schedule 27 para 3(3)) whether “the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated” the Tribunal was entitled to consider the impact on all or any children at the school. When explaining its decision, however, it needed to give a clear identification of just what difference D’s admission (not the admission of all four children with appeals pending) would have, and on the efficient education of which children. Where a school is nominally full, admitting children over this number might be incompatible with the efficient education of others: NA v LB Barnet [2010] UKUT 180 (AAC), [2010] ELR 617.</p> <p>The test for incompatibility is not met by a test of “adverse effect” or “impact on” or “prejudicial to”: **M v LB Harrow HS/4850/2013.</p>
EHCP	-
<p>EA 1996 s9 in play even where parent requests a maintained school</p>	<p>Even where the EA1996 schedule 27 para 3(3) duty to name the maintained school requested by parents has been displaced by (e.g.) “inefficient use of resources”, the EA1996 s9 obligation (as below) is still in play; i.e. s9 does not <u>only</u> apply where an independent school is requested: O v Lewisham [2007] EWHC 2130, [2007] ELR 633; but note that the decision maker must consider para 3(3) and section 9 separately – they do not collapse into a single test: Ealing v SENDIST & K [2008] EWHC 193 (Admin), [2008] ELR 183.</p>
EHCP	<p>EA1996 s9 is not affected by the shift from Statements to EHCPs (but only applies to parental requests – i.e. not young people’s - and only to “pupils” (defined in EA1996 s3), namely persons for whom education is being provided at a school, other than—(a) a person who has attained the age of 19 for whom further education is being provided, or (b) a person for whom part-time education suitable to the requirements of persons of any age over compulsory school age is being</p>

	provided).
Does EA1996 s9 apply to a request for change of name only?	EA1996 s9 does apply to a request for a change of name pursuant to EA1996 schedule 27 paragraph 8: Mulla v Hackney Learning Trust [2014] EWCA Civ 397, [2014] ELR 350 . This assists an applicant who seeks mainstream provision outside the authority's area, as the calculation of "efficient use of public resources" is of the public purse generally rather than limited to the maintaining authority's resources.
EHCP	There is no equivalent in CFA2014 to EA1996 schedule 27 para 8 , however the latter remains in force.
Where parents ask for a particular independent placement/provision	
Parental preference for an independent placement EA1996 s9	<p>Regard is to be had to the principle that education is in accordance with parental wishes unless that involves unreasonable public expenditure. There is no obligation (as such) to give effect to parental preference under section 9: C v Buckinghamshire (1999) ELR 179.</p> <p>Section 9 does not impose a duty to act in accordance with parental preference, but to have regard to it: WH v Warrington BC [2014] EWCA Civ 398, [2014] ELR 212.</p> <p>Even if the Tribunal finds incompatibility under section 9, that is not the end of the process. It does not mean that the Tribunal is entitled to ignore the reasons lying behind the parent's choice of school. Those are matters still to be taken into account by the Tribunal in the exercise of its discretion under EA1996 s324(4) and weighed in the balance among the other factors which the Tribunal considers to be relevant: Hampshire v R & SENDIST [2009] EWHC 626, [2009] ELR 371.</p> <p>Section 9 should be approached in three stages: IM v LB Croydon [2010] UKUT 205 (AAC): (1) Are both schools appropriate, (2) If they are, which is parent's preferred school? (3) Would naming the parent's preferred school be incompatible with the provision of efficient instruction and training or the avoidance of unreasonable public expenditure. If so, the school suggested by the LA must be named. [Note, however, the more nuanced explanation and analysis in Hampshire v R & SENDIST [2009] EWHC 626, [2009] ELR 371]</p> <p>A Tribunal cannot dodge these questions, and must answer them. For example, a failure to decide whether the parent's</p>

	<p>preferred school is suitable constitutes an error of law: EC v North East Lincolnshire [2015] UKUT 0648 (AAC), [2016] ELR 109 [21].</p> <p>Where a grandmother and local authority both had parental responsibility and disagreed over placement, neither preference inherently carried more weight and the issue was to be decided on the facts having regard to both preferences: **K v LB Haringey HS/3004/2014.</p> <p>Section 9 only applies to pupils as defined in EA 1996 s3, as set out above.</p>
EHCP	<p>Because EA1996 s9 is untouched by the change from EA1996 to CFA2014, if the LA/Tribunal finds incompatibility, the reasons lying behind the parent’s expression of preference for a school can still be taken into account per CFA2014 s39(5). (Note above on the applicability of EA1996 s9 post 16.)</p>
Whose efficient instruction and training?	<p>Reference to “the provision of efficient instruction and training” in EA1996 s9 is to the impact on the education of the other children with whom the child will be educated and not just the child concerned in the appeal: Hampshire v R & SENDIST [2009] EWHC 626, [2009] ELR 371.</p>
EHCP	-
Whose public expenditure?	<p>The term “public expenditure” within EA1996 s9 is concerned with the impact of the parent’s choice on the public purse generally and thus requires the Tribunal to take into account the cost of social services respite provision which would be saved by placing the child in a residential rather than day school: WH v Warrington BC [2014] EWCA Civ 398, [2014] ELR 212; O v Lewisham [2007] ELR 633. See also EH v KCC [2010] UKUT 376 (AAC) and KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC).</p> <p>It also involves taking into account the (positive) financial impact on another LA where the child being placed in a school maintained by another LA would lead to an inter-authority payment by the ‘home’ LA; it is not to be ‘read down’ so as to refer only to the resources of the home LA: CM v Bexley [2011] UKUT 215 (AAC), [2011] ELR 413.</p> <p>If money is delegated to a school by the LA, that remains expenditure of the LA and should be taken into account for the purposes of section 9: Coventry City Council v SENDIST [2007] EWHC 2278, [2008] ELR 1.</p>

EHCP	-
<p>How to calculate public expenditure for section 9?</p>	<p>It is only the marginal (i.e. additional) cost of the placements under consideration which is relevant; thus, if the taxi is already provided, or a learning support assistant could look after a second child at no extra cost, then there is no additional public expenditure: Oxfordshire v GB [2001] EWCA 1358, [2002] ELR 8.</p> <p>But note that a specific evaluation is needed, particularly if the cost balance is critical to the choice between two placements which have been found to be appropriate. Accordingly, where transport was needed, it could not be assumed that the marginal cost of transporting the child was nil where a taxi was already covering that route: evidence was needed as to how the price was affected, if at all, by the number of children carried. The Tribunal should have identified the issues it was considering and then expressly dealt with them: (1) what would be the cost of transport without an escort? (2) what would be the cost of the escort? (3) would an additional vehicle be required and, if so, at what cost? W v LB Hillingdon [2005] EWHC 1580, [2005] ELR 599.</p> <p>When considering relevant "public expenditure" for the purposes of EA1996 s9 the LA's budgetary arrangements for an individual school would usually be a sensible starting point. If those arrangements made provision for the payment of an age weighted pupil unit (AWPU) to the school then there was no reason why the First-tier Tribunal should not accept that the AWPU, together with any additional costs specifically incurred in respect of the child in question, were a fair reflection of the cost to the public purse of educating the child at that school: EH v Kent [2011] EWCA Civ 709.</p> <p>Additional expenditure by a maintained school arising from placing a child there is (as a matter of law) additional expenditure by the LA even where the LA has in place a scheme of delegation which means that it would not provide any extra funds to the school if the child was placed there: X City Council v SENDIST, AB, MB & GB [2007] EWHC 2278, [2008] ELR 1</p> <p>Under the "new" funding framework, when the LA determines budget shares for maintained schools, it must include £10,000 per place reserved for children with SEN (School and Early Years Finance (England) Regulations 2013). It follows that, generally, where there is a vacancy the £10,000 place funding is not treated as an additional cost. However, that is only the starting point for the evaluation. If the place review mechanism is such that, in fact, the decision on placement will impact on whether or not the £10,000 is paid now or in the future (albeit manifested in the allocation of a "place") then that will become relevant for EA1996 s9 purposes: Hammersmith & Fulham LBC v L & F [2015] UKUT 523 (AAC), [2015] ELR 528. This position applies to the Early Years Finance (England) Regulations 2014 and 2015 as well (Hammersmith was decided under the 2013 Regs): P v Worcestershire CC [2016] UKUT 120 (AAC), [2016] ELR 194.</p>

	<p>The comparison exercise for unreasonable public expenditure is between the fees and advantages of the schools which are proposed – see EC v North East Lincolnshire [2015] UKUT 648 (AAC), [2016] ELR 109, where the parents’ argument was rejected that account should be taken of savings the authority made when the child had previously not been attending school, and the high fees of the school where the child previously attended.</p> <p>Where a parent refuses to allow their child to the LA proposed school, if properly evidenced the “saved cost” of prosecuting the mother in relation to non-attendance could be taken into account. However, the “wasted cost” of the LA placement could not be taken into account where the LA would not carry on paying the cost of the placement if the child did not go there: LB Richmond upon Thames v AC (SEN) [2017] UKUT 173 (AAC).</p>
EHCP	-
Over what time to calculate for EA1996 s9	When considering the cost balance, the LA/Tribunal should look at the effect over time of the choice of placement – thus the Tribunal erred in not taking into account the fact that, at the parentally preferred school, a year extra would be needed to complete GCSEs: Southampton v G [2002] EWHC 1516, [2002] ELR 698 .
EHCP	-
What benefits to take into account?	In deciding on the balance between extra costs and extra benefits <u>all</u> benefits (including thus health, social, etc., benefits) and not just educational benefits arising from the extra cost must be taken into account: SK v Hillingdon [2011] UKUT 71 (AAC), [2011] ELR 165
EHCP	-
What is unreasonable?	As to what is “unreasonable”, note Wardle-Heron v Newham [2002] EWHC 2806, [2004] ELR 68 in which the judge remitted back to the Tribunal for it to consider whether the extra cost was “unreasonable” a case in which the LA package would cost £5,641 and the parental package £12,286, thus recognising that the difference (nearly £7,000) was not necessarily “unreasonable”. Similarly £4,000 was not necessarily unreasonable given the benefits which arose in

