Noddy
No-nonsense
Guide

Noddy No-nonsense Guide to SEN law

Special Educational Needs Provision in England

2026 update 19

David Wolfe KC Matrix

Leon Glenister KC Landmark Chambers

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Support SEND Kids.org
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CONSIDER THE ENVIRONMENT BEFORE PRINTING

NODDY NO-NONSENSE GUIDE TO SEN LAW

March 2026

Welcome to the March 2026 version of the "Noddy Guide" (as it has come to be known) which David Wolfe first produced 15+ years ago. Latest updates are listed after this section.

The original version of the Guide was produced in response to a request, from the then-President of the SENT (now FTT), for a "Noddy Guide" to train SENT Chairs (now FTT Judges). (The name was chosen to indicate straight forward, no-nonsense advice.) It is intended to be useful for people new to this area of law without compomising on detail to keep it comprehensive for use by experts. The Guide is regularly updated as a free public resource to assist all those who deal with Special Educational Needs (SEN) law in England – including judges, legal practitioners, schools, parents and local authorities.

It is now co-written by David Wolfe KC (Matrix) and Leon Glenister KC (Landmark Chambers), both public law barristers who have significant experience and expertise in SEN Law.

The Guide is available in a digitised format on the Support SEND Kids on-line platform: www.supportsendkids.org.

The Guide sets out SEN law but only as it applies in England. It also picks up some of the areas of overlap between SEN law and Disability law of relevance to children and young people in education in England, but it does not cover Disability law points which are distinct from SEN law. The Welsh SEN cases that remain relevant to SEN law in England are set out in the Guide. The Government's proposals for legislative change will be included if and when they become law.

Our aim is to bring together the relevant legal provisions, the codes of practice, 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 code of practice.

As for the law itself, in many respects the post 2014 framework in England 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. Some areas are identified where that may not be the case. To make the text of the Noddy Guide easier to read, we have used the terms relating to the CFA2014 (such as section F and EHCP) even when we are talking about case law decisions which would have used the terms from the EA1996 (part 3 and Statement of SEN in those case) other than where we directly quote from the old decisions (in which case we have just quoted).

THE LAW

CFA2014 Children and Families Act 2014 – the principal piece of legislation which governs SEN law in England

COP2015 SEN Code of Practice. More: **What is the SEN Code of Practice?**

EA1996 Education Act 1996 – the legislation which used to govern SEN in England (and was the basis for Statements of SEN). The SEN aspects are now covered by CFA2014, but some other elements of EA1996 (such as in relation to home-school transport) are still in operation.

EA2002 The Education Act 2002

EqA2010 Equality Act 2010

FTT (HESC) Rules First Tier Tribunal (Health, Education and Social Care) Rules 2008; i.e. the rules that specify the processes for FTT appeals.

NHSA2006 National Health Services Act 2006

Recoupment Regulations Inter-authority Recoupment (England) Regulations 2013

SEN Regs2014 Special Educational Needs Regulations 2014

SEND Guidance 19-25 DoE's guidance 'SEND: 19-25 year olds' entitlement to EHC plans, **access guidance here**

TCEA2007 Tribunals, Courts and Enforcement Act 2007, the legislation that established the FTT and UT

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Comments on any aspect of this Guide are welcome, particularly omissions or errors:

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Parents and professionals - we invite you to visit the **Support SEND Kids** charity website. The Guide is available as interactive Q&A - allowing you to bookmark, share with others, and engage with the authors on individual questions.

2026 UPDATES

In summary

New Questions & Answers

02.20 Can a special school provide a less than 32.5 hours a week of school hours?

08.135 Where a CYP requires SEP outside the school day does that necessarily mean they require a residential placement?

09.305 Is there a definition of a “mainstream school” for the purposes of the section 33 presumption?

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02.07 Must the LA (and then the FTT in an appeal) have regard to any particular factors when exercising its SEN functions?
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02.155 Does an LA cease to be responsible where a CYP is temporarily absent?
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09.04 Does section I always have to name a particular placement?
09.17 Can the LA/FTT ignore the parental preference?
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09.30 But surely the LA/FTT can ask whether the particular requested mainstream placement is suitable/appropriate?
11.02 Can an LA ever be required to provide home to school transport for sixth formers?
12.010 If I disagree with the contents of an EHCP, can I bring a judicial review?
12.22 Does the FTT have to give reasons for its decision?

New case law

2026

Hampshire CC v GC [2026] EWCA Civ 20 (AAC)

R (CHO) v GB of Lonsdale School [2026] EWHC 166 (Admin)

R (JSC) v Cambridgeshire CC [2026] EWHC 68 (Admin)

2025

AA v Bristol CC [2025] UKUT 010 (AAC)

AA v LB Hounslow [2025] UKUT 225 (AAC)

HJ and MM v Birmingham CC [2025] UKUT 323 (AAC)

Mrs and Mr D v Cheshire East Council [2025] UKUT 187 (AAC)

PS v LB Wandsworth [2025] UKUT 239 (AAC)

R & RK v Hertfordshire CC [2025] UKUT 381 (AAC)

R (LW) v LB Islington [2025] EWHC 703 (Admin)

R (TYC) v Birmingham CC [2025] EWHC 623 (Admin)

Additional references

Useful information is available in our partner publications:
No-nonsense Guide to Disability Law in Education
Nodi No-nonsense Guide to ALN law Wales

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GLOSSARY

Academy A type of independent school (i.e. not a school maintained by an LA) which has been set up in accordance with the Academies Act 2010 (i.e. through a Funding Agreement between the school and the Secretary of State for Education) and which is therefore state funded. Other independent schools are referred to here as "private schools".

Annual review The process of yearly review of an EHCP. See **CFA2014 s44(1)** and **Regs2014 r18**.

Authorities The collective term for decided case law, which constitutes previously decided cases (in the form of decisions and judgments) by the UT and Courts. These can be relied upon for particular legal propositions to show that a particular decision should be taken in a certain way. Where we mention an authority as being the reference for a particular legal proposition, the text includes a hyperlink to an on-line copy of its text.

Caselaw See 'The Law' in the introduction.

CCG Clinical Commissioning Group. These were the local NHS bodies generally responsible for providing health care provision in their area, including therefore to a CYP and where referred to were the relevant decision making body at the time that the answers and case law that refer to them were given. The equivalent bodies are now integrated care boards (ICBs)

Child A person who is not over compulsory school age: **EA1996 s579(1)** (definition still applies by virtue of **CFA2014 s83(7)**).

CFA2014 Children and Families Act 2014 – the principal piece of legislation which governs SEN law in England

COP2015 SEN Code of Practice. More: **What is the SEN Code of Practice?**

CYP Child or young person up to the age of 25.

Direct payment Payments representing all or part of a personal budget made to a child's parent or young person (or other prescribed person) to secure provision to which the budget relates. See **CFA2014 r49** and **The Special Educational Needs (Personal Budgets) Regulations 2014**.

Disability The Protected characteristic of disability in **EqA2010 s6** (England, Scotland and Wales) and in **Disability Discrimination Act 1995 s1** (Northern Island only).

EA1996 Education Act 1996 – the legislation which used to govern SEN in England (and was the basis for Statements of SEN). The SEN aspects are now covered by CFA2014, but some other elements of EA1996 (such as in relation to home-school transport) are still in operation.

EA2002 The Education Act 2002

EBD emotional and behavioural difficulties/disabilities

EHCP(s) Education Health and Care Plan.

EOTAS Education otherwise than at school, provided pursuant to CFA2014 s61

EqA2010 Equality Act 2010

FTT First Tier Tribunal. The independent court-like body to which parents (in relation to a child) or a young person (on their own account) can appeal in relation to decisions about the EHCP process and EHCPs. The term "SENDIST" or "SENT" or "tribunal" is also used by some people and in some contexts.

FTT (HESC) Rules First Tier Tribunal (Health, Education and Social Care) Rules 2008; i.e. the rules that specify the processes for FTT appeals.

HCP health care provision, which is "the provision of healthcare health care services as part of the comprehensive health service in England continued under **section 1(1) of the National Health Service Act 2006**": **CFA2014 s21(3)**

ICB Integrated Care Board. These are the local NHS bodies generally responsible for providing health care provision in their area. Until July 2022, the equivalent bodies were CCGs.

Independent living skills This includes finding employment, obtaining accommodation and participation in society (**Regs2014 r2(2)**), and will include basic living skills such as (for example) dressing, washing, food preparation etc.

Independent school Means (by virtue of **EA1996 s463**) a school which is not maintained by the LA (this includes Academies and private schools)

LA Local Authority. The relevant LA responsible for education provision for a particular child is set out in **CFA2014 s24**. In an area with a "county council", it is likely to be the County Council. Where there is a "unitary authority" (such as a "borough council") it is likely to be that body. The previous expression "local education authority" (LEA) no longer exists so it should only appear in old documents.

Maintained in general terms is an educational institution which is funded by, and operates under the oversight of, an LA. More legalistically: (a) a community, foundation or voluntary school, or (b) a community or foundation special school not established in a hospital: **CFA2014 s83(2)**

Mainstream means (by **CFA2014 s83(2)**: (a) a maintained school that is not a special school, or (b) an Academy school that is not a special school.

MLD moderate learning difficulties

National Trial The FTT procedure currently being operated as an experiment by which health and social care needs and provision can be considered by the FTT alongside consideration of educational matters. More: **Can I appeal to the FTT about health or social care provision when I appeal the education provision?**

NHSA2006 National Health Services Act 2006

Paramountcy principle The principle that the child's welfare shall be the Court's paramount consideration, see **Children Act 1989 s1(1)**

Peer group The other children who a CYP interacts with including in class.

Personal budget The amount an LA has identified as available to secure particular provision which is specified with a view to the child's parent or the young person being involved in securing the provision. See **CFA2014 s49** and **The Special Educational Needs (Personal Budgets) Regulations 2014**.

Placement This refers to the institution named in Section I of the EHC Plan. It is not a term used in the legislation but is often the heading in Section I of an EHC plan.

Private school A school that charges fees. Often referred to as an "independent school", however the legal definition of independent school includes Academy schools, which are not fee-paying.

Public sector equality duty (sometimes: **PSED)** The legal duty placed on all public authorities to consider the need to promote equality in everything they do, as defined in **Equality Act 2010 s149**.

Recoupment Regulations Inter-authority Recoupment (England) Regulations 2013

Regs2014 Special Educational Needs Regulations 2014.

SEN Special Educational Needs. A CYP is said to have SEN if they have a learning difficulty or disability which calls for SEP to be made for them: **CFA2014 s20**. More: **Are there particular rules about whether a child or young person has special educational needs?**

SEN Regs2014 Special Educational Needs Regulations 2014

SEND Guidance 19-25 DoE's guidance 'SEND: 19-25 year olds' entitlement to EHC plans, access guidance here

SEP Special Educational Provision. SEP is educational or training provision that is additional to, or different from, that generally made for others of the same age in mainstream provision: **CFA2014 s21**. More: **08.02 Is there a rule specifying what counts as SEP?**

SCP Social Care Provision, which is “provision made by a local authority in the exercise of its social services functions”: **CFA2014 s21(4)**; such provision is sometimes called “social care” or “community care”.

Section 41 School **CFA2014 s41** allows independent special schools and special post-16 institutions to apply to be approved (and then to be approved) as schools which can be the focus of a parental or young person’s request for a particular placement in circumstances where there is then a qualified presumption in favour of that request. More: **Must the LA consult with a candidate placement before naming it in section I?** and **Can parent’s/young person request a particular placement?**

Special school Means (by **EA1996 s337**) a school which is specially organised to make SEP for pupils with SEN that is maintained by the LA, an Academy [special] school or a non-maintained special school.

Statement [of SEN] The (now historic) document under the EA1996 which was previously the equivalent of what is now an EHCP.

TCEA2007 Tribunals, Courts and Enforcement Act 2007, the legislation that established the FTT and UT

UT (also Upper Tribunal). The court-like body to which a parent or LOA can appeal to if they believe the FTT has made an error of law. The principles in its decisions are binding on the FTT.

Young person A person who is over compulsory school age but under 25: **CFA2014 s83(2)**

01 Context of SEN Law

01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

Caselaw decided in relation to **EA1996** is potentially relevant even though SEN law is now set out in the **CFA2014** including in the light of what the UT said in **Devon CC v OH [2016] UKUT 292 (AAC) #33**:"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".

01.02 What is the SEN Code of Practice?

The SEN Code of Practice (COP) is "statutory guidance" in relation to the SEN regime. Access **COP2015 here.** It is produced by the Secretary of State for Education following public consultation and Parliamentary approval.

01.03 Is the SEN Code of Practice binding on local authorities and the FTT?

No. **CFA2014 s77** requires bodies including local authorities and schools to "have regard to" the Code of Practice. That means that they must identify and correctly understand the relevant provisions of the **COP2015** and apply them unless they have and state clear reasons for not doing so: **W v Blaenau Gwent [2003] EWHC 2880 #17-18**.

However, an LA or the FTT must always be prepared to depart from the requirements of the Code where that is appropriate in the particular case rather than treating it as "strict rules": **S v Brent [2002] EWCA Civ 693 #15**. That said, guidance or a statutory code of this kind can only be departed from for good reason: **Munjaz v Mersey NHS Trust [2005] UKHL 58 #46**.

01.04 Can the SEN Code of Practice trump the CFA2014?

No. The **COP2015** cannot override the **CFA2014** (or indeed any other statutory obligations): **Devon CC v OH [2016] UKUT 0292 (AAC)** #45, **Staffordshire CC v JM [2016] UKUT 0246 (AAC)** #40.

02 Overview of SEN education

02.01 Do all CYPs with SEN have an EHCP?

No. As of **June 2025**, around 14% of pupils receive SEN support and 5.3% have an EHCP. These figures increased slightly from the previous year. **More details in section: EHCP Assessment and Issuing**

02.02 Are all children with SEN educated in a school?

No. **EA1996 s7** places a duty on parents to secure suitable fulltime education for their child. They can do that either by home educating their child, or by taking advantage of the educational provision offered by the State. The latter can be in the form of school places or by non-school provision. **CFA2014** specifies what the State (primarily in the form of the LA) must can and offer.

In that regard, an LA can only offer to arrange for SEP to be delivered "otherwise than in a school" (such as through a home-based package) if it is satisfied that would be inappropriate for the provision to be made in a school: **CFA2014 s61**.

Overall a child need not be educated in a school if (1) their parent has chosen to provide their education, or (2) if the LA considers it would not be appropriate for them to be educated in a school.

More: Chapter 09 EHCP section I (placement) > Where parents seek non-school placement such as EOTAS

02.03 Do all children with SEN who attend schools attend special schools?

No. Contrary to the impression which the House of Lords Judicial Committee (predecessor to the Supreme Court) seemed to have in **B v Harrow (No 1) [2000] ELR 109**, not all children with EHCPs (then Statements) attend special schools.

Indeed, most children with EHCPs, and all children with SEN but no EHCP whose parents choose to have them educated in a school, attend mainstream schools (either maintained schools, mainstream academies, or mainstream private schools): **CFA2014 s34**.

02.04 Can a CYP attend a special school without an EHCP?

Generally, no. If the cost of the placement is being met by the LA or Secretary of State (i.e. the CYP's parents have not made other arrangements) then the CYP must attend a mainstream school unless they are attending a special school as part of an EHC needs assessment: **CFA2014 s34**.

02.05 Are the parents of a child with an EHCP legally obliged to send their child to the educational placement specified in that EHCP?

No. The parent can appeal to the FTT against the LA's decision to name that placement. More: **Section I – Placement**. If the appeal fails, then it is still perfectly lawful for the parent to decide either to home educate their child or to send their child to a private school. Linked to that, the obligation on an LA to secure the provision in an EHCP falls away if the child's parents have made suitable alternative arrangements for the child's education: **CFA2014 s42(5)**.

See: X County Council v DW [2005] EWHC 162 (Fam) #20 The decision of a FTT on placement did not oblige a parent to accept that decision and were free to make other arrangements.

See also: Buckinghamshire CC v SJ [2016] UKUT 254 (AAC) #14

02.06 Can the parent of a child with an EHCP refuse the placement the EHCP specifies, but insist that the LA still secures the SEP which the plans specifies in its section F?

No. What is set out in an EHCP by way of SEP, and the named placement, is a 'take it or leave it' package. It constitutes the LA's proposals for how it would discharge its obligations towards the child. If the child's parents do not want their child to attend that placement then they must make their own arrangements to discharge the obligation on them under **EA1996 s7** by securing that their child receives suitable education, including in relation to the child's SEN. Those alternative arrangements need not be the same as what was set out in any EHCP produced by the LA, but they must still be "suitable".

02.07 Must the LA (and then the FTT in an appeal) have regard to any particular factors when exercising its SEN functions?

Yes. 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**. The FTT must also have regard to these: **S v Worcestershire [2017] UKUT 92 (AAC) #70**.

As to how this applies in practice, a child may have very strong "feelings" in relation a particular placement which (given their specific mention in s.19, contrasting the position of parental "wishes" in **EA1996 s9**) must be considered by the FTT in determining Section I: **TM and SM v Liverpool CC [2024] UKUT 201 (AAC) #19**.

02.08 Does the paramountcy principle (which applies under the Children Act 1989 in other areas relating to children) apply here?