	<p>Ealing v SENDIST & K [2008] EWHC 193, [2008] ELR 183.</p> <p>See also MM & DM v Harrow [2010] UKUT 395 (AAC) where the UT declined to decide whether £17,000 (an extra 60%) would inevitably be unreasonable public expenditure, and KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC) where even a £71,000 difference was still analysed on the facts and not dismissed as inevitably unreasonable.</p> <p>Other appeals have, however, suggested that under the EA1996 s9 ‘unreasonable public expenditure’ test even fairly modest additional sums required to place a child in the parentally preferred school may prevent the Tribunal from naming it <i>unless</i> there is a clear explanation as to the additional benefit to be derived from the parental placement <i>and</i> the Tribunal explains why it is not unreasonable for this to be funded by the LA. As always, the detailed reasoning is key when deciding appeals on the basis of respective costs.</p>
EHCP	-
<p>Academies and Free Schools (including special academies and special free schools)</p> <p>EA1996</p>	<p>Academies are independent schools not maintained schools. They operate under contract (the Funding Agreement) between the SofS and an “Academy Trust” now taking effect under the Academies Act 2010.</p> <p>EA1996 provisions relating to SEN apply to Academies only as if they were independent schools other than where they are specifically mentioned in the specific provision in play.</p> <p>EA1996 s316 (qualified duty to secure mainstream) expressly applies to Academies.</p> <p>EA1996 schedule 27 para 3(3) does not apply to Academies. As with independent schools EA1996 s9 still applies</p> <p>Early funding agreements were very variable often saying little about SEN</p> <p>Latterly, a “model” was used as the basis for the contract, but the model changed over time</p> <p>However, the content of most if not all such agreements is such that the Academy is bound by contract to give effect to a Statement which names the Academy in Part 4 following a Tribunal appeal and so, in practice, the Tribunal should be able to proceed (in terms of its jurisdiction to deal with the case) as if this was a maintained school. The parental request for the Academy is operative unless “admitting the child would be incompatible with the provision of efficient education for other children, and no reasonable steps could secure compatibility” (from April 2016 model funding agreement).</p> <p>Beware that some Academies (apparently sometimes acting in collaboration with LAs) seemingly do not apply this and, instead, apply some other criteria, e.g. a quota of children with statements, or admitting only children with particular</p>

	<p>types of SEN, or applying a distance threshold to children with statements, or some combination; none of which would be lawful if they have the provisions above (which the overwhelming majority do).</p> <p>If the Academy wanted to apply such arrangements then they would need to be consistent with the Funding Agreement and would almost certainly require an amendment to the Funding Agreement which previous Secretaries of State would have resisted.</p> <p>SC v The Learning Trust [2012] UKUT 214 (AAC), [2012] ELR 474</p> <p>Even for an academy with a pre-2010 funding agreement (i.e. which did not specifically refer to the SENDIST or make clear that the academy had to admit where named in a statement) the SENDIST has jurisdiction to hear an appeal and order an academy placement which the academy resists.</p> <p>An issue remains, however, as to the test to apply. UT made it clear that the Tribunal looks to the test in the FA (and thus must be through the prism of section 9 EA 1996). But the subsequent FTT hearings looked only at section 9.</p> <p>“Free Schools” are, for these purposes, academies in all but name.</p> <p>There is likely to be nothing stopping a parent (1) making a request to the LA to name an academy in Part 4 <u>and</u> (2) applying directly to the academy for a place for their child. The effect of that is that, if the academy refuses the place (and the LA acts on that and refuses to specify the academy in part 4) then (unlike with a mainstream school request where the parent would not have been able also to apply directly for a school place to the school) the parent can <u>both</u> (a) appeal to the FTT against the LA’s refusal to name <u>and</u> (b) bring a disability discrimination claim to the FTT in relation to the <i>academy’s</i> refusal: AB v DYRMS [2014] UKUT 403 (AAC)</p>
<p>EHCP</p>	<p>CFA2014 places statutory SEN duties on academies just as it does on maintained schools.</p> <p>For example, they can be the subject of a parental request for a placement with the same effect as for a maintained school (section 38(3)(c)) and have a duty to admit when named (CFA2014 s43(1) and (2)).</p> <p>This is now reflected in the latest Model Academy Agreement (which will apply to newly created academies but has no retrospective effect) at section 10.</p> <p>But existing academies based on older model agreements will include SEN provisions which pre-date the CFA2014. For those:</p> <ol style="list-style-type: none"> 1. The provisions in the particular funding agreement (which should be specifically checked, as they vary) govern

	<p>the position in relation to a Statement and EA1996.</p> <ol style="list-style-type: none"> 2. For a CFA2014 situation (i.e. dealing with an EHCP) the provisions of the CFA2014 prevail over any conflicting provisions in the funding agreement (and there may well be a conflict in that the funding agreement may appear to allow the academy to, for example, refuse a placement in the face of CFA2014 obligation) but, 3. Provisions in the funding agreement which are consistent with the CFA2014 but which constrain the academy's position can still be relied on.
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Where parents want a maintained *mainstream* placement (or mainstream academy placement for EHCP)

<p><u>EA1996</u></p>	<p>DFES Guidance 0774/2001:</p> <p>“22. The starting point is always that children who have statements will receive mainstream education. The new section 316 states that a child who has special educational needs and a statement <i>must</i> be educated in a mainstream school unless this would be incompatible with –</p> <ol style="list-style-type: none"> (a) the wishes of the child's parents; (b) or the provision of efficient education of other children. <p>These are the only reasons why mainstream education can be refused outright.”</p> <p>“24. Mainstream education cannot be refused on the grounds that the child's needs cannot be provided for within the mainstream sector. The general duty assumes that with the right strategies and support most children with special educational needs can be included successfully at a mainstream school. The local education authority should be able to provide a mainstream option for all but a small minority of pupils. Local education authorities should look across all of their schools and seek to provide appropriate mainstream provision where possible...”</p> <p>EA1996 s316(3): “If a statement is maintained under section 324 for the child, he must be educated in a mainstream school unless that is incompatible with-</p> <ol style="list-style-type: none"> (a) the wishes of his parent, or (b) the provision of efficient education for other children.” <p>EA1996 s316A(5): “A local authority may, in relation to their mainstream schools taken as a whole, rely on the exception</p>
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	<p>in section 316(3)(b) only if they show that there are no reasonable steps that they could take to prevent the incompatibility”.</p> <p>Where a parent requests a particular mainstream school but specifically rejected the idea of other mainstream schools, the FTT was is not required to consider mainstream as a general type having concluded that the placement at the particular mainstream school would be incompatible with the efficient education of other children; i.e. section 316 did not require the FTT to override the parental wish as if the section 316 duty was a freestanding obligation on the FTT; nor did it require the FTT (in exercise of its inquisitorial jurisdiction) to pursue the matter regardless of parental wishes: GK v Essex CC [2017] UKUT 355 (AAC).</p> <p>The UT has upheld an FTT decision which found the mainstream placement sought by the parents “not suitable” for the saying “We do not accept it would be reasonable to expect [school A] to create a school within a school to meet the needs of [the girls]. [The cost of doing so] would be of the order of £60,000 pa and we accept that such expenditure would be unreasonable and excessive in the circumstances” (although the UT did not deal specifically with the authorities relating to suitability): AKT v Westminster CC [2018] UKUT 47 (AAC). Note, however, as our comment, that the FTT decision had (apparently) been “short on black letter law”; before the UT the parent acted as a litigant in person; also, the UT’s decision itself makes no mention of any of the authorities relating to “suitability” and section 316/33 nor deal with any of the issues they explain; nor have we been able to source a copy of the “clear written submissions on the law” from the LA on which the FTT had apparently received and applied.”</p>
<p>EHCP</p>	<p>Where (1) the maintained school requested by the parents is not named because of suitability or incompatibility with the efficient education of others, or (2) no school is requested by the parents, then the LA:</p> <p>“must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—</p> <p>(a) the wishes of the child’s parent or the young person, or</p> <p>(b) the provision of efficient education for others”: CFA2014 s33(2).</p> <p>In respect of not naming a mainstream placement generally, the LA “may rely on the exception in subsection (2)(b) [the exception for provision of the efficient education of others] in relation to maintained nursery schools, mainstream schools or mainstream post-16 institutions in its area taken as a whole only if it shows that there are no reasonable steps that it could take to prevent the incompatibility”: CFA2014 s33(3).</p>

	<p>In respect of not naming a particular mainstream placement, the LA “may rely on the exception in subsection (2)(b) in relation to a particular maintained nursery school, mainstream school or mainstream post-16 institution only if it shows that there are no reasonable steps that it or the governing body, proprietor or principal could take to prevent the incompatibility” (CFA2014 s33(4)).</p> <p>See overall COP2015 #9.88-9.90.</p> <p>What constitutes a reasonable step will “depend on all the circumstances of the case”, and factors include whether taking the step would be effective in removing incompatibility, whether the step is practical, what steps have already been taken, financial implications, and disruption caused by the step: COP2015 #9.91-9.94.</p>
<p>But surely we have to ask whether the mainstream placement is suitable/appropriate?</p>	<p>No. “Suitability” is no longer an issue when considering whether to specify mainstream as a “type” in Part 4 if the parents wants it. In effect, the statute deems that, for all children, mainstream is suitable or can (and thus must) be made suitable, unless that results in incompatibility with the education of others. That requires the LEA/Tribunal to consider (and include in Part 3) the additional support the child requires to make the placement suitable. Additional support must be provided to ensure that a mainstream placement (albeit not necessarily a particular mainstream placement) is made available. The only issue is whether the placement (including thus the additional support put in place to support the child) would be incompatible with the education of other children (section 316(3)(b)) and that incompatibility cannot be removed by the taking of “reasonable steps” (section 316A(5)/(6)). See MH v Hounslow [2004] EWCA Civ 770, (2004) ELR 424; Bury MBC v SU [2010] UKUT 406 (AAC); CCC v London Borough of Tower Hamlets [2011] UKUT 393 (AAC).</p> <p>See Harrow v AM [2013] UKUT 0157 (AAC): “In my judgment, the apparent incompatibility between the provision of suitable education and the requirement to name a mainstream school without express regard to the suitability of the school for the child can only be reconciled on the basis that the local education authority is under an absolute obligation to make a school suitable, if there is no suitable school already, whether inside or outside its area, where the child can be found a place, subject only to the qualification in section 316(3)(b). It has to provide for the identified needs. It cannot say that it will educate the child in a mainstream school without providing for them. Nor can it rely on any independent resources issue in this respect. This combines the need to protect the interests of the child with Parliament’s intention, in amending 1996 Act in 2001, to promote inclusion” (para 27).</p>
<p>EHCP</p>	<p>CFA2014 s33 and s39 provide essentially the same two stage process whereby the LA is under a duty to accede to the parental preference for a particular maintained school/academy/etc (s39(3)) unless it is unsuitable or is incompatible</p>

	<p>with the efficient use of resources or education of others (s39(4)); but even though a particular mainstream school fails at that stage, the same school remains a candidate in naming an “appropriate” school or type of school (s39(5)) because of the LA’s duty to secure mainstream (s33) where the parent wants it unless that involves incompatibility with the efficient education of others which cannot be removed by the taking of reasonable steps.</p> <p>A school which is “unsuitable” (s39(4)) may nevertheless become “appropriate” (s39(5)) once reasonable steps have been taken to upgrade it.</p> <p>See ME v LB Southwark [2017] UKUT 73 (AAC) for an extensive outline of the law on this point under the CFA2014. Note also R (An Academy Trust) v Medway Council [2019] EWHC 156 (Admin) in which the UT explained that that a school which found currently “unsuitable” (to resist a parental preference under section 39) may nevertheless become “appropriate” with additional SEP input. The court accepted a submission from the Secretary of State: “There is no “suitability” exception in section 33(2). Nor is there an “efficient use of resources” provision as a free-standing exception. Indeed, if education of the child in a mainstream school is currently incompatible with the efficient education of other children there, the local authority will be under a duty to spend money to overcome that incompatibility <u>up to a reasonable level. This is, in short, the effect of the “reasonable steps” requirement in subsections (3), (4) and (5) of section 33, together with section 42.</u>” The underlined words need to be treated carefully and not be read in a way which collapses the obligation to take “reasonable steps” to remove incompatibility with the efficient education of other children with the obligation secure a mainstream placement by making it <u>suitable</u> for the child or young person concerned without regard to the cost of doing so: they are not the same. The UT did not refer the case law which makes clear that cost is not a reason to refuse a mainstream placement on suitability grounds.</p> <p>As with the EA1996, the obligation on the LA becomes one of taking whatever steps are necessary (without regard to cost or other resources) to make that placement suitable, and the obligation to place there remaining unless that involves incompatibility with the efficient education of others which cannot be removed by the taking of reasonable steps. Resources may be relevant in deciding on the reasonableness of those additional steps (i.e. those which are only to remove incompatibility with the efficient education of others) but they are not relevant in relation to deciding what was necessary to make the placement suitable for the particular child in the first place.</p>
<p>What if parents only want <i>part time</i></p>	<p>Provided that more than a <i>de minimis</i> part of the child’s education could be provided in a mainstream school then EA1996 s316 can be in play such that, if parents want a mainstream placement then there is a duty to provide it unless</p>