No. The paramountcy principle under **Children Act 1989 s1(1)** does not apply to SEN proceedings – a child's needs are not thereby elevated above all other considerations including cost, provided that the LA provision meets their assessed needs: **LB Richmond upon Thames v AC [2017] UKUT 173 #27**.

02.09 Does the LA have to consider future benefits to the national economy in how it delivers education?

No. This was considered in **Devon CC v OH [2016] UKUT 0292 (AAC) #59**: "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".

02.10 Does higher education fall within the SEN legal framework?

No. 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 **CFA2014 s83(4)**: **Gloucestershire CC v EH (SEN) [2017] UKUT 0085 (AAC) #43**, **RB Kensington and Chelsea v GG (SEN) [2017] UKUT 141 (AAC) #5**.

But note also the definition of "post-16 institution in **CFA2014 s83(4)** (as amended in 2019, as seen in the square brackets here):

"post-16 institution" means an institution which— (a) provides education or training for those over compulsory school age, but (b) is not a school or other institution which is within the higher education sector [and which is solely or principally concerned with the provision of] higher education;"

In other words, an institution in the HE sector is only a post-16 institution for our purposes if it is not principally concerned with higher education.

02.11 Does the LA have to publicise the provision available in its area?

Yes. The LA must publish information on the education, health and social care provision it expects to be available in its area for children and young people with SEN: **CFA2014 s30**; **COP2015 Chapter 4**. This is known as the "local offer". 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.

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) #54-57**.

02.12 Does the LA have to consult prior to making budgetary cuts?

Yes. Where the LA is making significant and sufficiently rigid cuts in SEN spend as part of budget setting, it has discharge the "public sector equality duty" (under **EqA2010 s149**); 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 2103 (Admin)**.

However, the duty to consult in CFA2014 s27 is a single and indivisible duty to consult those listed concerned with consideration at a strategic level of the local provision for SEN, and the decision on whether something is a "trigger" to consult is for the LA unless the decision not to consult was legally "irrational": **R (D) v Hackney LBC [2020] EWCA Civ 518 #44-46**.

02.13 Do the SEN provisions in CFA2014 operate in a vacuum?

No. The **COP2015** places considerable emphasis on effective partnerships between (amongst others) care and education: see for example: "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**.

More: 07.03 Can health or social care needs be special educational needs?
08.06 Can HCP (health care provision) or SCP (social care provision) also be SEP?
12.26 Can I appeal to the FTT about health or social care provision when I appeal the education provision?

02.14 Can the LA end up being responsible for funding an education placement under a social services 'care plan'?

Yes. An LA can be responsible for funding an educational placement under an Adult Social Care (ASC) Plan pursuant to the Care Act 2014: **CP v NE Lincolnshire [2019] EWCA Civ 1614**. In that case, CP had an EHCP 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 section 1(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 social care 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 judicial review 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.

02.15 Are there rules for determining which LA is responsible for a CYP's special educational provision?

Yes. The duties in relation to EHCPs are owed by the LA who is "responsible" for the CYP, and an LA "is responsible for a [CYP] if he or she is in the authority's area": **CFA2014 s24(1)**. Only one authority can be responsible: **JG v Kent CC [2016] EWHC 1102 (Admin) #121.**

Whether a child is "in the area" of an authority is decided by reference to "ordinary residence" rather than physical presence: **Hampshire CC v GC [2026] EWCA Civ 20 (AAC) #72**. It should be noted though that GC concerned an LA ceasing an EHCP where the child went overseas; and a previous case involving a child moving between authorities (and the EHCP being transferred) considered that "the features identified in the ordinary residence cases are…no more than indirect pointers" as to whether a CYP has moved: **JG #134** (this case was not cited in **GC**). However, the Noddy suggests that it is likely **GC** now applies generally to **CFA2014 s24(1)** and the ordinary residence test will be applied in both situations.

To the extent ordinary residence is the test, in **GC** the CA referred to **R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46**, in which the adopted test was whether a person "has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether or short or of long duration….And there must be a degree of settled purpose". The CA also referred to the "habitual residence" test in **A v A (Children: Habitual Residence) [2013] UKSC 60 #224** in which it was said "a child will share the habitual residence of his parents with whom he lives" and it has "a certain duration which reflects an adequate degree of permanence, although the law does not lay down any minimum duration. However, before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the

permanence of the residence and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

02.154 Where a CYP resides at a 52 week placement, does the LA in which the placement is located become responsible?

Probably not. The Department for Education's **High Needs Funding Guidance** states "it is our view that the child or young person continues to be considered as living in the local authority area that placed them in the residential provision. A residential school or college placement, even for 52 weeks of the year, is educational provision and not a place where a child or young person lives, meaning the child or young person will remain resident at their family home). Therefore, they would continue to have the duty to maintain any EHC plan.."

In the experience of Noddy, that guidance is generally applied by LAs. Further, adopting the test in Hampshire CC v GC [2026] EWCA Civ 20 (AAC) **#72**, the question is one of ordinary residence not physical presence which supports that conclusion.

02.155 Does an LA cease to be responsible where a CYP is temporarily absent?

No. A "temporary or transitory" move does not lead to a change in responsibility: **JG v Kent CC [2016] EWHC 1102 (Admin)** #133. Where a child's family moved to Dubai for a parent's military service, had kept their house in the UK and did not intend to settle permanently in Dubai, the child remained the responsibility of the LA: **Hampshire CC v GC [2026] EWCA Civ 20 (AAC) #77-78.**

Where a child is temporarily absent, but the LA remains responsible, it may reassess what provision is necessary and effectively "freeze" or "pause" their provision of educational provision: **GC #79**.

02.16 If a CYP moves into another LA area, does the EHCP transfer to the new LA?

Yes. Where a CYP moves from the area of one LA to another, then the old authority shall transfer the EHCP to the new authority on the day of the move, or where it has not become aware of the move at least 15 working days prior to that move, within 15 working days from when it became aware. From the date of transfer, the EHCP is treated as if it had been made by the new authority on the date it was made by the old authority and must be maintained by the new authority. The new authority must confirm that the EHCP has been transferred, and whether it proposes to carry out an assessment or review of EHCP within 6 weeks: **Regs2014 r15**.

The definition of "moves" is "intended to capture the situation where a child was formerly the responsibility of one authority, but has since become the responsibility of a different authority": **JG v**

Kent CC [2016] EWHC 1102 (Admin) #131. The test of responsibility is linked to ordinary residence: **Hampshire CC v GC [2026] EWCA Civ 20 (AAC) #72**. **More**: **02.15 Are there rules for determining which LA is responsible for a CYP's special educational provision?**

02.17 If an LA is responsible for maintaining and securing provision in an EHCP, are they automatically responsible for funding the provision?

No. **CFA2014 s24** applies to the maintenance of an EHCP, and securing provision in it. An LA may be able to recoup costs in particular circumstances.

EA1996 s579(4) provides that regulations may make provision for where a person belongs, and those regulations are the **Education (Areas to which Pupils and Students Belong) Regulations 1996**. Those work alongside the provisions for recoupment between LAs as set out in the **Inter-authority Recoupment (England) Regulations 2013**. The operation of these provisions are complex, and the detail is beyond the scope of the Noddy Guide, however in summary the only situation where recoupment is possible is in respect of looked after children.

02.18 Can the FTT determine a dispute between LAs on responsibility for an EHCP, or funding provision in an EHCP?

No. A transfer can only be challenged in court by way of judicial review: **JG v Kent CC [2016] EWHC 1102 (Admin) #143.** There is no right of appeal, or power of the FTT, to determine disputes on responsibility or funding. Where applicable, disputes may be referred to the Secretary of State pursuant to **EA1996 s495(3)** (responsibility for maintaining and securing provision) or **EA1996 579(4)** (belonging).

However, where a LA ceases to maintain a plan because it is "no longer responsible" for the CYP, on the basis a CYP has moved abroad, the FTT can determine an appeal against a decision to cease under **CFA 2014 s51(2)(f)** (see e.g. **Hampshire CC v GC [2026] EWCA Civ 20 (AAC)**).

02.19 Does the LA need to take extra steps to pay "due regard" under the PSED when delivering SEP in an EHCP?

No. The statutory mechanism for discharging a LA's education, health and social care duties to an individual is based upon that individual's own particular personal needs and characteristics, so it is impossible to argue no due regard has been had under [**EqA2010 s149**]: **R (AI) v LB Wandsworth [2023] EWHC 2088 (Admin) #92**.

Public sector equality duty (sometimes: PSED) The legal duty placed on all public authorities to consider the need to promote equality in everything they do, as defined in **Equality Act 2010 s149**.

SEP Special Educational Provision. SEP is educational or training provision that is additional to, or different from, that generally made for others of the same age in mainstream provision: **CFA2014 s21**. **More: 08.02 Is there a rule specifying what counts as SEP?**

02.20 Can a special school provide a less than 32.5 hours a week of school hours?

Yes. The DfE publishes non-statutory guidance **'Length of the School Week'** which provides a minimum expectation for mainstream schools to provide 32.5 hours, and specialist provision (which includes special schools) to have an "overall ambition to increase the length of the school week, where it is beneficial for their pupils to do so". That guidance (and following it) is not in itself unlawful discrimination: **R (CHO) v GB of Lonsdale School [2026] EWHC 166 (Admin)**. But the legality of any decision to reduce hours will still depend on its circumstances.

03 Children/young people with SEN but no EHCP

03.01 What are the obligations of an LA in relation to children who have SEN but do not have an EHCP?

LAs have a general obligation to provide information relating to information about SEN for the CYPs in their area: **CFA2014 s32(1)**.

For children who have SEN but who do not have (or do not yet have) an EHCP, the LA's only direct obligations are (1) in considering the need for an EHC needs assessment where that arises (**More: Are there any particular rules about when an LA has to undertake statutory assessment of a child or young person's SEN?**) and (2) to "make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them": **EA1996 s19**. Note though that the s19 duty to provide what is sometimes called Education Otherwise Than At School (EOTAS) is only a residual safety net for children who are genuinely unable to attend school, and not an easy route to getting the LA to support home-based education.

03.02 What are the obligations of a school or similar institution in relation to CYPs who do not have an EHCP?

Where a child with SEN is in a mainstream school "those concerned with making special educational provision for the child must secure that the child engages in the activities of the school together with children who do not have special educational needs…": **CFA2014 s35(2)**. That is an obligation which, in a clear-cut case could be legally enforced.

Where a CYP is registered at a mainstream school, a maintained nursery school, a 16 to 19 Academy, an alternative provision Academy, an institution within the further education sector, or a pupil referral unit, and has SEN then the institution "must use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made": **CFA2014 s66**.

That obligation would be difficult directly to legally enforce not least because lack of funds could be relied on as a reason to limit the SEP being provided. Some parents have sought an EHCP for their child in such circumstances.

04 General Duty of the Local Authority

When it comes to special educational provision for a child with an EHCP

04.01 Where a child has an EHCP, does the LA have to secure the 'best' provision for a child?

No. The LA is under a duty to secure the SEP which meets the CYP's assessed SEN (and cannot use cost as a reason not to do so). But an LA is not "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** (not publicly accessible in full but referred to in **Devon CC v OH [2016] UKUT 0292 (AAC) #34**).

See also: S v SEN Tribunal [1995] 1 WLR 1627 at 1638; and **Hammersmith & Fulham v Pivcevic & SENDIST [2006] EWHC 1709 (Admin) #51**.

When deciding on provision, the duty is to provide "what is reasonably required". That calls for a decision on whether what was proposed for inclusion in a **statement** was reasonably required or

whether it went beyond that, which is a judgment for the expert Tribunal: **A v Hertfordshire CC [2006] EWHC 3428 #25**.

There is no legal duty "to secure the best possible outcomes, nor to secure the provision that is most likely to result in such outcomes being obtained", although regard should be had to the best possible outcomes: **Devon CC v OH [2016] UKUT 0292 (AAC) #21(a), #33**.

Reference has been made to the Court as to what is "appropriate for a child": **C v Buckinghamshire CC [1999] ELR 179 at 189**. 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) #15**. The term "appropriate" is used in **COP2015 #6.1**.

This means, when it comes to 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 CYP'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 #13**. Deciding what is "appropriate" does not engage the provisions of the UN Convention on the Rights of Persons with Disabilities: **MS v Wakefield [2021] UKUT 316 (AAC) #86.**

04.02 Does the LA have a duty to make provision under an EHCP for a young person up to the age of 25 even where they may not obtain further qualifications?

Yes. Obtaining qualifications is not an essential element of education (i.e. the fact that a young person will not obtain qualifications does not mean that they do not need, or are not entitled to, education).

In **Buckinghamshire CC v SJ [2016] UKUT 254 (AAC)**, the FTT was entitled to direct the LA to issue an EHCP 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.

More: 10.02 Can an LA just cease to maintain (i.e. terminate) an EHCP?

04.03 Can the LA or FTT look only at what the child or young person requires now for the purposes of EHCPs?

No. "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.**

If the CYP is beyond year 9, the EHCP must include within the SEP, HCP and SCP 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" local authorities should start to plan successful transition to adulthood: **Guidance19-25**.

Where a CYP has an EHCP, whilst that is subject to an annual review, the LA/FTT will consider not just the short-term needs of a child: see, for example, **Wilkin & Goldthorpe v Coventry CC [1998] ELR 345**, where there was an error in only looking at the one term the child had at primary school and not at what would happen at secondary school too.

See further **LS v Oxfordshire CC [2013] UKUT 135 (AAC) #48**, in relation to whether the FTT should have known about academisation of a school which may have a bearing on delivery of SEP: "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 FTT to be informed of the impending change in the school's status".

This principle applies to the question of whether to assess or not: **Buckinghamshire v HW [2013] UKUT 470 (AAC) #20**.

When looking at placement, the ongoing costs of a placement should be considered, for example in **Southampton CC v G [2002] EWHC 1516**, it was found to be an error of law not to look at the cost of the whole GCSE course.

04.035 Does the LA have to review an EHCP?

Yes. The LA must carry out an Annual Review every 12 months : **CFA2014 s44, Regs 2014 r18**. Following this it may amend an EHCP: **Regs 2014 r22**. Where the LA decides to amend the EHCP, the proposed amendments must be notified to the parents within four weeks of the review meetings pursuant to Regs2014 r20(10): **R (L) v Devon CC [2022] EWHC 493 (Admin) #61**.

04.036 Does the LA have a deadline by which to amend a plan where a CYP is

Yes. A transfer between phases of education is early years education to school, infant school to junior school, primary school to middle school or secondary school, middle school to secondary school or

transferring between phases of education?

secondary school to a post 16 institution: **Regs2014 r2(1)**. In such a case the LA must review and amend (where necessary) the CYP's EHCP before 15 February in the calendar year of the transfer (or 31 March where transfer is from secondary school to post-16 institution): **Regs2014 r18(1)**.

04.037 Can a parent request a reassessment of the CYP?

Yes. Where the LA maintains an EHCP for a CYP it must consider securing a re-assessment of the educational, health care and social care needs of a child where a request is made by the child's parent, the young person or the Placement the CYP attends. It must secure that reassessment unless it has carried out an assessment in the previous six months or where it is considered not necessary for a further assessment: **CFA2014 s44(2)**, **Regs2014 r24**. The LA also has a discretion to secure a re-assessment at any other time where it thinks it is necessary: **CFA2014 s44(3)**.

The LA has a discretion to review at any time, and the parent can request a review. There is no duty on the LA to carry one out, but a decision not to carry one out must be lawful.

04.04 Can an LA be obliged to fund health care provision under an EHCP?

Yes. By **CFA2014 s21(5)** HCP which 'educates or trains' is deemed to be educational and so falls within section F of an EHCP. **More: 08.06 Can HCP (health care provision) or SCP (social care provision) also be SEP?**

But in other instances, the health care provision is not part of the FTT's jurisdiction (other than in cases which are part of the National Trial).

The fact that a placement cost includes both SEP and HCP elements does not mean that the FTT can take decisions about 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 (now ICB): **East Sussex CC v KS (SEN) [2017] UKUT 273 (AAC) #64-66**. The Noddy Guide finds it surprising that the LA (with its wide powers outside the education statutes) was held to have no legal 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).

05 EHCP assessment and issuing

05.01 Are there any particular rules about when an LA has to undertake statutory assessment of a child or young person's SEN?

Yes. But it is quite complicated! The overarching requirement is set out in the **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."

That means that the focus is now (consistently with earlier case law on **EA1996** even though **EA1996** had framed the test differently) directly on the question of whether an EHCP is required as the practical means to secure the SEP which the CYP requires.

However, the structure of **CFA2014 s36** is not totally clear. It appears to provide for a 2-stage process where a request has been made:

- The first stage is for LA to determine whether it may be necessary for SEP to be made in accordance with a LA (section 36(3)) in consultation with the child's parent or young person (section 36(4)). At this stage the statutory provisions do require any actual assessment of those needs. Where it is determined it is not necessary the child's parent or young person is notified (section 36(5)).
- The second stage arises where the LA has determined it may be necessary for SEP to be made in accordance with an EHCP (section 36(6)). It requires the LA to notify the parent or young person that they have a right to express views and submit evidence (section 36(7)). If after considering this, there is a duty to assess where the LA considers the CYP may have SEN and it may be necessary for SEP to be made in accordance with EHCP (section 36(8)).