<p>mainstream school?</p>	<p>(per section 316) it would be incompatible with the efficient education of other children (etc.). Pursuant to EA1996 s319, where it is not appropriate to make all of that provision at school, the rest can then be made (as here) out of school: MS v Brent [2011] UKUT 50 (AAC), [2011] ELR 301.</p>
<p>EHCP</p>	<p>-</p>
<p>So how do we deal with a parental request for a particular <i>mainstream maintained</i> school?</p>	<p>Decision steps:</p> <ol style="list-style-type: none"> 1. If parents have expressed a preference under EA1996 schedule 27 para 3 (i.e. for a maintained mainstream school), consider it by reference to that paragraph first. 2. Unless one of the disqualifiers in para 3(3), applies, they have a <i>right</i> to that placement. 3. If one of the disqualifiers bites (see above on inefficient use of resources), then consider the <u>type</u> of placement under EA1996 s316. 4. Unless incompatible with the education of others <u>and</u> the steps to remove the incompatibility are unreasonable, then the Tribunal <i>must</i> specify mainstream as a <i>type</i> in Part 4. 5. Deciding whether the steps to remove incompatibility with the efficient education of other children are unreasonable can also involve considering their impact on the child in question (but that is not introducing a 'suitability' test by the back door). 6. If there is no incompatibility the Tribunal should try and identify a particular placement. 7. In doing so, all mainstream schools put forward by either parent or LA are candidates including the school put forward by the parent under para 3 (and rejected under para 3). 8. But the parent does not have a <i>right</i> to have any particular school named at this stage, only a right to have it considered as a <i>candidate</i>, albeit helped by EA1996 s9 (the general duty to educate in accordance with parental preference subject to unreasonable expenditure). Example: the child requires classes fitted with hearing aid loops; the parents want mainstream; s316 can secure them mainstream, but not a particular mainstream, such that the Tribunal could order placement at a mainstream school which has been equipped by the LA with loops. 9. But it may nonetheless be necessary (to comply with EA1996 s316) to prescribe additional provision to make

	“suitable” that which was considered “unsuitable” (EA1996 schedule 27 para 3).
EHCP	As above when it comes to the interaction between CFA2014 s33 and s39.
Does EA1996 s316 apply to a request for change of name only?	EA1996 s316 does <i>not</i> apply when considering a parental request under EA1996 schedule 27 para 8 to change the name of the placement in Part 4 (because changing name would not change the “type” i.e. from special to mainstream): Slough v SENDIST [2004] EWHC 1759, [2004] ELR 546 ; although that would not be the case where the statement was (unlawfully as it happens) silent as to “type” of placement and Part 3 was consistent with a mainstream placement, such that changing the name was all that was needed to achieve the outcome the parents wanted.
EHCP	Not relevant in CFA2014 as it contains no equivalent of EA1996 schedule 27 para 8.
Where parents ask for a home programme or other non-school placement	
What about home programmes or placements out of school? (EA1996 s319)	<p>By section EA1996 s319, an LA can make provision out of school if appropriate provision cannot be made in school. The first question to be asked is what does the child need (i.e. decide on Part 3) then decide if that can be provided in school: S v Bracknell Forest [1999] ELR 51.</p> <p>TM v Hounslow [2009] EWCA Civ 859, [2011] ELR 137: To answer the question whether or not it would be “inappropriate” for provision to be made in a school, it is not enough to ask whether the school “can” meet the needs set out in Part 3. One must ask if the school “would not be suitable” or “would not be proper”. That requires the LA to take account of the circumstances of the case which would include the child’s background and medical history, the particular educational needs of the child, facilities that can be provided by a school and otherwise than at a school, the comparative costs of alternative provisions, the child’s reaction to the provisions, the parents’ wishes and any other particular circumstances that might apply.</p> <p>Where a “home programme” is identified (e.g. Lovaas) that should be described in Part 3 and can also be described in Part 4: Wandsworth v K [2003] EWHC 1424 Admin, [2003] ELR 554.</p> <p>What is a school? A “unit” sited at a school but not part of it (and run as a partnership between several academies and</p>

	<p>the LA known as GROW) could nonetheless be a “school” for the purposes of section 319 EA 1996 (and thus be a second placement for children who were placed at PRU). Factors included the fact it had a management committee, a chain of command, a teacher who works at GROW and an EP employed by the LA: TB v Essex CC [2013] UKUT 534 (AAC), [2014] ELR 46. The question is a question of fact for the specialist FTT, and the decision should be reached considering at least the factors listed in paragraph 34 of TB (and paragraph 33 may be disregarded): MA v Kensington and Chelsea [2015] UKUT 186 (AAC), [2015] ELR 326.</p>
<p>EHCP</p>	<p>CFA2014 s61:</p> <p>“(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.</p> <p>(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.</p> <p>(3) Before doing so, the authority must consult the child’s parent or the young person.”</p> <p>So CFA2014 is similar to EA1996 s319 although with linguistic tweaks.</p> <p>The LA must now decide if it is “necessary” to educate a child or young person other than in a school or post-16 institution, but what is “necessary” is cast in terms of whether it is “inappropriate” for provision to be made in school or post 16 institution. Therefore case law on what “inappropriate” means is directly applicable, as are the cases on what constitutes a school.</p> <p>A child’s anxiety may lead for it to be “inappropriate” for provision to be made at school: M v Hertfordshire CC [2019] UKUT 37 (AAC).</p> <p>Any approved home tuition is not put into Section I: East Sussex CC v TW [2016] UKUT 528 (AAC). In such a case, the M & M v West Sussex CC (SEN) [2018] UKUT 347 (AAC), the UT decided that there remained a requirement to specify a type of school in section I remains, but, which can be met by specifying the type of school which is the ultimate aim to become appropriate for the child; or where part of the overall package is at a school, that type of school: M & M v West Sussex CC (SEN) [2018] UKUT 347 (AAC). However, in Derbyshire CC v EM and DM [2019] UKUT 240 (AAC) the UT found that M & M is wrong on this point and that the duties in s39(5) and s40(2) on the LA to name an “appropriate” school do <u>not arise where it has decided a child should have education otherwise than at school and therefore it would be</u></p>

	<u>inappropriate for the provision to be made at school.</u>
Out of area placements	
When is the placing LA responsible for the cost of accommodation?	<p>Section 517 EA 1996 EA1996 s517 states where a child is placed at a non-maintained school, the placing LA shall:</p> <p>“(1)...(b) if board and lodging are provided for the pupil at the school and subsection (5) applies, pay the whole of the fees payable in respect of the board and lodging.</p> <p>(5) This subsection applies where the authority are satisfied that education suitable</p> <p>(a) to the pupil’s age, ability and aptitude, and</p> <p>(b) to any special educational needs he may have,</p> <p>cannot be provided by them for him at any school unless board and lodging are also provided for him (either at school or elsewhere).”</p> <p>The LA is only required to pay for accommodation where it is provided “at the school” and not, for example, a children’s home nearby the school: JC v LB Bromley (SEN) [2016] UKUT 388 (AAC).</p>
Where parents or young person does not make a request	
EHCP	<p>CFA2014 s40:</p> <p>“(1) This section applies where no request is made to a local authority before the end of the period specified in a notice under section 38(2)(b) to secure that a particular school or other institution is named in an EHC plan.</p> <p>(2) The local authority must secure that the plan—</p> <p>(a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or</p> <p>(b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or</p>

	<p>young person.”</p> <p>Where no request is made, the LA/FTT is not limited in the CFA2014 s40 process of naming a placement in the list set out at CFA2014 s38(3), i.e. it can go beyond maintained schools, academies and section 41 institutions. Any other result would (unexpectedly) preclude placements at non section 41 independent schools for both children and young persons. That would be unexpected because at lease<u>least</u> for children there is no doubt that section 41 independent school placements can be ordered (and the answer is not in the operation of section 9 because that does not provide a power to name placements, rather it informs how the CFA2014 s40 power is to be exercised: see LB Hillingdon v SS (SEN) [2017] UKUT 250 (AAC) (Hillingdon was granted permission for an appeal to the Court of Appeal but did not in the end pursue the appeal).</p>
<p>CEASING TO MAINTAIN A STATEMENT/EHCP</p>	
<p>What happens when the child reaches compulsory school leaving age?</p>	<p>Where live issues between the parties remained and it was possible that if an appeal went ahead, the Tribunal might have made an order that special educational provision be provided by the LA, then the Tribunal had jurisdiction despite the child being over compulsory school age and not on the roll of a school: KC v Newham [2010] UKUT 96, [2010] ELR 429.</p> <p>See also Wolverhampton v Smith [2007] EWHC 1117, [2007] ELR 418 and Hill v Bedfordshire [2008] EWCA Civ 661, [2008] ELR 660.</p>
<p>EHCP</p>	<p>The EHCP will continue until the end of the academic year in which the young person turns 25: see CFA2014 s37(1), s46 and 83(2), where there definition of “young person” is “over compulsory school age but under 25”.</p> <p>The LA may cease to maintain a plan only where (1) it is no longer responsible for the child or young person or (2) it is no longer necessary for the plan to be maintained: CFA2014 s45(1).</p> <p>See also COP2015 #9.199-9.210.</p> <p>No additional considerations (other than the CFA2014 s45(3) obligation to have regard to whether the educational or training outcomes specified in the plan have been achieved) come into play simply because the young person is no</p>