Note that **COP2015** identifies additional considerations and factors which bear little resemblance to the statutory test – see **COP2015 #9.14** (with its focus on progress made and related matters). See on that: **Can the SEN Code of Practice trump the CFA2014?**

Per **Cambridgeshire CC v FL-J [2016] UKUT 225 (AAC) #4**, the two questions to be asked are (1) has the CYP a learning difficulty or disability, and (2) is it one that 'calls for' SEP? The question of whether SEP is "necessary" is at a later stage. The initial question on assessment is a "provisional and predictive" one.

The FTT will make a legal error if it asks itself "was special educational provision necessary" rather than "whether it may be necessary for special provision" to be made: **RB v Calderdale MBC (SEN) [2018] UKUT 390 (AAC) #22**.

The Court has suggested the test of whether a child "may" have special educational needs such that it should carry out a statutory assessment is "a low test": **R (W) v Hertfordshire CC [2023] EWHC 3138 (Admin) #3**.

Some of the old case law in relation to the test in **EA1996 section 323** will continue to be relevant (the old test was required considered of whether "it is necessary for the authority to determine the educational provision which any learning difficulty…calls for"). See for example **Buckinghamshire CC v HW [2013] UKUT 470 (AAC)** in which the UT rejected Buckinghamshire CC's argument that the FTT had been wrong to order an assessment without identifying the SEP the CYP 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 indispensable and useful or reasonable" (#16); "Whether something is necessary assumes a reason and a purpose. The reason and purpose is obviously to identify whether a child needs further educational provision and, perhaps, a statement of special educational needs" (#18).

See further: **SC & MS v Worcestershire CC [2016] UKUT 267 (AAC)** (LA of opinion child is "probably" a child for whom it is necessary to determine SEP, which is informed by "certainty and stability" of statement); **MC v Somerset CC [2015] UKUT 461 (AAC)** (may be lawful for authority not to assess where even if child exceeds general provision of schools, in the particular case the child has access to provision required).

05.02 Does a child or young person automatically get an EHCP following a statutory assessment?

No. It is entirely possible for an LA to decide in the light of a statutory assessment that the CYP does not after all require an EHCP in which case they should still have their SEN meets met by their school, but without the extra protection of an EHCP.

The legal test for that is in the **CFA2014**:

CFA2014 section 37(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 as above is now explicitly on what had – through case law – become the **EA1996** focus, namely on the simple and practical question of whether an EHCP is required by a CYP in order that the CYP gets the SEP they need (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**. The Noddy Guide would simply point out that what matters is the statutory test. The COP can explain that test,

but it cannot lawfully change the test as this appears to try and do. **More: Can the SEN Code of Practice trump the CFA2014?**

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) #36**.

The LA and FTT should generally ask whether, without an EHCP, "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) #14-15**, **DH & GH v Staffordshire CC [2018] UKUT 49 (AAC) #30**.

But the Noddy Guide thinks that the case law is currently a bit confused.

For a slightly different approach to the legal requirements, see **CB v Birmingham CC [2018] UKUT 13 (AAC) #16-17**: "there is a clear, albeit rough and ready resource line to be crossed before an EHCP 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". However, in reaching that different view about what was required the UT in that case 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 UT's suggestion in that case 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 EHCP trigger.

The Court of Appeal approved **HW** and **MC and KC** (as well as **Manchester CC v JW [2014] UKUT 168)** that what is necessary is a "value judgment" as to the approach to considering what is "necessary" in **Nottinghamshire CC v SF and GD [2020] EWCA Civ 226 #20-26**. 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", and "is not a concept that is to be over-defined". It also recorded that the provision made for the CYP 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 CYP 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 LA'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.

In that case, it is notable that the Court of Appeal upheld the legality of the FTT's conclusion that an EHCP was required even though the school had correctly identified the child's SEN and was making the required such that he was making appropriate progress: "We have concluded that the level and quality of provision currently made by [the school] for [HD] is unlikely to be replicated in other LA area mainstream schools, and would require an EHCP to ensure its delivery and monitoring." That shows that the door is firmly open for EHCPs which are essentially there as only a safety net (to prevent the specified SEP being removed or changed), rather than being used as levers to secure additional SEP as might more generally be the position.

The FTT can conclude that an EHCP is "necessary" even in the absence of a clear educational programme, particularly where the young person has suffered educational anxiety: **Gloucestershire CC v EH (SEN) [2017] UKUT 85 (AAC) #47**.

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) #5**.

More: 04.02 Does the LA have a duty to make provision under an EHCP for a young person up to the age of 25 even where they may not obtain further qualifications? More: 04.03 Can the LA or FTT look only at what the child or young person requires now?

Some of the caselaw under **EA1996** section 324 may continue to be relevant. See for example **SC & MS v Worcestershire CC [2016] UKUT 267 (AAC)** ("whether, without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered"); **LS v Oxfordshire CC [2013] UKUT 135 (AAC)** (relevance of whether SEP is secure); **JS v Worcestershire CC [2012] UKUT 451 (AAC)** (progress must be put into context of support being given and whether that support will continue); **MC v Somerset CC [2015] UKUT 461 (AAC)** (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").

06 EHCP general

06.01 Are there any particular rules about how an EHCP should be drafted?

Yes. 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.**

They 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**.

06.02 Is there a prescribed form of EHCP?

Yes. The required contents of an EHCP is set out in **CFA2014 s37**, **Regs2014 r12**, and **COP2015 #9.62-9.76**. An EHCP must set out:

- **section A** views, interests and aspirations of the child and his parents or the young person
- **section B** CYP's special educational needs

- **section C** CYP's health care needs which relate to their special educational needs
- **section D** CYP's social care needs which relate to their special educational needs or to a disability
- **section E** outcomes sought for him or her
- **section F** special educational provision required by the CYP
- **section G** any HCP reasonably required by the learning difficulties or disabilities which result in CYP having special educational needs
- **section H1** any SCP which must be made for the CYP as a result of the **Chronically Sick and Disabled Persons Act 1970 s2**
- **section H2** any other SCP reasonably required by the learning difficulties or disabilities which result in the CYP having special educational needs
- **section I** 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 EHCP, the type of school or other institution to be attended by the child or young person
- **section J** where any special educational provision is to be secured by a direct payment, the special educational needs and outcomes to be met by the direct payment

06.03 Should the sections of an EHCP be considered in a particular order?

Yes. When it comes to drafting an EHCP, the LA must first specify all of the CYP'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 (sent for consultation) must not include a name or type of placement (so that the placement decision is made in the light of whatever comes from section F and the consultation response): **CFA2014 s38(5)**.

This has been the subject of settled case law (albeit mostly in relation to statements under **EA1996**). See **The Learning Trust v MP [2007] EWHC 1634 (Admin) #42**: "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."

In that case the FTT had erred in law in deciding on Part 4 (predecessor to EHCP section I) 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 (placement) should only have been decided on after any disputes about Part 2 (SEN) and then 3 (SEP) had been resolved (and in the light of what had then been decided).

See also: A v Barnet [2003] EWHC 3368 #17, T v Neath Port Talbot [2007] EWHC 3039

More: Does Section F have to tie in with Section B?

06.04 Are there time limits in respect of the preparation of an EHCP?

Yes. The procedure for preparing an EHC Plan is set out in **Regs2014 r11-14**. The timescales are generally framed as absolute duties. For example **Regs2014 r13(2)** requires the LA to send the finalised EHCP to the child's parent or young person as soon as practicable and in any event within 20 weeks of the LA receiving a request for an EHC needs assessment or becoming the responsible LA. This is a hard edged legal duty and not a "best endeavours duty", and the timescale is not affected if a parent or young person appeals a refusal to assess which is conceded by the LA: **R (W) v Hertfordshire CC [2023] EWHC 3138 (Admin) #16-17**. Challenging a failure to comply with a time period is not within the scope of an FTT appeal so is a matter for judicial review: **#32**. The Court may grant a declaration that the LA was unlawfully acting in breach of statutory duty even if, after a claim is issued, the LA reaches a decision rendering the claim academic in practical terms; indeed that will generally be the norm unless there are reasons not to make a declaration and particularly appropriate where there is evidence of the LA missing deadlines in other cases: **R (JSC) v Cambridgeshire CC [2026] EWHC 68 (Admin) #81-89**.

07 EHCP section B

Special educational needs

07.01 Are there particular rules about whether a child or young person has special educational needs?

Yes. The rules are set out in **CFA2014**.

CFA2014 s20: a CYP 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."

The comparison is now between the provision this CYP requires and what is generally provided to other CYP in mainstream schools generally (i.e. nationally, which is a change in approach from that under the previous legislation). The comparison with what is provided generally to others of the same age – i.e. with general mainstream provision and not with what mainstream institutions might provide to some pupils/young people. So the question of whether a CYP has SEN does not change depending on where they live or where they study.

In relation to disability, see **EqA2010 s6**.

See also: COP2015 Introduction xiii-xxiii and **Disability Law in Education No-nonsense Guide**

07.02 Do all disabilities within the EA2010 constitute special educational needs?

No. Not every disability (as defined by **EA2010 s6**) falls within section **CFA2014 s20(2)(b)**. A disability which falls within **CFA2014 s20(2)(b)** must be such as to 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 (which might not be the case if the child/young person only had, say, a physical impairment): **Hertfordshire v MC & KC [2016] UKUT 385 (AAC) #14**.

07.03 Can health or social care needs be special educational needs?

Yes. In specified circumstances something which is generally provided by the NHS or social services ends up being also treated, in SEN law, as "educational provision" (which then ends up being included

as part of the SEP in section F of an EHCP and potentially also in the sections of the EHCP dealing with health care provision or social care provision).

See **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 CYP. 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. It follows that the needs which require that provision, are then SEN.

The most obvious effect of this is that speech and language therapy is almost always SEP and so communication needs are almost always an SEN and not just a health care need.

More: 08.02 Is there a rule specifying what counts as SEP?
08.06 Can health or social care provision also be educational provision?
08.07 Is Speech and Language Therapy SEP?
08.03 Can learning life skills be SEP?

07.04 Does the cause of a child or young person's SEN need to be known?

No. What matters is the impact of the impairment or disability in question on the CYP, not the medical or other reason for the impairment or its impact.

It follows that a CYP's SEN "may be accurately assessed without knowing their precise cause": **SG v Denbighshire CC [2018] UKUT 369 (AAC) #40** (note this was a UT permission decision but it has been published by the UT itself nonetheless so is likely to be treated as authoritative).

07.05 Does Section F have to tie in with Section B?

Yes. "Provision must be specified for each and every need specified in Section B": **COP2015 #9.69(F).** However, it has been held Section B can include narrative description of a child as well as specifying SEN (compare with: **R v Secretary of State for Education ex p E [1992] 1 FLR 377): W v Leeds CC [2005] EWCA Civ 988 #35**.

Some EHCPs have reference to a child's "primary need" and "secondary need". This is not unlawful, but such additions do not change the underlying legal obligations of the LA. Adding these labels does not change the legal requirement to specify all of the CYP's identified SEN.

More: 06.03 Should the sections of an EHCP be considered in a particular order?

08 EHCP section F

special educational provision

08.01 Does "provision" set out in an EHCP (section F) have to link to the "outcomes" set out in section E?

Yes. "It should be clear how the provision will support achievement of the outcomes": **COP2015 #9.69(F).** The outcomes are the "benefit or difference made to an individual as a result of an intervention": **COP2015 #9.66**.

If the FTT allows an appeal and recasts SEP in the EHCP, then it may make consequential amendments to the outcomes to fit with the SEP – even though there is no specific appeal right in respect of Section E: **S v Worcestershire CC (SEN) [2017] UKUT 0092 (AAC) #84-85**.

The principle under the **EA1996** remains applicable, that where something is identified as an "objective" in Part 3A (predecessor to an outcome), Part 3B (provision) needs to specify the SEP intended to meet that objective: **C v East Sussex CC [2004] EWHC 3122 (Admin) #17**. **More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?**

08.02 Is there a rule specifying what counts as SEP?

Yes. **CFA2014** provides for a three-way split between the different kinds of provision which a child or young person might need namely (special) educational provision (SEP), Social Care Provision (SCP) and Health Care Provision (HCP). **CFA2014 s21**:

- SEP (for a CYP 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 the **National Health Service Act 2006 s1(1)**. This means the provision must actually be being provided by the NHS, so provision of a particular therapy which was being

privately funded would not fall within this (so as to make it HCP) even if it could in theory be NHS funded (which would make it HCP): **R & RK v Hertfordshire CC [2025] UKUT 381 (AAC) #20-22**.

As to what is "educational", education "involves learning knowledge and acquiring skills" and a variety of factors may impede different elements of that process. What is "educational and training provision" pursuant to **CFA2014 s21(1)** does not need to actually "educate or train" (cf. deemed educational provision pursuant to **CFA 2014 s21(5)**). **More**: **08.06 Can HCP or SCP also be SEP?**

In considering whether provision is "educational" it may be helpful to consider **COP2015 #6.28-6.35** which brings together and classifies these factors under communication and interaction; cognition and learning; social, emotional and mental health difficulties; and sensory and/or physical needs: **EAM v East Sussex CC [2022] UKUT 193 (AAC) #7-10, #18-19**. In that case, a wired internet connection was considered SEP for a child who had electromagnetic hypersensitivity, because of the difficulties she had using computers, which affected how teaching is communicated to her and sensory needs which affected her use of computers: **#24-29; also R & RK v Hertfordshire CC [2025] UKUT 381 (AAC):** the hearing aid loop helps here access education and so is educational provision even it does not directly "education or train". Further, something which supports (or even facilitates) education can lawfully be educational provision, such as mentoring support: **Westminster CC v FTT [2023] UKUT 177 (AAC)** #108-109.

More: 07.03 Can health or social care needs also be special educational needs?
08.06 Can HCP (health care provision) or SCP (social care provision) also be SEP?

It may also be useful sometimes to look at the old **EA1996** caselaw (remembering though that the **EA1996** did not use the SEP/HCP/SCP split but, instead, looked only at whether provision was "educational" or "non-educational"). **More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?**

Some cases under **EA1996**: **W v Leeds City Council [2005] EWCA Civ 988** (the FTT 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 educational tribunal); **LB Bromley v SENT [1999] ELR 260** (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 FTT. The FTT 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); **A v Hertfordshire CC [2006] EWHC 3428** (it is well

established that there is no hard boundary between "educational" and "non-educational" – some things could be both – the LA, then FTT, decides. Just because particular provision brings some educational benefit, it does not follow that there is a special educational need for it. It certainly does not 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); **DC & DC v Hertfordshire CC [2016] UKUT 379 (AAC)** **#17** (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").

08.03 Can learning life skills be SEP?

Yes. Where a CYP does not just need help with basic life skills (such as dressing or washing) (sometimes referred to as independent living skills), which would be social care, but also needs to learn those things (such that the provision in question needs to educate/train the CYP to help develop/enhance their independent living skills or basic life skills) which could make it also educational provision; and so the CYP has an educational need arising from their difficulties in those areas.

More: 08.02 Is there a rule specifying what counts as SEP?

08.04 Can a requirement for parent/teacher meetings be SEP for the child or young/person?

Yes. In **HN v South Tyneside Council (SEN) [2019] UKUT 380 (AAC)** **#28, 31**, 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 provides something of educational worth to the child?". It considered that "meetings between parent and teacher might, in some circumstances, amount to SEP. That could be so 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 that was considered "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 of an EHCP.

More: 08.02 Is there a rule specifying what counts as SEP?

08.05 Can learned behaviour, such as sexualised behaviour, give rise to a need for SEP?

Yes. 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 #25-26**.

More: 08.02 Is there a rule specifying what counts as SEP?

08.06 Can HCP (health care provision) or SCP (social care provision) also be SEP?

Yes. 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)." Whether the particular item of HCP or SCP educates or trains for the CYP in question (which is what matters) is a judgment to be made by the LA (or FTT on appeal): **R & RK v Hertfordshire CC [2025] UKUT 381 (AAC) #27.**

There is no rule that SEP is provision which is "exclusively educational", and "there is no requirement of exclusivity in **CFA2014 s21(5)**: **East Sussex CC v JC [2018] UKUT 81 (AAC) #22**. See also: **LB Bromley v SENT** [1999] ELR 260 and **A v Hertfordshire CC** [2006] EWHC 3428 in relation to "educational" generally.

The task of the FTT 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 **CFA2014 s21(5): East Sussex CC v TW [2016] UKUT 528 (AAC) #15-26** (although the FTT has greater powers in respect of social care provision during the national trial).

To be deemed SEP, the provision must "educate" or "train". This is different to whether something is "educational" (for the purposes of being direct SEP). For example, a hearing aid enabling a pupil to hear the class can be (direct) educational provision even though it does not itself "educate" the pupil: **EAM v East Sussex CC [2022] UKUT 193 (AAC) #7-10.**

This example demonstrates there is a distinction between the terms "educational provision" (**CFA2014 s20(1), 21(1)-(2)**) and "educates or trains" (**CFA 2014 s21(5)**), such that "educational provision" is wider than the range of things which provide "education and training". HCP (or SCP)

may also be "educational provision", and where this is a possibility the FTT should consider first whether health care provision "educates or trains" before considering direct educational provision: **R & RK #29-30, #41-43.**

In **East Sussex CC v KS [2017] UKUT 273 (AAC) #89**, the UT approved of **City of Bradford v A [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 young person 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) #29**: "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 FTT 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.

The UT has left open the question of whether direct SEP and deemed SEP are mutually exclusive: **Westminster CC v FTT [2023] UKUT 177 (AAC) #110**.