	<p>longer of compulsory school age and may indeed be over 19. In particular, the continuing need for an EHCP is not premised on (for example) any particular expectation of progress let alone any requirement that the young person is expected to gain qualifications (see Buckinghamshire CC v SJ [2016] UKUT 254 (AAC), [2016] ELR 350 on issuing a plan, although its reasoning can be applied in the context of ceasing).</p> <p>The issue of ceasing to maintain was explained in B & M v Cheshire East Council [2018] UKUT 232 (AAC). In particular:</p> <ul style="list-style-type: none"> • Achievement of outcomes may indicate that a YP no longer requires SEP specified in a plan, however it does not follow from CFA2014 s45(3) that, where “outcomes” have been achieved it is no longer necessary to maintain the EHCP. Whether it is no longer necessary depends on a range of considerations “including for example the young person’s educational and training aspirations, the reasons why outcomes were achieved and whether the young person’s special educational needs profile has altered as s/he has matured.” • There is an “affinity” between the test for ceasing to maintain and the test for deciding whether an EHC plan should be prepared and maintained, and therefore in deciding whether to cease the LA should consider whether a YP would meet the test for preparing and maintaining an EHC Plan in the first place. <p>It therefore appears (as our comment) that a lawful cessation decision needs up to date information on what provision the YP requires (including in the context of considering whether revised “outcomes” are needed), whether it is (special) educational provision, and if so whether that SEP could and would be provided without the EHC Plan continuing.</p> <p>If an appeal is made against a decision to cease, the EHC Plan continues pending the determination of the appeal (CFA2014 s45(4)(b)).</p> <p>As regards young people over 18 who have left education but then want to return, see Regs2014 r30.</p> <p>Where a young person aged 18 or over leaves education or training before the end of their course, the LA should review to determine whether the young person wishes to return to education or training: Guidance19-25.</p>
<p>What happens when the ‘child’ reaches 19?</p> <p>EA1996</p>	<p>Statements of SEN cease automatically when the child reaches 19, albeit that LAs have the power to continue to make provision for the person beyond that point, including to finish the academic year: AW v Essex CC [2011] EWCA Civ 1315, [2012] ELR 1</p>

<p>EHCP</p>	<p>“In line with preparing young people for adulthood, a local authority must not cease an EHC plan simply because a young person is aged 19 or over. Young people with EHC plans may need longer in education or training in order to achieve their outcomes and make an effective transition into adulthood. However, this position does not mean that there is an automatic entitlement to continued support at age 19 or an expectation that those with an EHC plan should all remain in education until age 25. A local authority may cease a plan for a 19- to 25-year-old if it decides that it is no longer necessary for the EHC plan to be maintained. Such circumstances include where the young person no longer requires the special educational provision specified in their EHC plan. In deciding that the special educational provision is no longer required, the local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved (see the section on Outcomes, paragraphs 9.64 to 9.69)... Young people who no longer need to remain in formal education or training will not require special educational provision to be made for them through an EHC plan”: COP2015 #9.152-3</p> <p>When a young person is close to finishing their education and training, the LA should use the final annual review to agree the support needed to help them engage with services after they turn 19: Guidance 19-25.</p>
<p>Can a statement be ceased before a Learning Disability Assessment has been completed? EA1996</p>	<p>Although the contents of an LDA can and should provide information relevant to the question (in a challenge to a decision to cease to maintain a statement) of whether the statement continued to be needed, that was not the only source of such information, nor even a mandatory source. Accordingly it is not a prerequisite when making considering a cessation appeal for the Tribunal to have before it a complete and lawful LDA: LB v Kent [2011] UKUT 405 (AAC), [2012] ELR 31</p>
<p>EHCP</p>	<p>No equivalence or relevance for CFA2014 because LDAs no longer apply and the provision for young people beyond compulsory school age is dealt with through the ordinary EHCP regime under CFA2014.</p>
<p>TRANSPORT</p>	
<p>Children of</p>	<p>Unless someone else has made free travel arrangements, an LA must make such travel arrangements as it considers</p>

<p>compulsory school age EA1996 and CFA2014</p>	<p>necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating an “eligible child’s” attendance at the relevant educational establishment free of charge: EA1996 s508B(1).</p> <p>“Eligible child” means of compulsory school age and includes children living beyond the statutory walking distance and children with SEN, a disability or mobility problems registered at a school within that distance who by reason of SEN etc. cannot reasonably be expected to walk to school: EA1996 Schedule 35B para 2.</p> <p>“Relevant educational establishment” means (essentially) nearest suitable school: EA1996 s508B(10).</p> <p>“Travel arrangements” means transport or, with the consent of parents, an escort to accompany the child or payment of expenses: EA1996 s508B(2). It follows from the above that parents of children with SEN cannot be required to escort their child (although some LAs have tried to require this).</p> <p>It does not necessarily have to be door to door transport, but it can be lawful to use pick up points other than at the home of the eligible child: R (M and W) v LB Hounslow [2013] EWHC 579 (Admin). However, and in any event, the transport must be non-stressful: R v Hereford & Worcestershire ex p P (1992) 2 FCR 732.</p> <p>The LA in determining what it considers necessary can take account of cost and practicality, and there is no duty to provide transport from after school clubs, or before the end of the day where a child has medical appointments in the week: P v East Sussex CC [2014] EWHC 4634 (Admin), [2015] ELR 178.</p> <p>Travel arrangements made by a parent only displace the LA’s duty if the arrangements are made voluntarily: EA1996 s508B(5).</p> <p><u>Whilst in a different format, equivalent obligations in Wales are contained within s3 of the Learner Travel (Wales) Measure 2008. Note the general duty (not just for children of compulsory school age) under s10 of the Learner Travel (Wales) Measure 2008 that each Local Authority and the Welsh Ministers must promote access to education and training through the medium of the Welsh language when exercising functions under that measure.</u></p>
<p>Sixth form age</p>	<p>Sixth form age means a young person under 19, or a young person who began a particular course of education before 19 and continues to attend that course.</p> <p>The LA must provide a transport statement specifying arrangements for the provision of transport or otherwise that the LA consider necessary to make for facilitating persons of sixth form age receiving education or training at school at schools and other institutions: EA1996 s509AA.</p>

	<p>The statement must include the arrangements made for disabled persons and persons with learning difficulties and disabilities: EA1996 s509AB.</p> <p>The DfE’s statutory guidance (“Post-16 transport to education and training (October 2017)) sets out: (1) the LA should consider the impact of a learning difficulty or disability on the young person’s ability to walk the distance [18], (2) the LA should take account of its duty to encourage, enable and assist the participation of young people with learning difficulties and disabilities up to the age of 25 in education and training pursuant to Education and Skills Act 2008 s68 [22], (3) it is good practice to account for the fact a learner with a learning difficulty or disability may take longer to complete a particular programme and should consider extending travel arrangements for that period [23].</p> <p>The LA have a wide discretion as to what is “necessary” and some LAs implement an independent travel training scheme, which is lawful, and it is good practice to put this in the transport statement.</p> <p><u>School transport falls within the ambit of ECHR article 8 ECHR and article 2 protocol 1, such that any discrimination based on status (such as age) needs to be justified: R (Drexler v Leicestershire CC [2019] EWHC 1934 (Admin). As in that case, a difference in transport policy based on age may be justified by the difference in statutory obligations between those of compulsory school age and of sixth form age (but will of course depend on the facts).</u></p> <p>If the LA charge for transport, it must comply with the Equality Act 2010. Where there is a flat rate for travel, it will not be lawful to charge higher than the flat rate for those with SEN (for example paying a % of the cost).</p> <p><u>In Wales, s7 of the Learner Travel (Wales) Measure 2008 allows for Regulations to prescribe for such travel arrangements for those of sixth form age.</u></p>
18-25 year olds	<p>The LA “must make such arrangements for the provision and otherwise as they consider necessary” free of charge, for the purposes of (1) facilitating the attendance of adults at particular institutions (2) facilitating the attendance for those with an EHC Plan at their placements: EA1996 s508F.</p> <p>The duty is a weaker duty than that for eligible children of compulsory school age. In addition COP2015 #9.214-217 is unclear in this respect, in particular appearing to cite a “free-standing rule allowing transport needs to be included in an EHC plan if exceptional circumstances could be shown to exist, despite section 508F”: Staffordshire CC v JM [2016] UKUT 246 (AAC), [2016] ELR 307.</p>
Is transport	<p>For a child with a Statement, the transport would be “non-educational” – i.e. Part 6. And even then, COP1996 #8.89 it</p>

<p>“educational” and therefore within the Tribunal’s jurisdiction?</p> <p>EA1996</p>	<p>would only exceptionally be put into the Statement (where child has particular transport needs). But, of course, the LA remains under a EA1996 s509 duty to provide.</p>
<p>EHCP</p>	<p>Overall, see COP2015 #9.214-9.217.</p> <p>It remains the case that home to school transport is generally non-educational and cannot be categorised as SEP: Staffordshire CC v JM [2016] UKUT 246 (AAC), [2016] ELR 307 [24] and [27]. It should generally be in EHCP Section D and not F: Regs2014 r43, Staffordshire CC v JM [32-33].</p> <p>However, the FTT does retain jurisdiction over it if, on the facts of a particular case, it does constitute special educational provision: AA v LBH [2017] UKUT 0241 (AAC).</p> <p>The question is whether the provision “would educate or train so as to bring it within what is authorised by the 2014 Act”; “It is for the appellant to make the case that the transport fulfils some educational or training function or for the First Tier Tribunal to consider this pursuant to its inquisitorial or quasi-inquisitorial function”: Birmingham CC v KF [2018] UKUT 261 (AAC).</p> <p>COP2015 #9.215: “Transport should be recorded in the EHC plan only in exceptional cases where the child has particular transport needs”.</p>
<p>The relevance of transport to placement</p>	<p>Where transport costs impact on the cost balance (whether under EA1996 schedule 27 para 3(3) or under EA1996 s9) the Tribunal will have to properly evaluate the costs involved – see W v LB Hillingdon [2005] EWHC 1580, [2005] ELR 599. This includes deciding what would be needed by way of suitable transport.</p> <p>MM & DM v Harrow [2010] UKUT 395 (AAC): “Transport is not an educational need. However, it has to be taken into account. A placement cannot be appropriate if the authority cannot provide suitable transport to the school. ...On appeal, the First-tier Tribunal is not concerned with whether the authority’s proposed arrangements were within the range of reasonableness; it had to decide whether or not they were suitable. I also accept that stress, safety and comfort are not necessarily the only factors that might make a journey unsuitable.”</p>

	<p>A statement can, in Part 4, name a school on the basis of parental preference and subject to an expressed agreement by parents to transport the child to school without the statement identifying a particular fall-back to which the LA would send the child if the parents ceased to transport: M v Sutton [2007] EWCA Civ 1205, [2008] ELR 123.</p>
<p>EHCP</p>	<p>Transport remains relevant to placement cost, as under EA1996.</p>
<p>WHAT IF THE PARENTS WANT PROVISION IN EXCESS OF THAT WHICH THE TRIBUNAL CONSIDERS TO BE NECESSARY?</p>	
<p>What if the school requested for Part 4 provides more than the child needs (e.g. un-needed residential)</p>	<p>Even if the Tribunal considers that the school proposed by the LA is not suitable, it does not follow that it should automatically name the school requested by parents if that latter school costs a lot more because it makes provision (e.g. residential provision) which the child does not need. The Tribunal should specify a type or consider adjourning if there may be other, less costly, options Hereford & Worcester v Lane [1998] ELR 319, LB Hackney v Silaydin [1999] ELR 571.</p> <p>However, this does not mean in every hearing where the school named in Part 4 is inappropriate an LA should be given an opportunity to suggest alternatives that are less expensive than the parental school – where there is a risk the LA school will be found unsuitable the LA can suggest a fall-back: Rhondda Cynon Taff County Borough Council v SENDIST [2002] ELR 290.</p> <p>The onus is on an LA which is or should have be<u>been</u> aware that there was a risk that the FTT might find its proposed school unsuitable to bring forward alternatives if it wants to promote alternatives; and not therefore on the FTT to take the initiative: **LB Hillingdon v G HS/2241/2016.</p> <p>Extended day provision does not necessarily mean a residential placement provided that appropriate provision beyond the normal school day is available: TA v Bowen & Solihull [2009] EWHC 5, [2009] ELR 148. Such provision must obviously be taken into account in considering costs and it should also be specified to some extent in Part 3 rather than simply stating “an extended day” or similar. The decision should make clear the extent of extended day that is being approved as suitable provision for the child.</p>

EHCP	-
<p>Fall back positions</p>	<p>In Bromley v SENT [1999] ELR 260, Sedley LJ rejected an argument by an LA that the SENDIST should have given it opportunities to canvass alternative schools after it had rejected the LA’s proposal. He held: “While proceedings before SENTs are not expected to mimic litigation, a SENT is in the ordinary way entitled to expect each side to bring its full case forward, at least to the extent of putting down the necessary markers. No such marker was put down by the LA.”</p> <p>See also Stanley Burnton J in Hammersmith & Fulham v Pivcevic & SENDIST [2006] EWHC 1709 (Admin), [2006] ELR 594 para 62 “if a considerable amount of money turns on a decision of the Tribunal it is incumbent on the LA to prepare for and conduct its case with greater care.”</p> <p>The onus is on an LA which is or should be aware that there is a risk that the FTT might find its proposed school unsuitable to bring forward alternatives if it wants to promote alternatives; and not therefore on the FTT to take the initiative: **LB Hillingdon v G HS/2241/2016.</p> <p>A parent is entitled to express a first choice independent placement, and with a fall back mainstream provision. As in KC v LB Hammersmith and Fulham [2015] UKUT 177 (AAC), [2015] ELR 317, the Tribunal found the parental first choice school would involve unreasonable public expenditure as compared with the LA’s first choice maintained special school; however following this the Tribunal had to consider the parental mainstream fall back to which, by operation of s316 EA 1996, the parents would then have been entitled (over the LA’s maintained special school proposal).</p>
EHCP	-
<p>EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)/HUMAN RIGHTS ACT 1998</p>	
<p>Article 2 Protocol 1</p>	<p>A2P1: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”</p> <p>Breach by a public body of A2P1 can give rise to a claim in damages pursuant to the Human Rights Act 1998 s8.</p>

	<p>The right is to effective access, without discrimination, to whatever educational facilities the state provided. A child with SEN was not denied that right unless the child was denied access to whatever educational facilities the state provided for such pupils. Where a child was out of school but steps were being taken by the LA to provide him with high quality education (albeit the LA could have acted more expeditiously) that was not a breach; but a failure to provide interim educational assistance could have been a breach. In any event damages would be low or non-existent: A v Essex CC [2010] UKSC 33.</p> <p>However, where a LA with responsibility for providing education, if it knew a pupil was not receiving it and engaged in a completely ineffectual attempt to provide it, would be in breach of a2p1. HRA damages were payable for any loss shown to be directly attributable to Islington’s unlawful conduct. This was a “salutary reminder to all local education authorities [sic] and their staff that in performing their day-to-day functions they are discharging the United Kingdom’s obligations under the Convention”: E v LB Islington [2017] EWHC 1440 (Admin).</p>
<p>Article 8</p>	<p>A8: “1. Everyone has the right to respect for his private and family life, his home and his correspondence 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”</p> <p>CB v LB Merton [2002] ELR 441, at [20] rejected the argument that naming a residential school against parental wishes infringed the child’s Article 8 rights; the tribunal had not ordered the child to attend the school. That was a matter for the local authority if it decided to serve a school attendance order. Any challenge would then relate to that order, not to the tribunal’s decision to name the school.</p> <p>X County Council v DW [2005] EHC 162 (Fam), at [20] the decision of a tribunal on placement did not oblige a parent to accept that decision and were free to make other arrangements</p> <p>See also: Buckinghamshire CC v SJ [2016] UKUT 254 (AAC), [2016] ELR 350 [14]</p>
<p>TRIBUNAL (FTT) PROCEDURE</p>	

<p>Young people and capacity</p> <p>CFA2014</p> <p>EA1996</p>	<p>A “young person” is “over compulsory school age but under 25”: CFA2014 s83(2).</p> <p>Unless there is evidence to displace the statutory presumption of capacity to conduct the appeal, <u>(contained in s1 Mental Capacity Act 2005)</u>, the young person is the appellant (i.e. the appeal is in their name and they can appoint a representative – i.e. an advocate – like anyone else): CFA2014 s51, LB Hillingdon v WW [2016] UKUT 253 (AAC), [2016] ELR 431. It follows that, in such a case it is wrong in law for a parent (or similar) to be identified as bringing the appeal “on behalf of” (or similar) the young person: it is the <u>young person’s</u> appeal.</p> <p>Where a young person lacks capacity to conduct an appeal, an ‘alternative person’ <u>must</u> bring the appeal – that being a Court of Protection Deputy or donee of lasting power of attorney; and if there is no such person, the parent: Regs2014 r64(2)(b). They are then the appellant (i.e. the appeal is in their name) in respect of the young person, but not on behalf of the young person in the way an SEN advocate would: Buckinghamshire CC v SJ [2016] UKUT 254 (AAC), [2016] ELR 350 [14]. It follows that, in such a case it is wrong in law for the alternative person to be identified as bringing the appeal “on behalf of” (or similar) the young person: it is <u>the alternative person’s</u> appeal. (Note in that regard that COP2015 p274 is therefore misleading in referring to “occasions when a representative or parent has to act on behalf of young person who lacks capacity ...”)</p> <p>The ordinary presumption of capacity applies (i.e. capacity is presumed unless the contrary is shown). If there is an issue about the young person’s capacity then the Tribunal itself must resolve that issue: Buckinghamshire CC v SJ [2016] UKUT 254 (AAC), [2016] ELR 350.</p> <p>Where a young person lacks capacity and attends a residential placement consider whether the test for deprivation of liberty is met meaning the LA is required to make an application to the Court of Protection: see e.g. Birmingham CC v D and W [2016] EWCOP 8.</p> <p>In Wales, a child can bring an appeal to SENTW assisted by a “case friend”: EA1996 s332ZA-332ZC. See WRegs 2012 Part C for regulations determining “case friends”.</p>
<p>FTT appeal application notices</p>	<p>“The application notice must be signed by the applicant and must include—(a) the name and address of the applicant; (b) the name and address of the applicant’s representative (if any); (c) an address where documents for the applicant may be sent or delivered; (d) the name and address of any respondent; (e) details of the decision or act, or failure to decide or act, to which the proceedings relate; (f) the result the applicant is seeking; (g) the grounds on which the applicant relies; and (h) any further information or documents required by an applicable practice direction”: FTT (HESC)</p>

	<p>Rules 2008 r20(2).</p> <p>Failing to comply with the requirements in for an application notice in rule 20(2) may not mean it is invalid - a defective notice can be sufficient to register an appeal. Only where the application notice is so incoherent or lacking in specifics that that it cannot properly be construed as “disclosing an intention to start proceedings”, the Tribunal may conclude that it is not an application notice at all. In that situation, if the time limit has expired by the time the individual has prepared a valid notice, the individual will face the presumption against admission of a late application notice set out in rule 20(4): KD v Essex CC [2018] UKUT 147 (AAC).</p> <p>In Wales, under WRegs2012, an appeal application should be registered by the Secretary of the Tribunal (even if not providing complete information) unless the Tribunal is being asked to consider a matter outside its powers. The President of SENTW had no power to order that the appellant’s appeal “shall not be registered”: SG v Denbighshire CC and MB [2018] UKUT 158 (AAC).</p>
<p><u>Holding an oral hearing</u></p>	<p><u>The FTT must hold an oral hearing unless before making a final decision unless (1) each party has consented to the matter being decided without a hearing and (2) the FTT considers that it is able to decide the matter without a hearing: FTT (HESC) Rules 2008 r23(1).</u></p> <p><u>In GA and JA v Wirral MBC (SEN) [2020] UKUT 24 (AAC), the UT found the standard appeal form and directions used by the FTT unlawfully ‘inverted’ the consent requirement and applied an ‘opt out’. The fact a party had not ‘opted out’ was not sufficient to constitute consent.</u></p>
<p>Evidence from the child/young person</p>	<p>The Tribunal, as well as the LA, has an obligation to take into account a child or young person’s views, and the FTT is required to expressly deal with their views (albeit not extensively and a paragraph or two should normally be sufficient, or even less where there is no mismatch between the child and parental views): M & M v West Sussex CC (SEN) [2018] UKUT 347 (AAC). <u>If appropriate, a child’s views can be given through parental evidence: BB v LB Barnet [2019] UKUT 285.</u> However, in the case of a young person who brings the appeal, the Tribunal is not under a duty to give reasons for departing from their views over and above why it rejected their appeal: S v Worcestershire [2017] UKUT 92 (AAC).</p> <p>The older and more mature the child, the greater weight the LA (and Tribunal) should place on a child’s views: West Sussex CC v ND [2010] UKUT 349 (AAC)</p> <p>In St Helens BC v TE and another [2018] UKUT 278 (AAC), the UT held that it was lawful for the FTT to conclude that a</p>

	<p>school was not suitable solely by reference to its conclusion that the child “has formed an entrenched and currently intractable opposition to attending [R] school or any mainstream provision” given that it recognised that “his attitude to the proposed placement is part of the significant and complex needs that must be met by the provider” and given EP advice which linked his attitude to his SEN. On the facts (so the UT held) this was not unlawfully giving the child or YP a veto.</p>
<p>Working document</p>	<p>It does not assist to have two working documents, and the tribunal has the power to direct the parties to produce a single working document under its general case management power under rule 5(2): **G v LB Lewisham HS/1956/2016</p>
<p>Tribunal v the family law courts</p>	<p>The Family Division exercising its powers under the Children Act 1989 could not dictate to the Special Educational Needs and Disability Tribunal how it was to exercise its statutory jurisdiction under the EA1996 in relation to a child who happened to be subject to a care order. The family court was no more bound in practical terms by a decision of the tribunal than was a parent and if the family court was able to make other “suitable arrangements” for the child's education then the family court was not obliged to agree that the child be sent to the school identified in the statement of special educational needs: X CC v DW, PW and SW [2005] EWHC 162.</p> <p>A family proceedings court did not have the power to make an order under the Children Act 1989 s91(14) to prevent a mother from applying to the FTT without permission from the family court for the further assessment of the educational needs of her son who was in care. Re: M (a child) [2007] EWCA Civ 1550.</p> <p>Even though her child (being M in the case above) was in care, MG could still appeal to the SENDIST against the Statement of Special Educational Needs made for him by the local authority. And, where the SENDIST directed that the local authority make him available for assessment, the local authority (having not challenged the legality of that direction) was obliged to do so – it had no residual discretion to decide not to obey the direction in the light of its view that further assessment was “abusive” (of which, as it happened, it offered no evidence) MG v Tower Hamlets [2008] EWHC 1577, [2008] ELR 523.</p> <p>The child's parents wanted him to attend a residential special school. The LA wanted him to attend a day special school which (because his parents were no longer able to look after him) he could only do so if accommodated by the local authority. The parents sought to exercise a power of veto in Children Act 1989 s20(7) over the accommodation, thus blocking the local authority's preference. The SENDIST acceded to that. The Court ducked the issue, which thus remains to be decided. [But note that the Tribunal did not grapple with the question of whether the fact that his educational</p>