Where provision is SEP by virtue of **CFA s21(5)**, then it is SEP "instead of" HCP or SCP provision i.e. it is no longer HCP or SCP for the purposes of the EHCP. As such, any provision in sections G or H is *not* SEP: **R (LS) v LB Merton [2024] EWHC 584 #47**. It would therefore only form part of recommendations of the FTT, and not constitute an order. That prohibition on duplication should not though lead to provision being split into components, with an SEP element in section F and an SCP element in section G. **More: 12.27 Can you enforce an FTT recommendation that health or social care provision is specified in an EHCP?**

More: 08.02 Is there a rule specifying what counts as SEP?
08.08 Can Psychiatric input be SEP?

08.07 Is Speech and Language Therapy SEP?

Yes, generally so. "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 EHCP 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**.

08.08 Can psychiatric input be SEP?

Yes. Psychiatric input is capable of being SEP, but whether it is in any particular case is a question of fact for the LA and FTT (but not, like the case in question, "vague well-being sessions"): **DC & DC v Hertfordshire CC [2016] UKUT 379 (AAC) #11-20**.

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?
08.06 Can HCP (health care provision) or SCP (social care provision) also be SEP?

08.09 If a child is placed in a different year group is that SEP?

Yes. Placement in a different year group to that indicated by a CYP's chronological age is SEP: **AB v North Somerset [2010] UKUT 8 #28**. It follows that a CYP with an EHCP can only be placed in a different year group if that has been specified in section F of their EHCP. It follows in turn that the decision to place such a CYP in a different year group (or a decision to refuse to do so) can be part of an FTT appeal against the contents of their EHCP.

More: 08.02 Is there a rule specifying what counts as SEP?

08.10 If a child needs to be in small groups or small classes for some or all of the time is that SEP?

Yes. If the child needs small group teaching when not all children in a mainstream school would be getting it, or to be in classes smaller than in a mainstream school, then that is SEP: **H v Leicestershire [2000] ELR 471.**

More: 08.02 Is there a rule specifying what counts as SEP?

08.11 If a child or young person needs to be with a particular peer group other than that in a mainstream class, is that SEP?

Yes. A non-mainstream peer group, in law, is SEP. In **AJ v LB Croydon [2020] UKUT 246 (AAC) #65**, the UT held the FTT unlawfully named an ASD special school when nothing in Section F of the EHCP suggested or provided that the child required such a placement, or anything other than a mainstream placement.

This potentially precludes special school placements being justified by reference to peer group considerations when that has not been set out in Section F.

More: 08.02 Is there a rule specifying what counts as SEP?

08.12 Do terms "waking day curriculum" or "extended day curriculum" have any legal meaning?

No. The **UT** has acknowledged the imprecision of the term "waking day curriculum". 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) #28-30**.

Some of the dangers of the use of the non-statutory term "**waking day curriculum**" as a proxy for the more nuanced approach which is required have been explained in **LB Southwark v WE [2021] UKUT 241 (AAC)**. UTJ Jacobs memorably stated at **#1** in relation to the term "waking day curriculum": "If those words do not induce a feeling of dread in a judge of this Chamber, at least they produce a sense of foreboding". The following questions need to be asked: (1) does the child/young person have a learning difficulty or disability and does that call for SEP, if so the child/young person has SEN (Section B); (2) what SEP is called for (Section F); (3) what name or type of institution that the child/young person should attend. A "waking day curriculum straddles Sections F and I": **#5-12**. The FTT erred where it went beyond interpreting the existing wording of Section F in a Section I appeal: **#22-26**.

Noddy's experience is that the term "extended day curriculum" is sometimes now used instead, however in their view this term – though slightly more legally correct - suffers from the similar issues as "waking day curriculum" (not least in the use of the word 'curriculum').

More: 08.13 Is there a particular rule about when a child requires out of hours SEP?

08.13 Is there a particular rule about when a child requires out of hours SEP?

The key in each case is that (1) the provision in question (whether initially seen as educational provision or as SCP) involves education and/or training (which then means SCP is deemed SEP under **CFA 2014 s21(5)**) and (2) the need for it goes beyond or outside the ordinary school day.

Accordingly, the term 'waking day curriculum' does not, or should not at least, provide a short-cut way of avoiding the need properly to evaluate what out of school-hours provision the child or young person requires, and why: **LB Southwark v WE [2021] UKUT 241 (AAC) #5-12**. **More: Does the term "waking day curriculum" have any legal meaning?**

The focus should be on what SEP the child requires, and when. If the educational provision in question can only be made out of school hours (which means that it is necessarily SEP), then that should be clearly set out in Section F (as being SEP **More: 08.02 Is there a rule about what counts as**

SEP?), and the question then arises as to whether that necessitates a residential placement in Section I (or whether that our of school hours provision can be arranged by the LA in some other way). **More: 08.13 Is there a particular rule about when a child requires out of hours SEP?**, **08.135 Where a CYP requires SEP outside the school day does that necessarily mean they require a residential placement?**

Examples of that situation might include:

- the position where more of the provision in question is needed than can be delivered within the hours of the school day;
- where the child/young person specifically needs that provision throughout their waking hours (or at least beyond the school day); or
- because the educational provision in question relates to something which does not happen at school, such as teaching the child/young person basic life skills or independent living skills such to dress or wash themselves when they wake up or at bedtime.

More: 08.03 Can learning life skills be SEP?

The term is often used where it is said a child needs "consistency of approach". It has been said that a **"**waking day curriculum" may be justified if the CYP needs to "translate into his home and social and indeed all areas of his life and functioning, the skill which he [sic] learns within the school and school room": **S v SENDIST [2007] EWHC 1139 #17, #19**.

However, a need for consistency of approach (i.e. to be dealt with out of school hours in the same way as within school hours) is not necessarily an educational need which should be met beyond the school day: **LB Hammersmith and Fulham v JH [2012] UKUT 328 (AAC) #18-19**. This does not mean in a particular case the FTT cannot lawfully decide that a need for a consistency of provision is special educational provision in the circumstances of the particular young person, but it would be in extremely rare cases where consistency alone would justify programmes of learning beyond the ordinary school day: **Westminster CC v FTT [2023] UKUT 177 (AAC) #128, #131**.

In many cases (particularly involving a young person) there will be no dispute that provision in general is required outside of the school or college day. For example, a young person who is learning to cook in the college setting may need provision in the home setting to generalise those skills. The question

in this situation is whether or not that provision is SEP or SCP (SEP may either be direct educational provision because it is itself educational or training provision; or deemed provision because it is social care provision which educates or trains: **CFA 2014 s21(1) and (5)**). **More: 08.02 Is there a rule specifying what counts as SEP?**

Where it arises, the FTT is required to determine whether the provision is SEP or SCP. It is not sufficient to say that SCP to help a CYP "to generalise skills learnt at college in out of college time" becomes SEP by virtue of **CFA2014 s21(5)**. 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) #32**.

This will involve the FTT often needing to consider particular SEP specifically to determine whether it is SEP or SCP. Taking a "global" approach (i.e. deciding in general terms whether an extended day curriculum is required as if that were a freestanding and overarching question) is not legally correct: **HJ and MM v Birmingham CC [2025] UKUT 323 (AAC) #54-61**.

It is important also to note that parents/carers cannot be relied on to provide (or be expected or relied on to provide) any SEP in section F of the relevant **EHCP**. It follows that, where a need for educational provision outside the school day has been identified (and specified in section F) the LA cannot avoid the need to arrange that provision by saying that the parents should make that provision at home.
More: 08.22 Is the duty on the LA to secure the provision in Section F absolute?
08.23 Can the LA require parents to provide education?

08.135 Where a CYP requires SEP outside the school day does that necessarily mean they require a residential placement?

No. The mere fact a CYP requires SEP outside of the school day does not necessarily mean they require a residential placement. It is important to ensure that the specific SEP required is set out in Section F, and the question then is whether that requires a residential provision to deliver it. As noted in **LB Southwark v WE [2021] UKUT 241 (AAC) #28**, independent living skills "may be best acquired outside a formal educational setting and therefore where "better to learn such skills than when attempting to live independently?" – i.e. where a young person is learning living skills, that may require an extended day curriculum but not require a residential placement.

Where the extended day programme arises due to a high need for consistency, the question to be asked is whether the "need for a consistent program was such that [the CYP's] education could not

reasonably be provided unless accommodated on the site where [the child] was educated": **Hampshire CC v JP [2009] UKUT 239 (AAC) #29, Westminster CC v FTT [2023] UKUT 177 (AAC) #128, #132**.

When finding an educational need for a residential placement, the FTT needs to clearly to explain its finding that out of school hours SEP was required: **Essex CC v DH (SEN) [2016] UKUT 463 (AAC)**

08.14 Does the SEP in section F of an EHCP have to be set out in detail?

Yes. **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). It follows that all the SEP has to be set out including things like:

- 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.**

More: 08.02 Is there a rule specifying what counts as SEP?

08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?

Yes. "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).**

The previous case law has been applied under the **CFA2014** (**More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?**).

For the classic formulation see: "The real question … is whether [the statement] is so specific and so clear as to leave no room for doubt as to what has been decided and what is needed in the individual case": **L v Clarke and Somerset [1998] ELR 129 #27**.

For a useful summary on the law on specificity and quantification of SEP, see **Worcestershire County Council v SE [2020] UKUT 217 (AAC) #74** per UTJ West, in which the UT set out 11 principles summarising the case law above. The UT gave further guidance, in summary: (i) a primary consideration in relation to specificity are the statutory duties of the LA, (ii) the LA is a free standing legal document which parties are entitled to rely upon if a question arises about provision being made, (iii) where there is a need for flexibility it should not be an excuse for lack of specificity where detail could reasonably have been provided, (iv) the nature of the provision will often point towards the necessary level of detail, (v) vague words like "support", "input", "interventions" and "opportunities" are unlikely to be sufficient, (vi) if a SEN pupil is to attend a mainstream school the FTT is likely to need more detail than if the pupil were at a special school, (vii) the FTT can be pragmatic if the evidence does not enable the FTT to set out the detail but it would be inappropriate to adjourn, (viii) the FTT can use its expertise as a specialist panel.

The requirement for specificity "is carefully worded to depend on what is appropriate in the particular: so specific, so clear, necessary *in the individual case*, and *Very often*", and in certain circumstances a "plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time" (here the child was to change schools a few months later): **BB v LB Barnet [2019] UKUT 285 #22**.

Think who, what, where and when?

In limited and specific circumstances, the need for specificity must be balanced against the need for flexibility and pragmatism. As articulated by the UT in **London Borough of Redbridge v HO (SEN) [2020] UKUT 323 (AAC) #16**: "The devil resides in the level of detail that the plan must contain. The EHCP is a legal document of an unusual type. Insofar as the FTT has made an order, the order must have sufficient certainty to be enforced in case of dispute. On the other hand, the plan is a living document for a developing pupil. The tension is between the certainty the parties, in particular the LA, need to comply with or enforce their respective duties and rights and the need for sufficient flexibility for the plan to remain relevant until the next review of the plan takes place. The child [will] develop or deteriorate considerably during that period." In this case provision that the child "required extracurricular support at home for one hour a week from a trusted and familiar psychologist" was unlawful as it (i) was too vague in respect of content; (ii) impermissibly retrofitted to require, in practice, only one psychologist (a reminder that provision cannot be tied to a named provider or individual, see further **DM v Cornwall CC [2022] UKUT 230 (AAC) #27**); (iii) contained selection

criteria entirely subjective to the pupil; which (iv) may make compliance by the LA practical impossibility; and (v) was in any event unjustified on the evidence or based on insufficient reasons.

"The specificity and flexibility of [Section F] 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 Suffolk CC [2010] UKUT 368 (AAC) #33**. The FTT 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) #15-16**.

As such, following the UT's decision in **Worcestershire County Council v SE [2020] UKUT 217 (AAC)**, there is now a distilled set of principles to apply when considering whether provision is sufficiently specific, but it remains the case that those principles will have to be applied to the facts of an individual case and that sometimes seemingly fine lines will need to be drawn.

Words like "as appropriate", "as required", "regular", "periodic", "subject to review" are all likely to be indicative of illegality.

However, as noted in **L**, and **E v Rotherham MBC [2002] ELR 25 #25**, the requirement that provision should be specified in terms of hours per week is not an absolute and universal precondition of the legality of a statement (see further below cases).

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 #6**.

A FTT should not "rubber stamp" an inadequately vague EHCP: **EC v North East Lincolnshire [2015] UKUT 648 (AAC) #28**. 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": **LB Bromley v SENT [1999] ELR 260** at **294**.

Some examples of wording from the authorities:

- In **B-M and B-M v Oxfordshire CC (SEN) [2018] UKUT 35 (AAC)** **#5**, 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?

- In **SB v Herefordshire CC [2018] UKUT 141 (AAC)** **#35** 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 EHCP 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 LA 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. The Noddy Guide would note there was no mention by judge of other key cases such as **K&K v The Authority [2013] UKUT 624 (AAC)**, **L v Clarke and Somerset [1998] ELR 129**, **E v Flintshire [2002] EWHC 388** and **IPSEA v Secretary of State [2003] EWCA Civ 7**. It is hard to see how the requirement of "small groups" the judge contemplated could be enforced.

- **S v SENDIST [2007] EWHC 1139** is an example (of a child in a special school) where "much more detail" was needed:

  "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."

And per **S v SENDIST** 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 speech and language therapy "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 FTT 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?].

- The Court in **M v Brighton and Hove City Council [2003] EWHC 1722**, condemned 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."
- In **JD v South Tyneside [2016] UKUT 9 (AAC)** **#8-11** the FTT 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.
- In **K&K v The Authority [2013] UKUT 624 (AAC)**, 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, 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.

- In **Mrs and Mr D v Cheshire East Council [2025] UKUT 187 (AAC)** the UT rejected the wording which had been put forward by the parties (full time 1:1 as they had agreed versus a "high level of 1:1" as the FTT decided) inappropriately then selecting 'a level' of 1:1 based on the provision in Section F and not on an assessment of the amount actually required. That lacked appropriate specificity.

More: 08.17 Can section F be less specific just because the child or young person is in a special school?

08.155 Does section F have to be more specific if the child is receiving education otherwise than at school?

Possibly, but it will depend on the individual case. In **DM v Cornwall County Council [2022] UKUT 230 #7** the UT considered "in some very general sense that educational provision which is bounded by a school building and the provision and rules that may apply to all pupils in that school may to an extent be assumed and not need to be stated whereas that provision may need to appear more explicitly in a case where the EHCP concerns a child being educated at home and otherwise than in school, but "the degree of specificity that is required for an individual child in their EHCP will always have to depend on the facts of that child's case".

08.16 Can section F be less specific because a child or young person's needs are changing?

Yes. A CYP's educational needs may be "changing" because the CYP itself is changing or because of the interaction between the CYP and its environment, all of which could justify less specificity in section F of their EHCP. But vagueness cannot be justified by reference to external factors or changes. Accordingly, it is not permissible to leave SEP unspecified or unquantified simply to allow for flexibility in the school's approach/arrangements: **IPSEA v Secretary of State [2003] EWCA Civ 7 #8**.

More: 08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?

08.17 Can section F be less specific just because the child or young person is in a special school?

Sometimes, yes. Where a CYP is at a special school or college, rather than a mainstream placement, that may be a factor to be taken into account in allowing greater flexibility: **East Sussex CC v TW [2016] UKUT 528 (AAC) #41**. However "even for children 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) #5**.

More: 08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?

08.18 Can section F be less specific because the LA has a policy not to specify/quantify SEP?

An LA policy not to properly specify/quantify is unlawful.

More: 08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?

08.19 Is it permitted to mention funding bands into section F and, if so, does that change the other requirements for section F?

An LA can refer to funding "bands" in an EHCP but not as an alternative to specifying/quantifying provision nor so as to override or limit the specified/quantified provision. What matters is that the SEP is properly specified and then provided.

More: 08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?

08.20 If an LA delegates all its SEN funding to schools, does it still have to specify and quantify SEP in section F of an EHCP?

Yes. The fact that the LA has a policy of delegating "all" SEN funds to schools independently of the EHCP regime is not an answer to an appeal against a refusal to assess or make an EHCP. Funding follows an EHCP not the other way round. The FTT is *not* bound by an LA policy which tries to have that effect.

More: 08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?

08.21 Can an EHCP leave matters in section F by a future assessment?

No. **CFA2014 s36(3)** specifies that the LA must "determine" whether SEP may be necessary reinforcing that the LA must determine rather than leaving matters for future assessment.

In **Worcestershire County Council v SE [2020] UKUT 217 (AAC) #82-85**, the **UT** held that a "termly review" was permissible, stating that the "ECHP as amended with the review provision allowed professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time. I am therefore satisfied that the provision for termly review also does not offend against the principle laid down by Laws J in L v. Clarke and Somerset." The Noddy Guide thinks that is perhaps problematic – it leaves it to the "professionals" to decide on SEP rather than either (1) the LA(which is charged with specifying the SEP in an EHCP subject to an appeal), or (2) the FTT in the event that the parent disagrees with what gets decided (since there would be no appeal against the review outcome); and it hard to see how that fits with the bedrock requirements for enforceability.

The EHCP must actually set out what has been decided by the LA and, on appeal, the FTT. Recall: It cannot leave matters over for future assessment, such as:

- 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.**

For example, in **E v Rotherham MBC [2001] EWHC 432**, condemning a statement (now EHCP) which provided speech and language therapy 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 [LA], 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."

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 9 #61-66**; although presumably the results of the later assessment should then have been encapsulated in a fresh statement.

Also see **Hampshire CC v JP [2009] UKUT 239 (AAC)**: the FTT 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.

In **DM v Cornwall CC [2022] UKUT 230 (AAC) #32**, the UT found an "All You Need to Know" document about a child was unlawful on the basis that "the tribunal, as the arbiter of the document, had to say more about how that document was to be compiled and what it should contain".

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

08.22 Is the duty on the LA to secure the provision in Section F absolute?

Yes. "The word "secure" [in **CFA2014 section 42**] is an ordinary English word and needs no gloss - what is plain is that the duty has no "reasonable endeavours" escape clause available to excuse failure to secure the provision specified": **ZK v LB Redbridge [2020] EWCA Civ 1597 #13**, **R (BA) v Nottingham CC [2021] EWHC 13348 (Admin) #27**.

In **N v North Tyneside BC [2010] EWCA Civ 135**, N sought to compel delivery of speech and language therapy in her Statement (now EHCP) by judicial review. The Administrative Court refused to compel delivery. The Court of Appeal held that to be wrong. The obligation under the **EA1996 s324(5)** on an LA to arrange the SEP specified in a statement of SEN was absolute (now under **CFA2014 section 42**). It was not merely a "best endeavours" obligation which was satisfied where the LA had arranged most of the elements of Part 3 (now section F) of the statement (now EHCP) and considered that the child did not require the others (despite the FTT 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. See also **BA v Nottinghamshire CC [2021] EWHC 1348 (Admin) #37** applying **North Tyneside** and emphasising that the period allowed for an LA to amend an EHCP following an FTT order is the time during which the required SEP is to be put in place.

Whilst the duty to secure the provision in Section F is absolute, the Court retains a discretion on remedy should a judicial review challenge be brought. An LA may argue that the Court should not make a 'mandatory order' (an order requiring the LA to secure the provision) if it can show that it has "taken all reasonable steps" to comply with the duty and must file detailed evidence on this. This issue was considered in the context of housing in **R (Imam) v Croydon LBC [2023] UKSC 45 #40-60, 66-71**, including a discussion of the factors the Court would use to exercise its discretion. The Court has applied Imam in **R (HXN) v LB Redbridge [2024] EWHC 443 (Admin) #93-98**, **R (L) v Hampshire CC [2024] EWHC 1928 (Admin) #59-70** and **R (JSH) v Westmorland and Furnes Council [2024] EWHC**

3362 (Admin) #73-91, and on the facts of each of those cases, made a mandatory order requiring SEP in the EHCP to be delivered within 5 weeks.

Separately, the Integrated Care Board is under an absolute duty to secure the provision in Section G of the EHC Plan: **CFA2014 s42(3)**, **R (A) v NCLICB [2024] EWHC 2682 (Admin) #69**.

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

08.23 Can the LA require parents to provide education?

No. **CFA2014 s42(2)**: Where an **EHCP** is in place, the "local authority must secure the specified special educational provision for the child or young person" (i.e. LA and not parents) unless the LA has satisfied itself that the parents have voluntarily made suitable alternative arrangements for **SEP** to be made in which case no duty falls on the LA to secure the SEP: **CFA2014 s42(5)**, **COP2015 #9.131-9.136**.

It follows that an EHCP cannot lawfully specify (in section F or as a placement in section I) provision which the LA has in mind would be made by parents without those parents having volunteered to do so: **A v Cambridgeshire [2002] EWHC 2391 #59-60**. By extension, an EHCP cannot effectively require elements of provision to be provided by "carers" who are privately funded by parents or (perhaps from a damages payment) the child/young person themselves: **TW and KW v Hampshire County Council [2022] UKUT 00305 (AAC) #23-26.**

It follows that the FTT should look at what an EHCP requires of parents and ask whether it is "educational" or "special educational provision": **KW v Rochdale [2003] EWHC 1770 #26**. See thus for example, **T v Hertfordshire CC [2004] EWCA Civ 927 #50**, in which the FTT lawfully found that there was no need for educational provision out of school hours (there was merely a need for "consistency of approach"). Parents or carers becoming involved outside of the school day in reinforcing what has been done in school and by trying to act consistently with it is not in itself necessarily SEP (though it may be for the particular child/young in question: **TA v Bowen & Solihull [2009] EWHC 5 #39, TW and KW v Hampshire County Council [2022] UKUT 00305 (AAC) #27.**

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014? 08.13 Is there a particular rule about when a child requires out of hours SEP? Can parents agree to provide some EOTAS?

08.24 Can the EHCP require other bodies to arrange/fund the required SEP?

No. **CFA2014 s42(2)**: Where an **EHCP** is maintained, the "LA must secure the specified special educational provision for the child or young person" (i.e. it is for the LA and not other bodies or people to secure it).

The EHCP must make provision in its section F for all 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 unless they have agreed to do so: **T v Hertfordshire CC [2004] EWCA Civ 927 #48**; **A v Cambridgeshire [2002] EWHC 2391 #60**; **N v North Tyneside BC [2010] EWCA Civ 135 #5**.

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) #14**.

08.25 Can Section F make it the school's responsibility to fund provision?

No. See **CFA2014 s42**: Where an EHCP is maintained, the "local authority must secure the specified special educational provision for the child or young person" (i.e. LA and not the school).

See also **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 an LA names an private school or private college in the plan as special educational provision it must also meet the costs of the fees, including any boarding and lodging where relevant."

Section F can make reference to the arrangements for funding the provision (such as the share of costs between school and LA or health and LA in a joint-funded placement): **R v Cumbria CC ex parte P [1995] ELR 337**.

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 CYP's entitlement. The LA remains ultimately responsible for making the provision if the school (or other party) fails to do so: **R v Oxfordshire ex p C [1996] ELR 153; R v Hillingdon ex p Queensmead School [1997] ELR 331.**

08.26 Does the FTT have to consider what a placement must provide by way of 'reasonable adjustments' when considering SEP?

No. Whilst the definition of SEN borrows the meaning of "disability" from the **EqA2010**, the statutory regimes are different and the FTT is not required to order provision which may constitute a "reasonable adjustment": **RB v Calderdale MBC (SEN) [2022] UKUT 136 (AAC) #46-49**.

09 EHCP section I (placement)

General

09.01 Is it permissible to decide on placement (section I) and then fit the SEP (section F) around that?

No. The law here was established from the **EA1996** era: ".... 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 at 233C** (**More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?)**

Accordingly, SEP (Section F) is a prior consideration to placement (Section I). Where the draft EHCP 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)**.

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) #75**.

In an appeal made only in respect of Section I, the FTT 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) #83**.

09.02 Can a placement decision be made without evidence about the school in question?

No. The decision to name a particular school must be based on proper evidence. Before naming a particular school, the FTT should normally have at the very least the prospectus, or oral evidence or a written statement from a member of the school's staff. Neither the fact of registration of an private 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 #21**. In practice, the FTT now also expects to have an Ofsted or equivalent report.

The decision as to whether a particular CYP should be placed at a particular school must be based on the particular CYP 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 #24**.

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

09.03 Can a placement be named in section I even if the SEP required in section F is not already in place?

Yes. The fact that a particular school does not have all the required facilities at the time of the **FTT** does not preclude it from being named provided that the FTT is properly satisfied by the assurances that it will do so by the time the child attends: **Lawrence v LB Southwark [2005] EWHC 1210 #14**; and, of course, the SEP specified in section F 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).**

See also: **Hampshire CC v JP [2009] UKUT 239 (AAC) #19-22** showing that a place need not even be available at the time of the hearing.

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

09.04 Does section I always have to name a particular placement?

No. Section I *must* set out the "type of school" which is considered appropriate (e.g. mainstream, special, residential, MLD, EBD, etc.).

But, unless **CFA2014 s39** compels the naming of a particular placement (because there is no basis to displace the placement requested by the parent or young person), there is no absolute legal obligation to name a particular placement: **Richardson v Solihull [1998] EWCA Civ 3535 #49**. It may be

appropriate where, for example, by the time of the appeal hearing neither party was oproposing the school which had been named on the EHCP which was under appeal, but where neither had yet identified a suitable school: **PS v LB Wandsworth [2025] UKUT 239 (AAC) #30**.

Where, however, the LA/**FTT** has identified "**mainstream**" as the "type", then it should normally name a particular school: **MH v Hounslow [2004] EWCA 770 #76**.

Type includes "primary" or "secondary" which must be specified: **R(M) v East Sussex [2009] EWHC 1651 #12**, rejecting the LA's argument that it did not need to amend an EHCP to anticipate secondary transfer where the EHCP did not specify "primary school" and where the school named made provision for ages 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 section I of an EHCP.

For an EHCP: **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 I)".

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

09.045 Can a "unit" within in a school be treated as a separate school in its own right for the purposes of a placement request?

Yes. A "unit" sited at a school but not part of it (and run as a partnership between several academies and the LA known as GROW) could nonetheless be a "school" for the purposes of **EA1996 s319** (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) #28-41**. 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) #28**.

More: 09.305 Is there a definition of a "mainstream school" for the purposes of the section 33 presumption?

09.0454 Can a virtual education provider be a "school"?

Yes. There is nothing in the plain meaning of the words of **EA1996 s4** or any related or contextual provision which mean that a virtual provider cannot be a "school" (provided it is an educational institution providing the required types of education and is outside FE/HE sectors etc as specified in s4). However, Noddy notes that the DfE (and seemingly Ofsted) are not treating them as 'schools' for inspection and registration purposes (although, confusingly, they also seek to distinguish such providers from 'traditional schools' which might rather suggest that they are schools). But Noddy sees no basis for that and, clearly, DfE/Ofsted practice should reflect rather than make law. The reference in **Regs2014 r12(1)(i)** to "attendance" cannot change the meaning of the primary legislation. But even if the r12(1)(i) reference to "attend" indeed connoted physical attendance, all that would do is disengage the obligation to include name/type in section I for a virtual provider, it would not remove any obligation (arising **CFA2014 s39** / **s40**) to secure that the plan named the provider.

09.0455 Should a virtual education provider be specified in Section I?

Yes, if that is where the CYP attends. **CFA2014 s39** / **s40** refer to school "or other educational institution". So even if a 'virtual school' were not a school it could still be specified in an ECHP. The requirement to consider whether the CYP's "attendance" would be incompatible with the efficient education of others does not (even if "attendance" connoted physical attendance) change that, nor does it impact on the question of whether such providers are 'schools'.

Where a CYP physically attends a placement part time, and then attends a virtual education provider part time arranged by the placement, then (depending on the facts) it is likely the placement the CYP physically attends should be named in Section I.

09.05 If parents disagree with each other about placement, is the LA/FTT obliged to resolve the dispute?

No. **CFA2014 s38(2)(b)(ii)** 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, it is open to a parent to argue one school would provide a better education than the other, and the FTT can undertake a comparative exercise. The FTT cannot name two schools, but it may name a type of school: **SG v Denbighshire CC [2016] UKUT 460 (AAC)** **#87**.

Where two parents disagree on a choice of maintained school, the LA or FTT may name a type of school only, and leave it to the family court to have the final say on which school the child will attend: **SG v Denbighshire CC [2016] UKUT 460 (AAC)** **#93, 99**.

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

09.06 Can the LA/FTT ignore the fact that the relationship between the parent and school has broken down in deciding on placement?

No. The FTT is entitled to take account of the breakdown in relationship in considering suitability of a placement and "give some weight to it": **L v Wandsworth [2006] EWHC 694 (QB) #25.**

More: 01.01 Why does the Noddy Guide refer to the EA1996 and cases related to it when SEN law is now in CFA2014?

09.07 Are a family's religious beliefs always relevant to placement in section I?

No. Parental religious beliefs can of course inform their thinking in requesting a placement under **CFA2014 s38**, but that does not in itself give them any greater importance than other factors informing the parental request.

However, the impact of religion can be relevant to the delivery of provision, for example how a CYP can access provision at a non-religious school where they have previously attended a religious school: **A v SENDIST & LB Barnet [2003] EWHC 3368 #22**.

09.08 Can the LA/FTT ignore the fact that a particular placement will cause stress to the pupil/young person?

No. The fact that a particular placement will cause great stress to the **CYP**, or even that they may refuse to attend, can be relevant when it comes to deciding on placement.

In **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 (now Section I) of her statement of SEN. Her parents' appeal was allowed because there had been a failure to address how, given her refusal, the FTT had concluded that the school could provide for her needs.

In **MW v Halton BC [2010] UKUT 34 (AAC) #37**, the UT considered that if the FTT were merely to find that a CYP, 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. In **A v A Local Authority (17 September 2021** not yet publicly reported**)**, UT Judge Hemingway held that the FTT had unlawfully

failed to consider for itself (the point not having been directly raised by the YP appellant) whether the stress which was said would arise from a particular placement was related to the YP's SEN in a way which would have made it significant in selecting her placement.

09.085 Should the FTT consider the impact of transition on a CYP when determining placement?

Yes. Where it is considering an "appropriate placement" this should include any difficulties arising from transitioning to another placement, such as whether the same courses are available: **W v Gloucestershire CC [2001] EWHC Admin 481 #21.**

09.09 Must the LA consult with a placement before naming it in section I?

Yes. The LA must consult with a placement before naming it: **CFA2014 s39(2), s40(3)**. Such a consultation must comply with the 'Sedley criteria', which are that (1) consultation must occur when the proposal to name the school is at a formative stage, (2) sufficient information must be given to permit the school to intelligently consider and respond, (3) adequate time must be given, (4) and the consultation response must conscientiously be taken into account by the LA: **R (Moseley) v LB Haringey [2014] UKSC 56 #25, COP2015 #9.80**.

However, a school should be careful before refusing to admit a CYP on the basis it was not consulted by the LA. Where a school is named in an EHCP, 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 Secretary of State has agreed with the school in a determination under **EA1996 s496** that the LA has unreasonably named the school in question): **N v Governing Body of a School [2014] EWHC 1238 (Admin)**.

A school can bring a judicial review challenge against an LA's decision to name it in an EHC Plan. But such a challenge would not succeed unless there was something unlawful about the LA's decision. This could include a failure to lawfully consult the school before deciding to name it. It would however not be enough merely for the school to disagree with the LA's assessment of (say) its suitability.

An example of illegality was seen with **R (An Academy Trust) v Medway Council [2019] EWHC 156 (Admin)** where the Court found, when it was transferred the child's EHCP from RB Greenwich, Medway Council had irrationally removed provision from Section F in order to name a particular school.

Another example of illegality was in **R (Swalcliffe Park School) v Wokingham Borough Council [2023] EWHC 1451 #80-89**, where the LA had not given sufficient consideration of the school's response to consultation, noting that consultation is a "dialogue" where a school raises concerns.

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.

Note in that regard that maintained schools, academies and section 41 schools have a duty to admit where named in the EHCP: **CFA2014 s43**.

Most academies also 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, they may not refuse to admit the CYP pending a determination; and any determination remains subject to a CYP's appeal to the FTT.

09.10 Surely parents/young people have a human right to the placement they want?

No. **ECHR Article 2 Protocol 1**:

"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."

A breach by a public body of A2P1 can give rise to a claim in damages pursuant to the **Human Rights Act 1998 section 8**.

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**.

However, where an 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) #156**.

09.11 Does ECHR Article 8 come into play when it comes to residential school placements?

Yes. **ECHR Article 8**: "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."

CB v LB Merton [2002] ELR 441 #20 rejected the argument that naming a residential school against parental wishes infringed the child's Article 8 rights; the FTT had not as such ordered the child to attend the school (because compelling attendance – which might engage Article 8 – would at most be a matter for the LA if it decided to serve a school attendance order). Any challenge would then relate to that order, not to the FTT's decision to order that the school be specified in the statement (not EHCP). That is because the naming of the school in an EHCP merely sets out the provision which the state (in the form of the LA) is offering.

More: Are the parents of a child with an EHCP legally obliged to send their child to the educational placement specified in that EHCP?

Where parents ask for a particular maintained school/academy (or other CFA2014 s38(2) placement)

09.12 Can parents/young person request a particular placement?

Yes. When a draft EHCP is prepared, the child's parents or the young person may express a preference that the LA should name a particular school or institution of the type listed: **CFA2014 s38(2)(b)(ii)**, **COP2015** #9.78.

Those listed are set out at **CFA2014 s38(3)** and are wider than simply maintained schools (under **EA1996**, a request could only be made for a maintained school):

"(a) a maintained school;

(b) a maintained nursery school;

(c) an Academy;

(d) an institution within the further education sector in England

(e) a non-maintained special school;

(f) an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval)."

That extension beyond "maintained schools" has the effect of putting academies/free schools on an equal footing with maintained schools.

The addition of section 41 schools, namely a "institution approved by …" under **CFA2014 s41** allows for individual independent schools to choose to 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 or academy). A spreadsheet list of section 41 schools can be found on the DfE website.

MORE: Must the LA consult with a candidate placement before naming it in section I?

When a parent or young person has requested such a placement, the LA is then required to consult the school or institution (**CFA2014 section 39(2)**), and must secure that the EHCP names the school or institution (**CFA2014 section 39(3)**) unless **CFA2014 section 39(4)** applies:

"(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

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

(i) the provision of efficient education for others, or

(ii) the efficient use of resources."