	<p>needs could <i>only</i> be met where the school was combined with residential provision meant that the latter was providing education; nor was the point taken on appeal. Bedfordshire CC v Haslam and others [2008] EWHC 1070, [2008] ELR 333.</p> <p>The mother had made a specific issue application in the Family Court that the child attend a particular school, the SEND Tribunal was right to adjourn an appeal by the father for a different school pending resolution of the mother's application to the Family Court: **C v LB Richmond HS/5021/2014.</p>
<p>CFA2014</p>	<p>This case law remains good law as to the relationship between the Tribunal and family law courts, applying now to the SENDIST's statutory jurisdiction under the CFA2014 in relation to children who happen to be subject to a care order.</p> <p>However COP2015 places considerable emphasis on effective partnerships between (amongst others) care and education: see e.g. "Local authorities must work to integrate educational provision and training provision with health and social care provision where they think that this would promote the wellbeing of children and young people with SEN or disabilities, or improve the quality of special educational provision": COP2015 #3.13.</p>
<p>Role of the Tribunal/FTT</p>	<p>The Tribunal stands in the LA's shoes, re-evaluating the available information in order if necessary to recast the statement: London Borough of Bromley v SENT [1999] ELR 260.</p> <p>"... if there was inadequate information [about the proposed school placement], the Tribunal should have taken the necessary steps to obtain it, if necessary adjourning to do so. Tribunals, it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially, when the occasion arises by making sure they have the necessary information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The Tribunal will usually have much greater expertise than the parents who appear before them": W v Gloucestershire CC [2001] EWHC Admin 481 [15]. See also J v SENDIST and Brent [2005] EWHC 3315 and MW v Halton [2010] UKUT 34.</p> <p>Where the appellant is unrepresented and there is an evidential shortfall, there may be a duty on the FTT to adjourn on its own initiative even if no application has been made: **C v Wiltshire CC HS/2270/2014.</p> <p>Where issues arise at the oral hearing where the parental experts are not present (for example, for costs reasons) fairness can require that those experts have a chance to deal with essential points emerging for the first time during others' oral evidence (e.g. by an adjournment): **O v Devon City Council HS/716/2016.</p> <p>Note earlier judicial comments to the effect that the Tribunal has no power to consider issues not raised by the parents' grounds of appeal: M v Essex, 5 November 2001, unreported. It is not clear, however, whether the judge in that case</p>

	<p>was referred to Bromley, which takes precedence.</p> <p>Where there is a crucial disagreement between experts and “the dispute involves something in the nature of an intellectual exchange with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over another”: Hampshire CC v JP [2009] UKUT 239 (AAC), [2010] ELR 413.</p> <p>It was impermissible for a Tribunal to decline to make findings on an issue subject to competing expert reports on the basis that “the contents of the reports had not been agreed and the subject matter...was highly technical” (here evidence on acoustics) – the Tribunal should have decided how to resolve the issues: RB Kensington & Chelsea v CD [2015] UKUT 396, [2015] ELR 493.</p>
<p>CFA2014</p>	<p>The Tribunal’s inquisitorial role remains. The powers of the Tribunal (FTT) are now set out in Regs2014 r43. Sometimes there will be a tension between limiting an appeal to issues in dispute and the positive obligation that facts have been properly found. In this situation the overriding objective should be applied, and for example where evidence has not been provided an adjournment is not inevitable (including taking into account whether the cost and delay of an adjournment is justified, whether the evidence is needed for the parties to participate fully, whether the tribunal’s special expertise would assist, and whether the parties have provided all the evidence available to them): DH & GH v Staffordshire CC [2018] UKUT 49 (AAC).</p> <p>An appeal is a “general appeal” and the issue for the Tribunal is whether, on the evidence and submissions before it, the LA came to the correct conclusions on matters of fact, law and judgment, assessed at the time of the hearing: DH & GH v Staffordshire CC [2018] UKUT 49 (AAC). Gloucestershire CC v EH [2017] UKUT 85 (AAC) confirms that for EHCP appeals as for statement appeals, the FTT looks at the position at the date of the hearing and looking forward, not at the time of the appealed decision.</p> <p>The FTT should check for itself the appropriateness and legality of changes which the parties have agreed should be made (e.g. in a working document), not simply rubber stamp them: East Sussex CC v TW [2016] UKUT 528 (AAC) 388</p>
<p>Bias</p>	<p>The ‘fair minded and informed observer’ test applies as set out in Porter v Magill [2001] UKHL 67. Bias was not established where a judge who sat on an earlier unsuccessful disability discrimination appeal sat on a SEND case, even though he raised inconsistencies between evidence he heard in the previous case and evidence in the present case: SG v</p>

	LB Bromley [2013] UKUT 619 (AAC), [2014] ELR 190.
Amendment to a statement after an appeal is made	Where the contents of a statement is appealed and subsequently amended, then the FTT may – by case management – refocus an appeal to deal with the amended version: Essex CC v DH (SEN) [2016] UKUT 463 (AAC).
Appeal by non-party	Where a parent who has not taken part in proceedings before the FTT seeks permission to appeal, the FTT has discretion to add that parent at a party pursuant to FTT Rule 9, and then consider a permission application. The UT declined to give guidance as to how that discretion should be used: JW v Kent CC [2017] UKUT 281 (AAC).
Jurisdiction in respect of sections other than B, F and I	Where the FTT has make orders in relation to sections B, F or I, it has power to make “consequential amendments” to other sections. There must be a link to sections B, F and I, but it need not be a strong connection. An example is moving a young person’s views from section B to section A: LB Hillingdon v SS [2017] UKUT 250 (AAC). See further above in relation to the FTT’s jurisdiction to make consequential amendments in relation to Outcomes.
LA’s duty to the Tribunal	Although the proceedings are in part adversarial because the LA will be responding to the parents’ appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the LA should be placing all its cards on the table, including those which might assist the parents’ case. It is not an adequate answer to a failure to disclose information to the Tribunal for an LA to say that the parents could have unearthed the information for themselves if they had dug deep enough: JF v Croydon [2006] EWHC 2368. As an example of that, it was incumbent on the LA to tell the FTT about the impending conversion into an academy of the school it was proposing: LS v Oxfordshire CC [2013] UKUT 135 (AAC), [2013] ELR 429
CFA2014	The LA’s duty remains the same, and all public bodies are subject to the duty of candour.

<p>Can the FTT use its own expertise?</p>	<p>“A specialist tribunal, such as the SENDIST, can use its expertise in deciding issues [including rejecting expert evidence], but if it rejects expert evidence before it, it should state so specifically. where the specialist tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it.”: L v Waltham Forest [2003] EWHC 2907, [2004] ELR 161.</p> <p>However, the Tribunal can use its expertise in deciding between competing expert views and, for example, in ordering a level of provision in between that contended for by competing experts. Wiltshire CC v TM and SENDIST [2005] EWHC 2521 (Admin), [2006] ELR 56; T & A v London Borough of Wandsworth [2005] EWHC 1869; D v SENDIST [2005] EWHC 2722, [2006] ELR 370.</p>
<p>CFA2014</p>	<p><u>-How the FTT may use its expertise, and whether it is required to put their thinking to the parties, is fact dependent.</u></p> <p><u>In BB v LB Barnet [2019] UKUT 285, it was not unlawful for the FTT to disagree with the parental OT evidence where the LA had not put in any OT evidence without canvassing this with the parties: “The tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing and that further reference back to the parties is not necessary unless something new arises that has not been fairly covered. The tribunal is entitled to expect the representatives to anticipate the likely range of options that the tribunal will consider and present their case accordingly”. The UT further noted in this context the duty of the parties to assist the Tribunal: “the parties should have provided evidence, if they wished to do so, and assisted the tribunal by inviting the members to put their ideas to the parties and the witnesses. They should not sit back and then criticise the tribunal for not doing what they could have prevented. I am not saying that this absolved the tribunal from its duty of fairness, only that the parties were required to assist the panel.”</u></p> <p><u>In NE and DE v Southampton CC (SEN) [2019] UKUT 388 (AAC), the FTT had acted unlawfully when considering progress in the context of suitability of a placement when it relied on a review which whilst in the bundle but was never cited by the Tribunal or the LA: “In all the circumstances it seems that the proceedings were fundamentally unfair because a central evidential plank on which the tribunal based its decision was not one which either of the parties or the tribunal had ever raised as having any importance to the issues the tribunal had to decide: see, if it is needed, L v Waltham Forest [2003] EWHC 2907 (Admin); [2004] ELR 161 at paragraph [15] and page 279 of O’Reilly v Mackman [1982] 2 AC 237. This is not diluted in my judgment by the fact that the March 2018 additional annual review was in the bundle and ‘viewed by’ two of the witnesses. The issues before the tribunal were framed by the parties’ submissions and the evidence they called in support of them, as supplemented by probing and questions from the tribunal. It is uncontested</u></p>

	<p><u>before me that at no stage was a case advanced prior to the tribunal’s decision that founded the answer to current progress significantly or at all on the March 2018 additional review. To then find as the tribunal did was unfair to the parents and amounted to a material error of law on the part of the tribunal in coming to its decision.”</u></p>
Procedure	<p>Barking & Dagenham v SENDIST & MG [2007] EWHC 343: A tribunal had been correct in its decision to proceed with an appeal hearing in the absence of the LA and had been correct to rule that staff shortages were not an excuse for failing to submit a statement of case within the requisite time limit.</p> <p>HJ v Brent [2010] UKUT 15 (AAC): The Tribunal should have given reasons for its refusal to admit in evidence a video submitted at the hearing. The Tribunal needed to consider whether the evidence was relevant, whether it went to the issues in dispute, why it was submitted late and the overriding objective.</p> <p>Camden v FG [2010] UKUT 249 (AAC): It is not the case that the Tribunal can only bar a party from attending a hearing following a failure to comply with a direction where there was wilful and repeated disobedience.</p> <p>NW v Poole & SENDIST [2007] EWCA Civ 1145, (2008) ELR 232: Where a case had been remitted to the Tribunal for it to provide additional specificity in the statement, that did not necessarily require that there should be a complete rehearing of all the issues.</p>
CFA2014	-
Time limit for appeal	<p>Appeal has to be made within 2 months after written notice of the decision or final statement or EHCP is sent to (i.e. not received by) parents or young person: FTT (HESC) Rules 2008 r20(1)(c). In Wales, the same deadline applies: WRegs2012 r12(1). Tribunal has power to extend time under FTT (HESC) Rules 2008 r20(1)(c-) or WRegs 2012 r16(a) in Wales.</p> <p>Factors to be taken into account include: (1) length of delay, (2) reasons for the delay, (3) the chances of the appeal succeeding and (4) degree of prejudice to the respondent if the application is granted: KS v FTT and CICA [2012] UKUT 281 (AAC). These were approved in CM v Surrey CC (SEN) [2014] UKUT 4 (AAC), [2014] ELR 91, in which emphasis was placed on the fact that it is not only the explanation of the delay that is relevant.</p> <p>Note appellants (excluding appeals only about a school or institution, or type of school or institution) must obtain a mediation certificate: CFA2014 s55. In such cases the appellant must contact the mediation adviser within 2 months:</p>