See also **COP2015 #9.79**

The FTT must consider under CFA 39(4)(a) whether the placement is "unsuitable" rather than "inappropriate", although if it applies the "inappropriate" test the error may not be material to the outcome: **LC and RC v Hampshire CC [2023] UKUT 281 #19-20**.

09.13 Can the LA/FTT refuse to name a requested s38(3) placement simply because it costs a bit more?

No. The mere fact that the parentally/young person-preferred placement is a bit more expensive is *not* an automatic barrier under **CFA2014 s39(2)** to placement in respect of efficient use of resources. The LA/FTT must balance the statutory weight given to the parental/young person preference against the extra cost in deciding whether the extra cost is "inefficient", and even if it is found to be "inefficient" the FTT must still then, as a second stage, balance the extra cost against any extra benefit it is claimed to bring for the child/young person: **Essex CC v SENDIST [2006] EWHC 1105 (Admin) #24-32** (upholding a decision in which the FTT had held that £4,000 extra was not 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/young person preferred placement is displaced **Surrey CC v P [1997] ELR 516**. See also **C v Lancashire [1997] ELR 377**.

09.135 Are the resources taken into account in s39(4) only those of the LA?

Possibly. For Statements under **EA1996**, the "efficient resources" in question were those of the LA responsible (not LAs generally): **B v Harrow (No 1) [2000] ELR 109**. This was such that the LA could take into account the cost of an out-of-area placement if that was requested; and the LA could take into account – in a special school funded on a place-led basis – the "wasted" cost of not placing the child at the school.

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 #12-13**.

The Noddy Guide considers that it cannot be assumed that the same will apply for EHCPs under **CFA2014**.

In particular, 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 section 39(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.

In **PD and AD v Stockton-on-Tees BC (SEN) [2019] UKUT 57 (AAC)** **#48** the **UT** suggested **CFA 2014 s39(4)** resources were limited to those of the LA itself: "section 39(4) requires the LA or the FTT standing in its shoes to look at the resources of the LA itself whereas section 9 requires the FTT to take a 'holistic' look and take a wide view of public expenditure rather than just the resources of the LA". However, it is (arguably) not "binding" on the FTT or other UT judges (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".

The opposite conclusion was reached in **PM v Worcestershire CC [2022] UKUT 53 (AAC)** **#44(d)**. There, the UT stated **CFA2014 s39(4)** "does not restrict resources only to those that would be expended by a local authority were a young person to attend a particular educational institution", taking into account high needs funding from central government provided through the Education and Skills Funding Agency. However, like **PD**, it is (arguably) not "binding" on the FTT or other UT judges because the ground to which the statement relates was decided on the basis the point was not put before the FTT (**#49**). The UT did not consider any of the prior case law on the point; and, on the basis it considered resources other than that of the LA could be taken into account, does not consider *what* other resources could be taken into account (e.g. is it limited to those of central government, or other public bodies such as a CCG?).

In summary, this point remains undetermined and the UT has reached differing conclusions.

More: Can parents/young person request a particular placement?
Must the LA consult with a candidate placement before naming it in section I?

09.14 In looking at the cost of a placement, does it make a difference if parents are prepared to pay the costs of transport?

Yes. Where parents/young person and LA both prefer placements falling within section 38, but attendance at the parentally/young person-preferred placement would lead to additional transport costs, the stages to consider are (1) the parental/young person preferred placement should be named alone (pursuant to **CFA2014 s39**) 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 requested placement, the **FTT** should determine whether the extra transport costs are unreasonable public expenditure (**EA1996 s9**) – if not the requested placement should be named alone, (3) if the costs are unreasonable, is it still incompatible if the parents/young person pay for transport – if not, then both placements can be named subject to parents/young person paying travel costs to their preferred school: **Dudley MBC v S [2012] EWCA Civ 346 #27**.

Where parents propose to arrange transport to a school, thus removing the transport cost from their proposed placement, the Tribunal will err if it does not consider (1) naming more than one school in Section I or (2) naming one school in Section I, subject to a condition that the parents arrange transport at their own expense: **S-MR v Carmarthenshire CC [2021] UKUT 294 (AAC) #7**.

More: **Can parents/young person request a particular placement?**

09.15 Can the parental/young person request for a particular placement be refused simply because it will impact on other children/young people?

No. The presumption of placing in line with parental/young person preference in **CFA2014 section 39(3)** is only displaced by a positive finding of "incompatibility with the efficient education for others" and not merely by evidence of an impact on those other learners: **Hampshire v R & SENDIST [2009] EWHC 626 #48**.

When considering the question whether "the attendance of the child at the school would be incompatible with the provision of efficient education for others" the FTT is entitled to consider the impact on all or any learners at the placement. When explaining its decision, however, it needs 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 others. Where a placement is nominally full, admitting learners over this number might be incompatible with the efficient education of others: **NA v LB Barnet [2010] UKUT 180 (AAC), [2010] ELR 617 #31, 36**. Where the FTT finds this is satisfied it must explain why the quality of provision at the placement "would unavoidably result in the quality of education provided to those other pupils falling below the threshold of "efficient education": **OO and BO v LB Bexley [2023] UKUT 223 (AAC) #12**. The UT's introduction of the word "unavoidably" puts a gloss on the statutory language which, if correct, would appear to imply an obligation to take steps (perhaps by way of SEP for the CYP in question) to "avoid" the incompatibility if possible.

More: **Can parents/young person request a particular placement?**

09.16 Does EA1996 s9 still apply if the parent requests a CFA2014 s38(2) placement under section CFA2014 s39(3)?

Yes. Even where (in the case of a child but not for a young person) the **CFA2014 s39(3)** *duty* to name the **CFA2014 s38(2)** placement) requested by parents has been displaced by (e.g.) "inefficient use of resources", the **EA1996 s9** obligation (which applies only in relation to children, as below) is still in play; i.e. s9 does not only apply where private school is requested: **O v Lewisham [2007] EWHC 2130 #16**; but note that the decision maker must consider **CFA2014 section 39(3)** and s9 separately – they do not collapse into a single test: **Ealing v SENDIST & K [2008] EWHC 193 (Admin).**

EA1996 s9 applies in the context of EHCPs but only applies to parental requests – i.e. not young persons - 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 provided).

More: Can parents/young person request a particular placement?

Where parents ask for a particular independent placement/provision (not within CFA2014 s38(2))

09.17 Can the LA/FTT ignore the parental preference?

No. The LA/FTT must always take into account what the parents (in the case of an EHCP for a child) have asked for: **EA1996 s9**. But is not the same as saying that the LA/FTT must agree to that preference.

In particular, consideration must be given 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 **EA1996 s9**: **C v Buckinghamshire (1999) ELR 179**.

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 #31**. However, it has been observed by one UT judge that "cases tend in my experience to be argued on the basis that, if there is no unreasonable expenditure, effect will be given to parental preference": **Hammersmith & Fulham LBC v L & F [2015] UKUT 523 (AAC) #40**.

However, note that section 9 only applied to "pupils", which does not apply to those over 18 receiving further education: **EA1996 s3**.

More: Can parents/young person request a particular placement?
Does EA1996 s9 still apply if the parent requests a CFA2014 s38(2) placement under section CFA2014 s39(3)?

09.18 Does the fact that the placement requested by parents people costs more automatically disqualify it?

No. Even if the FTT finds incompatibility under **EA1996 s9** (in the case of a request by a parent in respect of their child) that is not the end of the process. It does not mean that the FTT 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 FTT in the exercise of its discretion under **CFA2014 s40(2)(a)** and weighed in the balance among the other factors which the FTT considers to be relevant: **Hampshire v R & SENDIST [2009] EWHC 626 #65**.

EA1996 s9 should be approached in three stages: **IM v LB Croydon [2010] UKUT 205 (AAC) #9**: (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**)

An FTT cannot dodge these questions and must answer them. For example, a failure to decide whether the parent's preferred school is suitable constitutes an error of law: **EC v North East Lincolnshire [2015] UKUT 0648 (AAC) #21**.

More: Can parents/young person request a particular placement?
Does EA1996 s9 still apply if the parent requests a CFA2014 s38(2) placement under section CFA2014 s39(3)?

09.19 Does "efficient instruction and training" in EA1996 s9 mean education and training generally?

No. 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 particular child in question: **Hampshire v R & SENDIST [2009] EWHC 626 #28**.

09.20 Does the term "public expenditure" in EA1996 s9 mean only the education department's costs?

No. The term "public expenditure" within **EA1996 s9** is concerned with the impact of the parent's choice on the public purse generally (not just the education department or even just the **LA**'s costs).

It requires the LA (and on appeal the FTT) to take into account (for example) 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 #27**; **O v Lewisham [2007] EWHC 2130 #17**. See also **EH v KCC [2010] UKUT 376 (AAC) #21** and **KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC) #15-16**.

It also involves taking into account the (positive) financial impact on an 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 referring only to the resources of the home LA: **CM v Bexley [2011] UKUT 215 (AAC)**.

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 **EA1996 s9**: **X City Council v SENDIST, AB, MB & GB [2007] EWHC 2278 #12-13**.

09.21 Does "expenditure" in EA1996 s9 refer to the cost of the provision already in place?

No. When deciding how to approach a parental request under **EA1996 s9**, 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 CYP at no extra cost, then there is no additional public expenditure: **Oxfordshire v GB [2001] EWCA 1358 #16**.

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 FTT 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 #26**.

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 FTT 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**.

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 #12-13**.

Under the current 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 2026 r15**). 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) #126-128**. This position applies to the later versions of the regulations as well (**L & F** was decided under the 2013 Regs): **P v Worcestershire CC [2016] UKUT 120 (AAC)**.

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) #11**, 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.

Where a parent refuses to allow their child to attend 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) #21, 25**.

09.22 When calculating the extra cost of a parental placement for EA1996 section 9 purposes, is the LA/FTT only concerned with one year's costs?

No. When considering the cost balance for the purposes of **EA1996 s9**, the LA/FTT should look at the effect over time of the choice of placement – thus the FTT was wrong not to take 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.**

09.23 When deciding if extra cost is reasonable under EA1996 section 9, does the LA/FTT only look at educational benefits of the parental placement?

No. In deciding on the balance between extra costs and extra benefits for the purposes of **EA1996 s9**, all 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) #29**, **LB Croydon v K-A (SEN) [2022] UKUT 135 (AAC) #51** (note in this case, the UT doubted comments to the contrary in **KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC) #20-21**, see **K-A #40-45**).

09.24 Can an LA/FTT approach EA1996 s9 on the basis that any extra cost for a parental placement is "unreasonable"?

No. There are no hard and fast rules about how much extra expenditure counts as "unreasonable" so as to downgrade the parental preference for **EA1996 s9** purposes.

As to what is "unreasonable", note **Wardle-Heron v Newham [2002] EWHC 2806** in which the judge remitted back to the FTT 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 **Ealing v SENDIST & K [2008] EWHC 193**.

See also **MM & DM v Harrow [2010] UKUT 395 (AAC) #35** 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) #22-29** where even a £71,000 difference was still analysed on the facts and not dismissed as inevitably unreasonable. The UT found an extra £70,000 in the context of two placements costing over £200,000 might be expected to require "quite exceptional circumstances" to justify, but the FTT had not erred in finding advantages in health provision justified the extra expenditure: **LB Croydon v K-A [2022] UKUT 106 (AAC) #54-55**.

Conversely in **JI and SP v Hertfordshire CC (SEN) [2020] UKUT 200 (AAC) #48,** the UT considered a cost difference of £2,661 compared to £19,000 would have constituted unreasonable public expenditure.

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 FTT from naming it unless there is a clear explanation as to the additional benefit to be derived from the parental placement and the FTT 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.

09.25 If the parental school provides more than is required by the child, is the LA/FTT obliged to name it? (e.g. un-needed residential)

No. Even if the FTT 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 (for example residential provision) which the child does not need. The **FTT** should specify a type or consider adjourning if there may be other, less costly, options **Richardson v Solihull [1998] EWCA Civ 3535 #51, LB Hackney v Silaydin [1999] ELR 571**.

However, this does not mean in every hearing where the school named in Section I is inappropriate a 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 [2001] EWHC Admin 823 #14**.

09.26 Is the LA/FTT obliged to consider fall-back options?

No. In **LB Bromley v SENT [1999] ELR 260**, Sedley LJ rejected an argument by a LA that FTT should have given the LA opportunities to put forward alternative schools after it had rejected the LA initial placement 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."

See also Stanley Burnton J in **Hammersmith & Fulham v Pivcevic & SENDIST [2006] EWHC 1709 (Admin) #62** "if a considerable amount of money turns on a decision of the FTT it is incumbent on the local authority to prepare for and conduct its case with greater care."

A parent is entitled to express a first choice private school placement, and a fall back provision. As in **KC v LB Hammersmith and Fulham [2015] UKUT 177 (AAC) #23**, the FTT 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 FTT had to consider the parental mainstream

fall back to which, by operation of **EA1996 s316**, the parents would then have been entitled (over the LA's maintained special school proposal).

09.27 Are Academies and Free Schools legally the same as maintained schools?

No. Academies are independent schools not maintained schools. They operate under contract (the Funding Agreement) between the Secretary of State and an "Academy Trust" now taking effect under the Academies Act 2010. 'Free Schools' is the term used to describe some academies.

Legal provisions which only apply specifically to "maintained schools" do not directly apply to academies. However, academy Funding Agreements often make some of those provisions apply to the particular academy in question.

09.28 Are academies and free schools legally the same as maintained schools when it comes to SEN?

Yes. **CFA2014** SEN provisions apply to academies in the same way that they apply to maintained schools. **CFA2014** places statutory SEN duties on academies just as it does on maintained schools.

For example, they can be the subject of a parental request for a placement with the same effect as for a maintained school (**CFA s38(3)(c)**) and have a duty to admit when named (**CFA2014 s43(1) and (2)**).

Where parents want a maintained mainstream placement (or mainstream academy placement for EHCP)

09.29 Can the LA/FTT decide to name a special school just because it thinks that would be suitable, rather than a mainstream school requested by the parent/young person?

No. **CFA2014 s33** provides that where (1) the maintained school requested by the parents/young person under **CFA2014 s38(2)** 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:

"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—

(a) the wishes of the child's parent or the young person, or

(b) the provision of efficient education for others".

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)**.

When it comes to 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)**).

See overall **COP2015 #9.88-9.90**.

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**.

The UT has upheld an FTT decision which found the mainstream placement sought by the parents "not suitable" on the basis that "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) #23, 32**. 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" (**#30**).

09.30 But surely the LA/FTT can ask whether the particular requested mainstream placement is suitable/appropriate?

No. "Suitability" is no longer an issue when considering whether to specify mainstream as a "type" in Section I 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.

CFA2014 s33 and **s39** provide a two stage process whereby the LA is under a duty to accede to the parental preference for a particular maintained school/academy/etc (**CFA2014 39(3)**) unless it is unsuitable or is incompatible with the efficient use of resources or education of others (**CFA2014 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 (**CFA2014 s39(5)**) because of the LA's duty to secure mainstream (**CFA2014 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.

A school which is "unsuitable" (**CFA2014 s39(4)**) may nevertheless become "appropriate" within the context of the sequential decision making process (**CFA2014 s39(5)**) once reasonable steps have been identified to be taken which would upgrade it.

See **ME v LB Southwark [2017] UKUT 73 (AAC)** **#7-22** for an extensive outline of the law on this point. Note also **R (An Academy Trust) v Medway Council [2019] EWHC 156 (Admin)** in which the High Court explained that that a school which found currently "unsuitable" (to resist a parental preference under **CFA2014 s39** 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 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." The Noddy Guide would point out that this needs 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 suitable for the child or young person concerned without regard to the cost of doing so: they are not the same. The Court did not refer the case law which makes clear that cost is not a reason to refuse a mainstream placement on suitability grounds. In **AA v LB Hounslow [2025] UKUT 225 (AAC)** **#20** the UT repeated the caution

about treating the section 33(3)/(4) obligation to take reasonable steps to act to prevent incompatibility with the efficient education of *others* into a duty to prevent incompatibility with the efficient education of *the child* in *question* while noting that "in general terms that there are safeguards that will in most cases ensure that a child whose parent wishes them to be educated in a mainstream school even though that is unsuitable for them does not receive a wholly inappropriate education … [including] it may be possible to read into the duty on the local authority under **section 39(5)** to name an 'appropriate' school an implicit obligation to make a school appropriate if there are no alternatives"

In light of this framework, the LA's duty under **CFA 2014 s33(2)** is complied with if it names a mainstream school and it is not the function of **section 33** to provide a further specific right for parents to request a particular mainstream school (including where the LA's school had a unit whereas the parental preference was not to have a SEN base); however in the naming of an appropriate school in **section 39(5)**, the LA must have regard to parental wishes under **EA1996 s9**: **AA #42-43** giving effect to which could then lead to the parentally preferred school being selected.

For case law under the **EA1996** see **MH v Hounslow [2004] EWCA 770**; **Bury MBC v SU [2010] UKUT 406 (AAC)**; **CCC v London Borough of Tower Hamlets [2011] UKUT 393 (AAC)**. See **Harrow Council v AM [2013] UKUT 157 (AAC)** **#27**: "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".

In summary:

- 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 the CYP there remaining unless doing so would involve 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.

09.305 Is there a definition of a "mainstream school" for the purposes of the section 33 presumption?

Yes. A mainstream school is a maintained school or Academy that is not a special school: **CFA2014 s83(2)**. A "special school" is a school which is "specially organised to make special educational provision for pupils with [SEN]": **EA1996 s337(1)** (note also the definition of school in **EA1996 s4**). Therefore, a "mainstream school" is a maintained school or Academy that is not specially organised to make provision for pupils with SEN.

Section 33 applies to a "particular type of institution, not to the provision of a particular type of education". It is a qualified entitlement to a type of school not to a type of provision i.e. mainstream school, not necessarily mainstream schooling. Accordingly, where a mainstream school has an SEN base (or "unit") within the mainstream school, then that placement in that base is still technically placement in a mainstream school even though it chooses to organise itself to make SEP for those with SEN in separate classes to other pupils: **AA v LB Hounslow [2025] UKUT 225 (AAC) #34.**

But there must come a point where a unit/base of that kind has to be treated as a separate school (a point which also arises if a parent requests a placement at the unit and merely at the school within which it sits). The question of whether a base constitutes a separate school is question of fact: **TB v Essex CC [2013] UKUT 534 (AAC) #28-41, MA v Kensington and Chelsea [2015] UKUT 186 (AAC) #28**. In **AA #34**, the Judge warned that "if the distinction between mainstream and special schools (and the section 33 duty) is not to be rendered nugatory, care needs to be taken to ensure that an institution in reality operates as a separate special school (even if co-located/co-managed with a mainstream school), is not classified as a 'mainstream school'".

More: **09.045 Can a "unit" within in a school be treated as a separate school in its own right for the purposes of a placement request?**

Even if a base is part of a mainstream school, the LA and FTT must still determine placement in accordance with parental preference and may give weight to any concerns of parents in respect of

the child's school experience: **AA #49(b)**. More: **09.30 But surely the LA/FTT can ask whether the particular requested mainstream placement is suitable/appropriate?**

09.31 Can parents insist on only part time mainstream school?

Yes. Provided that more than a negligible part of the child's education could be provided in a mainstream school **CFA2014 s33** can be in play such that, if parents want a mainstream placement then there is a duty to provide it unless it would be incompatible with the efficient education of other children. Pursuant to **CFA2014 s61**, 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) #21**.

More: But surely the LA/FTT can ask whether the mainstream placement is suitable/appropriate?

09.32 Is there a particular order to consider a parental/young person request for a particular mainstream maintained/section 38(2) school?

Yes. Decision steps:

1. If parents have expressed a preference under **CFA2014 s39** (i.e. for a maintained/section 38 mainstream school), consider it by reference to that paragraph first.
2. Unless one of the disqualifiers in section **CFA2014 s39(4)**, applies, they have a right to that placement. **More: Can parent's/young person request a particular placement?**
3. If one of the disqualifiers bites (see above on inefficient use of resources), then consider the type of placement under **CFA2014 s33**.
4. Unless incompatible with the education of others and the steps to remove the incompatibility are unreasonable, then the FTT must specify mainstream as a type in section I.
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 FTT 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 section 39(2)).
8. But the parent does not have a right to have any particular school named at this stage, only a right to have it considered as a candidate, albeit helped (but only in relation to a child, and not a young person, **More: Does EA1996 section 9 still apply if the parent requests a CFA2014 section 38(2) placement under section CFA2014 section 39(3)?**) by **EA1996 section 9** (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; **CFA2014 s33** can secure them mainstream, but not a particular mainstream, such that the FTT 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 **CFA2014 s33**) to prescribe additional provision to make "suitable" that which was considered "unsuitable".

Where parents seek non-school placement such as EOTAS

09.330 Can the LA provide SEP outside of a school or educational institution?

Yes. By section **CFA2014 s61**, an LA can make provision out of school if appropriate provision cannot be made in school, known as "EOTAS" i.e. Education Other Than At School (although there has been some debate whether the correct term is "EOTIS" as the legislation refers to "in school": **LB Camden v KT [2023] UKUT 225 (AAC) #5**):

"(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

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

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

This provides a discretion for the LA to provide any SEP which it has decided is necessary to be provided otherwise than in a school or institution.

Note: this is not the same as, and should not be confused with the situation in which a parent chooses to 'home educate' their child. **More: Is elective home education the same as EOTAS under CFA 2014 s61?**

It has been suggested that CFA2014 s61 requires the LA to "decide that it is necessary for the special educational provision for the child or young person to be made otherwise than in a school", as well as consider the pre-condition that it would be "[i]nappropriate for the provision to be made in" a school:

NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) #31. It is arguable what is necessary has been determined in deciding what provision to specify in Section F, and Section 61 only asks the single question of whether it would be inappropriate for that provision to be made in a school. This had been the case under the **EA1996**, where the first question to be asked is what does the CYP need (i.e. decide on Section F) and then decide if that can be provided in school: **S v Bracknell Forest [1999] ELR 51**. However, it is unlikely anything turns on this issue as what is "necessary" to be provided outside of a placement and what would be "inappropriate" to be delivered in a placement are likely to result in the same outcome.

For guidance as to how to approach cases where EOTAS is proposed, see **NN #47.**

More: Are all children with SEN educated in a school?

09.3305 Is education from a virtual education provider EOTAS?

No. A virtual education provider can be a school in which case the provision made there will not be EOTAS. **More: 09.0454 Can a virtual education provider 09.0456be a "school"? / 09.0455 Should a virtual education provider be specified in Section I?**

But, if for some reason the particular provider does not meet the requirements of **EA1996 s4** (or if Noddy is wrong on the application of s4 to virtual providers) then **CFA2014 s61** could stand in the way of it being specified in an EHCP. That is because it creates a specific presumption in favour of education in schools (see above) which would then operate as a presumption against a virtual provider which was not a school. In other words, the LA or FTT could (in that event) only specify such provision if satisfied that placement in a school was inappropriate.

09.331 Does the LA have to engage with the parents or young person before providing EOTAS?

Yes. **CFA2014 s61(3)** requires an LA to consult the child's parent or young person before providing EOTAS.

Whilst the statutory consultation duty in CFA2014 s61 does not apply where the parents or young person seeks EOTAS but the LA proposes to place at an institution, in exercising its functions the LA has a duty to take into account the views, wishes and feelings of the child, their parents or the young person: **CFA2014 s19(a)**.

Where there is a duty to consult under s61(3), the general legal requirements applicable to all consultations will apply: (1) the consultation must be undertaken when the proposals are still at a

formative stage, (2) the LA must give sufficient reasons for the proposal of EOTAS to enable a response, (3) adequate time must be given for response and (4) the response to the consultation must be taken into account in the decision: **R (Moseley) v LB Haringey [2014] UKSC 56 #25**.

More: 02.07 Must the LA (and then the FTT in an appeal) have regard to any particular factors when exercising its SEN functions?

09.332 Can only some SEP in Section F be made otherwise than in a school or educational institution?

Yes. One slight change from the position under **EA1996 s319** is that there is no longer an express power to arrange just part of the SEP to be delivered otherwise than in school, although that remains permissible and so there is no effective change in the law: **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) #30**.The FTT must first consider **CFA2014 s61** and "separately ask whether it is satisfied that it would be inappropriate for (i) any special educational provision that it has decided is necessary for the child to be made in any school and (ii) any part of the provision to be made in any school": **NN #47(a)**

09.333 In order to determine whether it would be inappropriate, do you just ask whether the provision "can" be made in a school or education institution?

No. In determining whether it would be inappropriate, it is not enough to ask whether the school "can" in general terms make the SEP set out in section F. One must ask if doing so in that way (i.e. at 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: **TM v Hounslow [2009] EWCA Civ 859 #26**, **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) #47(b)**, 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) #45**.

09.334 Is it enough to show it is inappropriate for SEP to be made in the LA's preferred school or educational institution?

No. The term "a" school should be read as "any", so that it must be shown it would be inappropriate for the provision to be made in "any school or post-16 institution": **Derbyshire CC v EM and DM [2019] UKUT 240 (AAC) #18**, **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) #28**. To put it another way, the question is "whether, in general, it would be inappropriate for the provision required...to be made in a school": **AA & BB v Bristol City Council [2023] UKUT 52 (AAC) #48**.

CFA2014 s61 provides a presumption in favour of school based provision in general, not merely a presumption relating to a particular school.

09.335 Should there be reference to EOTAS in Section F?

No. Section F should set out the SEP required by the CYP: **Regs2014 r12**. The SEP is the education or training provision rather than the provider of that provision. Of course, what is specified in section F might be expressed in a way in which, in practice, the provision could only be made other than at a school, but it should not state that conclusion.

09.336 Should there be reference to EOTAS in Section I?

No. The requirement is that Section I specify the school the child "attends": **Regs2014 r12**. This means the institution the CYP is "to be present at": **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) #43**. If attending for at least part of the time, the school or type of school must be specified in Section I; this includes where a CYP attends provision provided by a school as will a bespoke package outside a conventional classroom setting: **NN #47(f).**

If the child does not attend a school or other institution at all, section I should be left blank: **Derbyshire CC v EM and DM [2019] UKUT 240 (AAC) #15-24**. Note that previous case law had come to a different view. It had been considered that where a "home programme" is identified (e.g. Lovaas) that should be described in section F (previously Part 3) and can also be described in section I (previously Part 4): **Wandsworth v K [2003] EWHC 1424 (Admin)** #14. In **M & M v West Sussex CC (SEN) [2018] UKUT 347 (AAC) #68**, the UT decided that there remained a requirement to specify a type of school in section I, 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. However, in Derbyshire the UT found that **M & M** is wrong on this point and that the duties in section 39(5) and section 40(2) on the LA to name an "appropriate" school do not arise where it has decided a child should have education otherwise than at school and therefore it would be inappropriate for the provision to be made at school.

What is specified in Section I must be strictly limited to the name and type of school or other educational institution. Any approved home tuition is not put into Section I: **East Sussex CC v TW [2016] UKUT 528 (AAC) #33**. Anything specified in additional to the name and type of school is likely to be an error of law: **NN #46, #47(g).**

09.337 Can parents agree to provide some EOTAS?

Yes. Whilst in general an EHCP cannot require parents to provide SEP (**More: 08.23 Can the LA require parents to provide education?**), parents can provide all or part of the EOTAS provision if they agree to do so. In this instance, the LA will have to be satisfied the parents have made "suitable alternative arrangements" for that part of the specified SEP and does not have a duty to secure the element of the SEP: **CFA2014 s42(5)**. The UT has found that, where the parents agreed, requiring them to allow an EOTAS package to be provided in the home is lawful: **LB Camden v KT [2023] UKUT 225 (AAC) #24, 31**.

If that is the agreed way forward then the parents are providing some of the EOTAS provision specified in Section F of the EHCP, which is distinct and different to from elective home education. **More: 09.338 Is elective home education the same as EOTAS under CFA2014 s61?**

09.3375 If a CYP's EOTAS package includes elements of SEP at different locations, can the LA require the parents to transport the CYP between locations?

Transporting a CYP between the locations at which EOTAS (if in an EHCP) is provided (where that is done at multiple locations as part of a package) is not "home to school" transport, except possibly at the start and end of the educational day and so the LA powers and duties in relation to such provision are not relevant (nor are the limitations on provision which they involve).

Such transport is also unlikely to be "special educational provision" unless it educates or trains. **More**: **11.04 Is transport "educational" and therefore within the FTT's jurisdiction?**

However, transporting a CYP between locations is part of the context for the wider legal delivery of that SEP (like having toilets in a school, for example), and it is unlikely parents can be required to provide that transport. Even if transport is not SEP (and therefore does not form part of the duty to deliver SEP in **CFA2014 s42**) it would be a necessary exercise of the LA's powers to do things incidental to the exercise of its powers (**Local Government Act 1972 s111(1)**) or the LA 'wellbeing power' in **Local Government Act 2000 s2(1)**. The position is akin to the provision of transport for pupils generally to an offsite educational element or a school visit.

09.338 Is elective home education the same as EOTAS under CFA2014 s61?

No. Parents have a duty to ensure their child received efficient full-time suitable education "either by regular attendance at school or otherwise": **EA1996 s7**. Elective home education is where parents choose to provide education for their children at home. This may include where parents do not agree with the placement named in their child's EHCP and decide to educate the child at home or with other provision. Where the parent or young person "has made suitable alternative arrangements" the LA's

duty to secure the SEP in the EHCP does not apply: **CFA2014 s42(5)**. In practical terms that means that a parent who undertakes elective home education can ask the LA to undertake a statutory assessment and even produce an EHCP (and the LA must do that as they would for any other child and cannot refuse to do by reference either to the fact that the child is not in school at the time, or to the likelihood that the parent will opt for or continue with elective home education, let alone by operating a blanket policy of not doing do for electively home educated children generally). But there would be no obligation on the LA to arrange any of the SEP specified in section F of an EHCP that came out of that process. In other words, a parent cannot insist on a hybrid arrangement in which they are electively home educating while at the same time calling on the LA to provide some SEP.

09.3384 Does an LA have a role in overseeing the elective home education being provided to a CYP with SEN?

Yes. As explained by the court in **Goodred v Portsmouth CC [2021] EWHC 3057 (Admin) #65** an LA has powers to check whether parents who are electively home educating are "causing their child to receive efficient full-time education suitable to (a) his age, ability and aptitude and (b) to any special educational needs … he may have" (from **EA1996 s7**). If the LA is not satisfied of that, then it can serve a School Attendance Order (SAO) which specifies a particular school to which the parent should send the child or risk criminal prosecution. For a child who would have an EHCP if they were to attend a school that, in practice, would require the LA to assess the child and produce an EHCP as the route to naming a particular school (even if the parent refused to co-operate with that process). Importantly in all of those things, the LA's assessment of whether the parent is providing suitable education should not be based on comparison with what the child would receive in school let alone via an EHCP at school: it is a freestanding question. (Be aware though that the Children's Wellbeing Bill 2025 is (at the time of drafting) proposing changes which, in some instances, would require an LA to serve an SAO and prosecute even where it agreed that the elective home education was suitable, but on the basis that it thought school attendance was nonetheless in the child's 'best interests'. If enacted that would be a significant change to one of the fundamental's of education law for over 150 years, namely that it is enough for a child to be provided with 'suitable education', even if the state might think other education would be preferable.)

09.3385 Do the rules preventing removal of a child's name from the roll of a special school somehow prevent a parent from removing their child from the school?

No. The rules themselves do not **- School Attendance (Pupil Registration) (England) Regulations 2024 r9(42)** prevents the proprietor of a school being attended by a pupil under LA arrangements (likely to mean an EHCP) from removing their name from the school roll without the consent of the LA or the Secretary of State. That allows the LA to ensure that the school place is kept open until it is satisfied that the parent is providing suitable alternative education. But it does not have the effect of preventing the parent from removing the child from the school in the first place (as any other parent can do in relation to any other child).

However, if a child of compulsory school age who is a registered pupil at a school fails to attend regularly, the parent is guilty of a criminal offence: **EA 1996 s444**. That is subject to statutory defences set out within that section (such as there being a "reasonable justification") and there is no failure to attend where there is an "unavoidable cause".

Where the parent promptly arranged suitable alternative education (including potentially elective home education), it could be argued (depending on the exact facts) that either a statutory defence applies, a prosecution would not be in the public interest, or may possibly be an 'abuse of process'. In addition, a decision of the LA not to remove the child's name from the register would be amenable to a judicial review challenge of its legality.

(Be aware though that the Children's Wellbeing Bill 2025 is (at the time of drafting) proposing changes which would allow an LA to prevent a parent from removing their child from a special school to electively home educate even where it agreed that the elective home education proposed would be suitable, but on the basis that it thought school attendance was nonetheless in the child's 'best interests'. If enacted that would be a significant change to one of the fundamental's of education law for over 150 years, namely that it is enough for a child to provide suitable education, even if the state might think other education would be preferable.)

[Answer revised based on feedback from **DfE SEND Policy team** 24/04/25]

09.339 Is the LA's duty to provide suitable education under EA 1996 s19 the same as EOTAS under CFA 2014 s61?

No. The LA has a duty to make arrangements for the provision of suitable education at school or otherwise than at school for children of compulsory school age who by reason of illness, exclusion from school or otherwise, may not receive suitable education unless such arrangements are made for them: **EA1996 s19**. This incorporates a discretion for the LA as to what is suitable education.

This is a different duty to the duty to secure SEP in an EHCP under **CFA2014 s42**. However, where a child has an EHCP but is unable to attend the named placement the LA duties under both **EA1996 s19** and **CFA2014 s42** are likely to be engaged.

09.34 Should a placement be named in Section I where there is a slow transition to that placement?

Possibly. The point was raised but not determined in **LC and RC v Hampshire CC [2023] UKUT 281 (AAC) #28-32**. It was argued that even where there is a very slow transition to a school setting, the setting should be named in Section I as the child is "on the roll" there; however the Court noted the potential conflict of this argument with **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) #43** which considered that "attends" means "to be present at".

Out of area placements

09.35 Where a child is placed at a residential school outside its home area, can the placing LA be responsible for the cost of accommodation?

Yes. **EA1996 s517** states where a child is placed at a non-maintained school, the placing LA shall:

"(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.

(5) This subsection applies where the authority are satisfied that education suitable

(a) to the pupil's age, ability and aptitude, and

(b) to any special educational needs he may have,

cannot be provided by them for him at any school unless board and lodging are also provided for him (either at school or elsewhere)."

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) #7**.