	Regs2014 r33. This does not apply to appeals concerning a statement.
CFA2014	The Tribunal procedural rules are unchanged and the time limit still applies.
Evidence/submissions	<p>Assertions that are made only by representatives cannot be treated as evidence, see e.g. JS v Worcestershire [2012] UKUT 451 (AAC), [2013] ELR 138: “It is trite law that submissions are not evidence and if a representative puts forward alleged facts that are not otherwise in evidence, the tribunal should elicit how far the facts alleged are within his personal knowledge or based on some other evidence that can be produced. Little, if any, weight should normally be attached to assertions by the representative on instructions where there is no other evidence to back up those instructions.”</p> <p>However, see CB v Birmingham [2018] UKUT 13 (AAC) for a seemingly contrary position: “Tribunals are not required to distinguish rigidly between information coming from witnesses and representatives”, in respect of the LA’s “confirmation” that the cost of the provision which was set out in an expert report.</p> <p>A school witness cannot be excluded from giving evidence just because they have a financial interest in the school, although it may be a factor that goes to the weight to be given to the evidence: DH & GH v Staffordshire CC [2018] UKUT 49 (AAC).</p>
CFA2014	-
Striking out	<p>Under FTT (HESC) Rules 2008 r8(4)(c), “no realistic prospect of success” means “where the case is clearly unfounded or the opponents case is clear and incontestable”: **G v Governing Body of Queen Elizabeth’s Girls School HS/817/2014. A decision to strike out an unrepresented appellant entails particular dangers as laymen may be unable to explain a case in writing they may be able to do so orally – a strike out decision should contain a notice that the appellant may apply for reinstatement: **W v Upwood Primary School HS/1033/2014.</p> <p>“Striking-out is a draconian remedy of last resort, perhaps especially in an inquisitorial jurisdiction where the participation of both parties is most likely to contribute to achieving the “correct” outcome”: RBKC v MJ [2017] UKUT 102 (AAC). It may be preferable for orders to contemplate discretionary barring rather than automatic barring, thus</p>

	<p>retaining judicial discretion in relation to the consequences of a failure to comply.</p> <p>In Wales, the grounds on which an appeal can be struck out are contained in WRegs2012 r29(2). Namely, the appeal (a) is made otherwise than in accordance with those regulations, (2) is not, or is no longer, within the jurisdiction of the Tribunal, (3) discloses no reasonable grounds, or (4) is an abuse of the Tribunal’s process.</p> <p>The FTT can make directions which provide for automatic barring in the event of non-compliance (often known as an ‘unless order’): FTT (HESC) Rules 2008 r8(2). If a party is barred they can request reinstatement with an application within 28 days after the date on which the Tribunal sent notification of the striking out to that party (r8(6)-(7)).</p> <p>However an unless order has to be clear, and cannot be conditional – for example, an order which only bars a party in the event it fails to comply “without reasonable explanation” is not automatic because it requires an assessment of any explanation: LB Enfield v NH and anor (SEN) [2019] UKUT 1 (AAC).</p>
<p>Reasons</p>	<p>In H v East Sussex CC [2009] EWCA Civ 249, [2009] ELR 161, the Court of Appeal explained that the Tribunal “is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts.”</p> <p>Despite that concerning an obligation only to give ‘summary reasons’ (which is no longer the position for the FTT) the UT has applied that approach to FTT decisions: SG v Somerset [2012] UKUT 353 (AAC); DC v Hertfordshire [2016] UKUT 379 (AAC); Hertfordshire v MC [2016] UKUT 385 (AAC); **L v Cheshire West HS/3089/2016: “The basic principles relating to adequacy of a decision are summed up ... in H v East Sussex”.</p> <p>However, the obligation on the FTT is not distinct from that of a court, as any rate where there is a duty to address expert evidence: “Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the [FTT] (having no doubt summarised the evidence) to indicate simply that [it] believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the [FTT] must enter into the issues canvassed before [it] and explain why [it] prefers one case over another. That is likely to apply particularly in [appeals] where, as here, there is disputed expert evidence; but it is not necessarily limited to such cases”: Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377, applied in Hampshire CC v JP [2009] UKUT 239 (AAC), [2010] ELR 413.</p> <p>The FTT is “entitled to limit its consideration to the matters identified in the working document”: DL v LB Redbridge</p>

	[2010] UKUT 293 (AAC).
Non-standard experts (i.e. not OT, EP, SALT, PT)	Some guidance was given in RB Kensington and Chelsea v CD [2015] UKUT 396, [2015] ELR 493 . Parties should communicate their intention to rely on expert evidence as soon as possible; the Tribunal should consider a joint expert; and in case management directions a tribunal judge could helpfully identify precisely the issues which the experts are to address.
Review and seeking permission to appeal to the Upper Tribunal	<p>The FTT may set aside a decision which disposes of proceedings and remake it if (1) it is in the interests of justice to do so and (2) EITHER a document relating to the proceedings was not sent/received by party OR a document relating to proceedings was not sent to the FTT at an appropriate time OR a party/representative was not present at a hearing OR there has been some other procedural irregularity: FTT (HESC) Rules 2008 r45. This power is limited to procedural mishaps and errors, not matters that go to the substance of the decision: Worcestershire CC v JJ [2014] UKUT 406 (AAC), [2014] ELR 553.</p> <p>An application for permission to appeal to the UT must be made first to the FTT within 28 days of the latest of (1) the decision notice, (2) written reasons, (3) notification of amended reasons, (4) notification an application to set aside has been unsuccessful: FTT (HESC) Rules 2008 r46. Upon receipt the FTT must consider whether to review the decision in accordance with FTT (HESC) Rules 2008 r49 and if it declines it must provide reasons and notification of the right to seek permission to appeal from the UT.</p> <p>The FTT can undertake a review in two situations: FTT (HESC) Rules 2008 r49.</p> <p>First, it can undertake a review if it is satisfied there is an error of law in the decision: FTT (HESC) Rules 2008 r47(1) and r49(1)(a). As to the scope of this power: As for staying the FTT decision pending a UT appeal: "A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking the stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted." Carmarthenshire v M & JW (SEN) [2010] UKUT 348 (AAC). Where an FTT decision has been implemented, it is possible but unlikely that a stay is appropriate: Essex CC v FA and anor [2019] UKUT 38.</p> <p>In relation to review, see RB v First Tier Tribunal (Review) [2010] UKUT 160 (AAC): "It cannot have been intended that the power of review should enable the First Tier Tribunal to usurp the Upper Tribunal's function of determining appeals on contentious points of law. Nor can it have been intended to enable a later First Tier Tribunal judge or panel, or the original First Tier Tribunal judge or panel, to re-decide the matter. This [the power of review] is intended to capture</p>

decisions that are clearly wrong, so avoiding the need for an appeal. The power has been provided in the form of a discretionary power for the Tribunal so that only appropriate decisions are reviewed. This contrasts with cases where an appeal on a point of law is made because, for instance, it is important to have an authoritative ruling....The key question is what, in all the circumstances of the case, including the degree of delay that may arise from alternative courses of action, will best advance the overriding objective of dealing with a case fairly and justly....”

~~Setting aside a decision under FTT (HESC) Rules 2008 r45 is limited to procedural mishaps and errors, not matters that go to the substance of the decision: **Worcestershire CC v JJ [2014] UKUT 406 (AAC), [2014] ELR 553.**~~

....”. See further **Oxfordshire CC v GB [2001] EWCA Civ 1358. [2002] ELR 8:** ~~The~~the Tribunal is required to give reasoned decisions and should not respond to an appeal by purporting to amplify its reasons.

Second, it can review if “circumstances relevant to the decision have changed since the decision was made: **FTT (HESC) Rules 2008 r48 and r49(1)(b)**. Although the provisions in relation to a change in circumstances are not drafted particularly clearly, that there is a change of circumstances is a “threshold” question, which if satisfied, triggers a review. Whether there is a change of circumstances is a matter for the FTT, but where it had relied heavily upon an Ofsted report which was superseded shortly after the decision was published the test was satisfied and the FTT had to at least conduct a review: **R (EL and JB) v STT and Surrey CC (JR) [2020] UKUT (AAC)**.

As for staying the FTT decision pending a UT appeal: “A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking the stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.”: **Carmarthenshire v M & JW (SEN) [2010] UKUT 348 (AAC)**. Where an FTT decision has been implemented, it is possible but unlikely that a stay is appropriate: **Essex CC v FA and anor [2019] UKUT 38.**

In reviewing a decision, the UT judge should not discuss matters with the FTT judge (whose decision is under challenge), nor should the UT (having allowed an appeal) determine the scope of the decision to be made by the panel re-deciding the matter: **LW v Norfolk CC [2015] UKUT 65 (AAC), [2015] ELR 167.**

It is generally not a proper exercise of the FTT’s discretion in deciding whether to review, to refer a matter to the UT which requires practical educational expertise: **Harrow Council v AM [2013] UKUT 157 (AAC), [2013] ELR 351.**

A consent order constitutes a decision for the purposes of **FTT (HESC) Rules 2008 Part V** and therefore can be appealed: **R v FTT and Hertfordshire CC [2012] UKUT 213 (AAC), [2012] ELR 456.**

Where, following review, the FTT is to re-decide a case it should hold a hearing unless both parties do not want one:

	<p>Essex CC v TB [2014] UKUT 559 (AAC), [2015] ELR 67.</p> <p>The UT is badly placed to adjudicate on what was said by witnesses before the FTT – in the absence of a transcript, the hand written note of the Chair is the only authoritative guide to the evidence adduced: NC and DH v Leicestershire CC [2012] UKUT 85 (AAC), [2012] ELR 365.</p> <p>The UT has criticised attempts by the FTT to become involved in UT proceedings. In SG v Denbighshire CC and MB [2018] UKUT 158, the Tribunal President of SENTW sought to make written submissions, and the UT said it was “quite wrong” in principle for the Tribunal to “dogmatically advance a particular standpoint” before going on to criticise the substance as demonstrating “no discernible chain of reasoning to support the Tribunal’s assertions”.</p> <p>At a hearing following an appeal, a second panel is not entitled to simply uphold the first tribunal’s decision if it has been found to include an error of law: JS v FTT and LB Greenwich [2011] UKUT 374 (AAC).</p> <p>The fact that an annual review of the Statement has been undertaken in the meantime, or is pending, does not mean that the UT appeal is rendered academic or that no relief should be given in the appeal: “its decision on whether errors were made may be important”: SG v Bromley [2013] UKUT 0619 (AAC)</p>
<p><u>Appeals before the UT</u></p>	<p><u>The UT is badly placed to adjudicate on what was said by witnesses before the FTT – in the absence of a transcript, the hand written note of the Chair is the only authoritative guide to the evidence adduced: NC and DH v Leicestershire CC [2012] UKUT 85 (AAC), [2012] ELR 365.</u></p> <p><u>The UT has criticised attempts by the FTT to become involved in UT proceedings. In SG v Denbighshire CC and MB [2018] UKUT 158, the Tribunal President of SENTW sought to make written submissions, and the UT said it was “quite wrong” in principle for the Tribunal to “dogmatically advance a particular standpoint” before going on to criticise the substance as demonstrating “no discernible chain of reasoning to support the Tribunal’s assertions”.</u></p> <p><u>At a hearing following an appeal, a second panel is not entitled to simply uphold the first tribunal’s decision if it has been found to include an error of law: JS v FTT and LB Greenwich [2011] UKUT 374 (AAC).</u></p> <p><u>The fact that an annual review of the Statement has been undertaken in the meantime, or is pending, does not mean that the UT appeal is rendered academic or that no relief should be given in the appeal: “its decision on whether errors were made may be important”: SG v Bromley [2013] UKUT 0619 (AAC)</u></p>
<p>Compliance with a</p>	<p>The time an LA has to comply with an FTT order depends on what the order is in respect of, and the time limits are set</p>

<p>FTT decision</p>	<p>out in Regs2014 r44(2-) or WRegs 2012 r61 in Wales.</p> <p>Where a LA makes amendments which are different to those that are ordered by the FTT, Regs2014 r28 applies, and the amendments require the procedural requirements in Regs2014 r22 to be complied with and there is a fresh appeal right: Essex CC v FA and anor [2019] UKUT 38 (AAC). See also R (S) v Camden [2018] EWHC 3354 (Admin).</p>
<p>Costs</p>	<p>The general rule is no order as to costs, but the Tribunal may make an order where “a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings”: FTT (HESC) Rules 2008 10(1).</p> <p>Where the parties have agreed matters and the appeal is withdrawn, FTT (HESC) Rules 2008 r10 allows a costs application to be made within 14 days: UA v LB Haringey [2016] UKUT 0087 (AAC), [2016] ELR 219.</p> <p>The proper approach is a three stage process, (1) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings? (2) if it did, should the tribunal make an order for costs? and (3) if so what is the quantum of those costs?”: MG v Cambridgeshire CC [2017] UKUT 172 (AAC-), LW v Hertfordshire CC (SEN) [2019] UKUT 109 (AAC).</p> <p>As to (1), just because one party wins a case does not mean it was unreasonable to defend it – the reasonableness of conduct must take into account the ongoing and evolving nature of proceedings: HJ v LB Brent [2011] UKUT 191 (AACV), [2011] ELR 295.</p> <p>Those who make costs applications “face a high hurdle. The requirement to demonstrate unreasonable conduct of the proceedings is not easily met, especially where the applicant’s conduct of the proceedings was itself in some respects remiss. A party should think carefully before instituting costs order proceedings. There is no point throwing good money after bad.” **A v Durham CC HS/231/2016 per UTJ Mitchell</p> <p>“..nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs...Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule”: MG v Cambridgeshire CC [2017] UKUT 172 (AAC).</p> <p>An example of unreasonable conduct is where the LA had provided misleading evidence to the FTT in oral evidence at</p>

the hearing: **NK v LB Barnet [2017] UKUT 265 (AAC)**. Another example is where a parent appealed to the UT on the basis of wanting a mainstream school where the UT found it “could not really have been believed by her” that mainstream school was suitable and that she “wanted to thwart the F-tT’s decision by whatever means necessary”, her grounds of appeal relied on an inaccurate account of proceedings, and that appeal was subsequently withdrawn: **LW v Hertfordshire CC (SEN) [2019] UKUT 109 (AAC)**.

However, where the LA conceded the appeal the day before the hearing, and only minor issues of wording remained but the parent (represented by an advocate) pressed ahead with the hearing, this was not unreasonable – but it may have been unreasonable had the concession occurred earlier: **Walsall MBC v SPC and KU (SEN) [2018] UKUT 37 (AAC)**.

As to (2), the Tribunal will have regard to all the circumstances including the nature of the unreasonable conduct, how serious it was, and what the effect of it was: **MG v Cambridgeshire CC [2017] UKUT 172 (AAC)**. In **NK v LB Barnet [2017] UKUT 265 (AAC)**, the effect of the unreasonable conduct was the UT appeal to correct the unreasonable evidential error, however at that appeal the LA showed the error was not material, and therefore no order for costs was made.

~~There is authority from other jurisdictions which suggests a~~ A costs order does not necessarily need to be confined to the costs attributable to the unreasonable conduct: **LW v Hertfordshire CC (SEN) [2019] UKUT 109 (AAC)**, approving **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. **LW** also approved of case law that held the party’s ability to pay was not a relevant factor and at a minimum should cover the costs attributable to the unreasonable behaviour.

As to (3), the amount payable did not depend on whether the claiming party was legally aided or not – the same was payable: **MG v Cambridgeshire CC [2017] UKUT 172 (AAC)**.

RELATIONSHIP OF CFA2014 AND OTHER STATUTORY SCHEMES

General

The **COP2015** places considerable emphasis on effective partnerships between (amongst others) care and education: see e.g. “Local authorities must work to integrate educational provision and training provision with health and social care provision where they think that this would promote the wellbeing of children and young people with SEN or disabilities, or improve the quality of special educational provision”: **COP2015 #3.13**.

Any decision by a local authority after 3 April 2018 will fall under the **Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017**, which give the Tribunal the power to make recommendations on health and social care need and provision. This is an extension of the pilot that has run since 2015 involving 17 local

	<p><u>authorities. It was initially a scheduled run until 31 March 2020 but by letter dated 4 November 2019, Michelle Donelan MP (Parliamentary Under-Secretary of State for Children and Families) extended the trial to run until 31 August 2020.</u></p> <p><u>For further information in respect of the relationship between education, health and social care see above under Section F and the law on what is educational vs non-educational.</u></p>
<p><u>Education v social care</u></p>	<p><u>An LA can be responsible for funding an educational placement under an Adult Social Care Plan pursuant to the Care Act 2014: CP v NE Lincolnshire [2019] EWCA Civ 1614. In that case, CP had a statement of SEN which lapsed when she was 19, but the LA nonetheless put in place an ASC Plan pursuant to the Care Act 2014 which needed to promote her “well-being” which, by s1(2)(e) of that Act included her “participation in work, education, training or recreation”. Her ASC plan explained her need to attend a particular educational placement. The LA provided a personal health budget which did not include the cost of the placement. The Court of Appeal held that this was unlawful, and the LA can be responsible for funding educational placements through ASC plans. The High Court had adjourned the JR whilst an appeal was pending. The Court of Appeal held there was no reason why placement in the ASC plan could not be considered by the Court whilst the FTT proceedings were ongoing. The LA was ordered to compensate CP for her accrued right to the cost of her attendance at the placement during the intervening period.</u></p>
<p><u>Education v NHS</u></p>	<p><u>The fact that a placement cost includes both SEP and HCP elements does not mean that the FTT has jurisdiction over the HCP, and the LA is not obliged to (indeed cannot) secure/fund other HCP, even if that HCP is “essential for [the child] to be educated”. That part of the funding should come from the CCG: East Sussex CC v KS (SEN) [2017] UKUT 273 (AAC). It is potentially surprising that an LA (with its wide powers outside the education statutes) has no power to provide health services, even if it has no duty to do so. Consider the cases on EA1996 s9 which have held “public expenditure” concerns the public purse generally. Those decisions were premised on the fact that the FTT can order – as educational – a school placement which also provides social care (with the LA having to pay for it all). And there is nothing in principle different with health provision. In neither case does the FTT have power to determine the SCP or HCP, but what it can do is order a placement at which the LA will have to pay all the costs (particularly, but perhaps not necessarily, where that is all wrapped up as a single fee).</u></p> <p><u>It is not a necessary requirement of fairness to join a CCG as a party where the FTT makes a health care recommendation as part of the ‘national trial’: NHS West Berkshire CCG v FTT [2019] UKUT 44 (AAC). The FTT only has power to recommend, and the legal consequences for the CCG are not unduly onerous – it must consider the recommendation</u></p>

	<p><u>and provide written reasons if it decides not to follow it. In this case, the FTT had taken case management steps to appraise itself of the CCG's position which was sufficient, and the fact it did not have a legal representative was not necessary in the case as the CCG's legal obligations were not being determined by the FTT. Any dispute between the LA and CCG as to the scope of the CCG's legal obligations was a matter for another jurisdiction.</u></p>
<p><u>Tribunal v the family law courts</u></p>	<p><u>The Family Division exercising its powers under the Children Act 1989 could not dictate to the Special Educational Needs and Disability Tribunal how it was to exercise its statutory jurisdiction under the EA1996 in relation to a child who happened to be subject to a care order. The family court was no more bound in practical terms by a decision of the tribunal than was a parent and if the family court was able to make other "suitable arrangements" for the child's education then the family court was not obliged to agree that the child be sent to the school identified in the statement of special educational needs: X CC v DW, PW and SW [2005] EWHC 162.</u></p> <p><u>A family proceedings court did not have the power to make an order under the Children Act 1989 s91(14) to prevent a mother from applying to the FTT without permission from the family court for the further assessment of the educational needs of her son who was in care. Re: M (a child) [2007] EWCA Civ 1550.</u></p> <p><u>Even though her child (being M in the case above) was in care, MG could still appeal to the SENDIST against the Statement of Special Educational Needs made for him by the local authority. And, where the SENDIST directed that the local authority make him available for assessment, the local authority (having not challenged the legality of that direction) was obliged to do so – it had no residual discretion to decide not to obey the direction in the light of its view that further assessment was "abusive" (of which, as it happened, it offered no evidence) MG v Tower Hamlets [2008] EWHC 1577, [2008] ELR 523.</u></p> <p><u>The child's parents wanted him to attend a residential special school. The LA wanted him to attend a day special school which (because his parents were no longer able to look after him) he could only do so if accommodated by the local authority. The parents sought to exercise a power of veto in Children Act 1989 s20(7) over the accommodation, thus blocking the local authority's preference. The SENDIST acceded to that. The Court ducked the issue, which thus remains to be decided. [But note that the Tribunal did not grapple with the question of whether the fact that his educational needs could <i>only</i> be met where the school was combined with residential provision meant that the latter was providing education; nor was the point taken on appeal. Bedfordshire CC v Haslam and others [2008] EWHC 1070, [2008] ELR 333.</u></p> <p><u>The mother had made a specific issue application in the Family Court that the child attend a particular school, the SEND Tribunal was right to adjourn an appeal by the father for a different school pending resolution of the mother's</u></p>

application to the Family Court: ****C v LB Richmond** HS/5021/2014.

This case law remains good law as to the relationship between the Tribunal and family law courts, applying now to the SENDIST's statutory jurisdiction under the CFA2014 in relation to children who happen to be subject to a care order.