09.355 Can a parent or young person express a preference for a school outside their own LA's area?

Yes. Preferences in accordance with **EA1996 s9** or **CFA2014 s39** are not limited to placements within your LA's area. The fact it is out of the LA's area may affect the costs, for example in respect of fees payable when compared to a school maintained by the local LA, transport and potentially accommodation. This will go to whether complying with the preference would constitute "unreasonable public expenditure" or be "incompatible with the efficient use of resources".

Where parents or young person do not make a request for a placement

09.36 Is that the end of it if the parents/young person do not make a placement request (or their request falls away under section 39)?

No. Specific rules apply where the parents/young person do not make a **CFA2014 s39** request (i.e. a request for a **CFA2014 s38(2)** school), or their request falls away because it is too expensive or too impactful on others.

This is, of course, what applies where their request is for an private school which is not a section 41 school.

By **CFA2014 s40**:

"(1) This section applies where no request is made to a LA 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.

(2) The local authority must secure that the plan—

(a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or

(b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person."

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 schools. Any other result would (unexpectedly) preclude placements at non section 41 schools for both children and young persons. That would be unexpected because at least for children there is no doubt that section 41 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) #43-54** (Hillingdon was granted permission for an appeal to the Court of Appeal but did not in the end pursue the appeal).

10 CEASING TO MAINTAIN AN EHCP/ STATEMENT

10.01 Does an EHCP expire automatically?

No. The duty to maintain an EHCP applies until an individual is 25, as at that point they cease to be a "young person": **CFA2014 s37(1)**, **s42**, **s46** and **s83(2)**. However, the LA has a discretion to continue to maintain an EHCP for a young person until the end of the academic year during which the young person turns 25: **CFA2014 s46**. Any dispute as to the discretion to continue a plan beyond the age of 25 is for judicial review rather than the FTT: **JL (by EA) v Somerset County Council [2021] UKUT 324 (AAC) #25-29**.

10.02 Can an LA just cease to maintain (i.e. terminate) an EHCP?

No. 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)**.

See also **COP2015 #9.199-9.210**.

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 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 (**More: Does the LA have a duty to make provision under and EHCP for a young person up to the age of 25 even when they may not obtain further qualifications?**).

The issue of ceasing to maintain was explained in **B & M v Cheshire East Council [2018] UKUT 232 (AAC) #85, #91**. In particular:

"Achievement of outcomes may indicate that a young person 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 EHCP should be prepared and maintained, and therefore in deciding whether to cease the EHCP, the LA should consider whether a young person would meet the test for preparing and maintaining an EHCP in the first place.

An EHCP may still be necessary even where a significant level of provision may only lead to a small amount of progress, as there is no requisite requires of learning for an EHCP to continue: **EM v RB Windsor and Maidenhead [2024] UKUT 317 (AAC) #43**. **More: Does the LA have a duty to make provision under an EHCP for a young person up to the age of 25 even where they may not obtain further qualifications?**

It therefore appears (in the Noddy Guide's view) that a lawful cessation decision needs up to date information on what provision the young person 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 EHCP continuing.

When considering whether to cease to maintain, it is relevant to consider educational difficulties which would occur if a CYP is required to move placement: **AB v Newport CC [2022] UKUT 190 (AAC) #84**.

Where an LA proposes to cease an EHC Plan it must (amongst other things) consult the child's parents or young person, the headteacher of any institution and notify the parents of their appeal right: **Regs2014 r31**. A decision to cease is liable to be held invalid and set aside by the FTT if these procedural requirements are not complied with, although where lack of compliance is not material the FTT may decline to set the decision aside: **Hampshire CC v GC [2026] EWCA Civ 20 (AAC) #62-64.**

10.03 Is an EHCP kept in force where an appeal is made against ceasing?

Yes. If an appeal is made against a decision to cease, the EHCP continues pending the determination of the appeal (**CFA2014 s45(4)(b)**).

10.04 Can an LA cease (i.e. terminate) an EHCP just because a child/young person has come to the end of a particular academic course?

No. Not unless it has been subject of review: see **Regs2014 r30**. 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**.

10.05 Can an LA cease (i.e. terminate) an EHCP just because a young person turns 19?

No. "In line with preparing young people for adulthood, an LA **must** not cease an EHCP simply because a young person is aged 19 or over.

Young people with EHCPs 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 EHCP should all remain in education until age 25. An LA may cease an EHCP for a 19- to 25-year-old if it decides that it is no longer necessary for the EHCP to be maintained. Such circumstances include where the young person no longer requires the special educational provision specified in their EHCP. 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 EHCP 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**

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**.

11 TRANSPORT

11.01 Can an LA be obliged to provide home to school transport?

Yes, in some cases.

The law here is in the **EA1996**, but not in the sections of that Act which were SEN specific and which have now been superseded by **CFA2014**.

Unless someone else has made free travel arrangements, an LA must make such travel arrangements as it considers 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)**.

"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 paragraph 2**.

"Relevant educational establishment" means (essentially) nearest suitable school: **EA1996 s508B(10)**.

"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 unlawfully tried to require this).

It does not necessarily have to be door to door transport, and 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)** #21. However, and in any event, the transport must be non-stressful: **R v Hereford & Worcestershire ex p P (1992) 2 FCR 732.**

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).**

Travel arrangements made by a parent only displace the LA's duty if the arrangements are made voluntarily: **EA1996 s508B(5)**.

11.02 Can an LA ever be required to provide home to school transport for sixth formers?

Yes. 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.

The LA must publish a "transport statement" specifying the 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**.

The transport statement must include the arrangements made for disabled persons and persons with learning difficulties and disabilities: **EA1996 s509AB**.

The DfE's statutory guidance ('**Post-16 transport to education and training**' (January 2019)) 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 **(#29(c)),** (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 section 68** (**#31**), (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 (**#35**).

The LA has 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.

School transport falls within the ambit of ECHR article 8 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)** (upheld by the Court of Appeal). 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).

If the LA charges for transport, it must comply with the **EqA2010**. 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).

The implementation of a transport statement must be reasonable and cannot be a blanket policy – the LA must engage with reasons given as to why a parent says their CYP's particular circumstances are exceptional and justify transport provision: **R (TYC) v Birmingham CC [2025] EWHC 623 (Admin)** #17.

11.03 Does an LA ever have to provide home-school/college transport for 18-25s?

Yes. 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 a LA at their placements: **EA1996 section 508F**.

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 EHCP if exceptional circumstances could be shown to exist, despite section 508F": **Staffordshire CC v JM [2016] UKUT 246 (AAC) #40**.

11.04 Is transport "educational" and therefore within the FTT's jurisdiction?

For a **CYP** with a EHCP, transport would generally not be **SEP**. Overall, see **COP2015 #9.214-217**.

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) #24, 27**. It should generally be in EHCP Section D and not F: **Regs2014 r43**, **Staffordshire CC v JM [2016] UKUT 246 (AAC) #32, 32**.

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) #11**.

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 FTT to consider this pursuant to its inquisitorial or quasi-inquisitorial function": **Birmingham CC v KF [2018] UKUT 261 (AAC) #19**.

COP2015 #9.215: "Transport should be recorded in the EHC plan only in exceptional cases where the child has particular transport needs".

11.05 Can transport issues be relevant to choice of placement?

Yes. Where transport costs impact on the cost balance (whether under **CFA2014 s39/s40** or under **EA1996 s9**) the **FTT** will have to properly evaluate the costs involved – see **W v LB Hillingdon [2005] EWHC 1580 #26**. This includes deciding what would be needed by way of suitable transport.

MM & DM v Harrow [2010] UKUT 395 (AAC) #27-28: "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."

An EHCP can name a school in section I 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 #20**.

12 TRIBUNAL PROCEDURE

FTT Procedure

12.010 If I disagree with the contents of an EHCP, can I bring a judicial review?

No. Permission for judicial review may be refused where the claimant has another remedy available to them, and therefore a judicial review challenge generally inappropriate where an EHCP can be appealed to the FTT: **R (XXX) v East Sussex CC [2024] EWHC 3160 (Admin) #22-23** (case viewable on Westlaw legal subscription service only), **R (LW) v LB Islington [2025] EWHC 703 (Admin) #32-39**.

12.01 Are parents still the people to bring an appeal when it comes to an over 16?

No. A "young person" is "over compulsory school age but under 25": **CFA2014 s83(2)**.

Unless there is evidence to displace the statutory presumption of capacity to conduct the appeal (contained in s1 Mental Capacity Act 2005), 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) #13. 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 young person's appeal.

Where a young person lacks capacity to conduct an appeal, an 'alternative person' must 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). Where such a person is not acting in a person's best interests, the FTT does have a power to appoint an alternative litigation friend: MM v RB Greenwich [2024] UKUT 179 (AAC) #61. 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) #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 the alternative person's 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 …")

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 FTT itself must resolve that issue: Buckinghamshire CC v SJ [2016] UKUT 254 (AAC) #19. In determining that question, the FTT must consider both the bringing of the appeal as well as the ongoing conduct of it (for example what changes are sought to the EHCP); and the FTT should pause proceedings to determine capacity where there is "good cause for concern" about capacity: MM v RB Greenwich [2024] UKUT 179 (AAC) #32-33.

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.

12.02 Are there particular rules about what goes in an FTT appeal application notice?

Yes. "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) Rules 2008 r20(2).**

Failing to comply with the requirements in an application notice in **r20(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 FTT 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) #3**.

12.03 Do all FTT appeals involve a hearing?

No. 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).**

In **GA and JA v Wirral MBC (SEN) [2020] UKUT 24 (AAC) #25**, the UT found the standard appeal form and directions used by the FTT unlawfully 'inverted' the consent requirement and meant a party had to 'contract in' to have an oral hearing rather than a 'contract out' as regulation 23 provides. The fact a party had not 'contracted in' was not sufficient to constitute consent.

12.04 Does the FTT have to make reasonable adjustments for those participating?

Yes. The FTT has issued a Practice Direction on **'Child, Vulnerable Adult and Sensitive Witnesses'** which requires that the FTT "must consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness" (#7).

This applies to cases involving SEN, and applies to (for example) parties with a visual impairment, however where an appeal is made on the basis there were not any special arrangements, it has to be shown that the lack of such arrangements was material: **AA and BA v A Local Authority (SEN) [2021] UKUT 54 (AAC) #4-7, 13, 22-23**.

The FTT has to conduct proceedings in a fair way but also respect individual autonomy where someone has indicated they would manage at the outset; and where that person has made such an indication, it is reasonable to expect that person to raise an issue at the time: **TC and BW v LB Islington [2021] UKUT 196 (AAC) #28-29**.

12.05 Does the FTT have to listen to the child/young person themselves?

Yes. The **FTT**, as well as the LA, has an obligation to take into account a **CYP**'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) #39-44, 59**. If appropriate, a child's views can be given through parental evidence: **BB v LB Barnet [2019] UKUT 285 #9**. However, in the case of a young person who brings the appeal, the FTT 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) #71**.

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) #33**.

In **St Helens BC v TE and another [2018] UKUT 278 (AAC) #14, 23**, the UT held that it was lawful for the FTT to conclude that a 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 young person a veto.

12.06 Does the FTT just decide who is correct?

No. The FTT does not just decide between competing positions and competing evidence. The FTT "stands in the LA's shoes, re-evaluating the available information in order if necessary to recast the statement [EHCP]": **LB Bromley v SENT [1999] ELR 260**.

"… if there was inadequate information [about the proposed school placement], the FTT 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 FTT 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 #32** and **MW v Halton BC [2010] UKUT 34 #36**.

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) #39.**

It was impermissible for the FTT 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 FTT should have decided how to resolve the issues: **RB Kensington & Chelsea v CD [2015] UKUT 396 #31**.

The FTT's inquisitorial role remains. The powers of the 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) #22-25**.

In **A J v. LB of Croydon [2020] UKUT 246 (AAC) #151**, the **UT** doubted there was a "burden of proof" as such in the inquisitorial jurisdiction, but if there was, it fell to the LA to demonstrate a placement a child was attending was no longer suitable. Where the LA had not provided positive evidence that the parental evidence was unsuitable, but the LA took that position in the hearing, the FTT ought to have adjourned for further evidence: "The overarching question which the FTT had to consider in this context was whether there was sufficient evidence on which it could properly decide the appeal. If it does, I accept that "the question of whether it should have performed an inquisitorial function in seeking further evidence does not arise," as Lloyd-Jones J said in **J v. SENDIST** at [33]. Where, however, there is inadequate information to reach a decision, then the FTT cannot proceed on a purely adversarial basis, but has "a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the appeal before them, rather than rely entirely on evidence adduced by the parties" as Scott Baker J held in **W v Gloucestershire CC [2001] EWHC Admin 481 at #15**, a duty which Lloyd-Jones said in J at [32] was a duty cast on special educational needs and disabilities tribunals in general…this was a clear case in which the FTT needed to adjourn, either opening the matter up for an oral hearing, or asking the Council (which had raised

the points) to investigate further and make good its concerns (and then give the parents the opportunity to respond to anything put forward). But the FTT did not do that and in the circumstances it plainly failed to operate the necessary inquisitorial jurisdiction and approach."

The UT found an FTT erred where it placed a burden of proof on the LA in respect of the costs of each of the placements: **LB Islington v A Parent [2024] UKUT 252 (AAC) #54**. In that case the UT found it was perverse for the FTT not to have adjourned for further evidence on costs given that there was an indicative difference of £48,000 - £60,000 per year between the placements.

An appeal is a "general appeal" and the issue for the FTT 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) #19**. **Gloucestershire CC v EH (SEN) [2017] UKUT 85 (AAC) #47** 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.

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) #38**.

More: Does the FTT just have to decide which expert is right?
Does the LA have to 'play fair'?

12.07 Can an FTT judge be involved in two cases involving the same child/young person?

Yes. An FTT must always avoid 'bias'. The 'fair minded and informed observer' test applies as set out in **Porter v Magill [2001] UKHL 67 #103**.

But 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 LB Bromley [2013] UKUT 619 (AAC) #42-55**.

12.08 Can a parent who did not take part in an FTT appeal, then appeal its decision to the UT?

Yes. 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 as a party pursuant to **FTT (HESC) Rules 2008 r9**, 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) #14**.

12.09 Can the FTT order changes to sections other than B, F and I?

Yes. 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) #55-56**.

More: Does "provision" set out in an EHCP (section F) have to link to the "outcomes" set out in an section E?

12.10 Does the LA have to 'play fair'?

Yes. Although the proceedings are in part adversarial because the LA will be responding to the parents' appeal, the role of an LA as a public body at such a hearing is to assist the FTT 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 FTT 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 #11**.

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) #50-52**.

In **A J v. LB of Croydon [2020] UKUT 246 (AAC) #129-130**: "The duty cast on the LA in a special educational needs case is as set out by Sullivan J in JF, namely that the role of an education authority as a public body at such a hearing is to assist the FTT 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". The UT rejected the proposition that there is "no authority suggesting that the principle extended to a duty to obtain further evidence, let alone evidence which rebutted the LA's own evidence."

The LA's response to an appeal must include "any further information or documents required by an applicable practice direction or direction" (**FTT (HESC) Rules 2008 2008 r21(2)(f)**), which according to the **Practice Direction** #10(c) includes "any supplemental evidence and professional reports currently available to the LEA and upon which it attempts to rely". However, in accordance with the overriding objective, the LA should "supply any such material which it does not wish to rely upon but which it nevertheless thinks is likely to assist the [FTT] in reaching a just decision on the appeal before it" and "where a local authority is in doubt about whether such material in its possession would assist the [FTT] in reaching a just decision it should play safe and produce it": **AC v LB Richmond on Thames [2020] UKUT 380 (AAC) #4, #17**.

More: Does the FTT just decide who is correct?

12.11 Does the FTT just have to decide which expert is right?

No. "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 #14**.

However, the FTT 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) #27; T & A v London Borough of Wandsworth [2005] EWHC 1869 #16-23**; **D v SENDIST [2005] EWHC 2722 #13**.

How the FTT may use its expertise, and whether it is required to put their thinking to the parties, is fact dependent.

In **BB v LB Barnet [2019] UKUT 285 #18**, 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."

See further **(1) BK (2) AK v. Hackney LBC [2020] UKUT 329 (AAC) #60-61** where the UT held that it was not unfair for the FTT to make decisions about the disadvantages of attendance at the parent's preferred school (which the LA had accepted as suitable) without putting the same to parents' witnesses or their representative at the hearing: "The issue is the fairness of the proceedings, not the particular context or the way in which fairness was said to be compromised. Fairness depends on the context. If there is an entirely new issue which no one contemplated during the hearing, fairness will require the FTT to put it to the parties. By contrast, in other cases where the FTT's thinking has been effectively, albeit not perhaps directly, addressed putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. In the latter event the FTT is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing. Further reference back to the parties is not necessary unless something new arises which has not been fairly covered. The FTT is entitled to expect the representatives to anticipate the likely range of options that it will consider and present their case accordingly…The issue of the suitability of The [parent's choice of school] had been accepted by the local authority, but that did not preclude the FTT from using its own expertise in deciding about the balance of advantages and disadvantages of the respective placements in relation to the section 9 exercise, which was clearly an issue which was going to have to be decided and should therefore have been anticipated…"

In **NE and DE v Southampton CC (SEN) [2019] UKUT 388 (AAC) #13**, 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 FTT based its decision was not one which either of the parties or the FTT had ever raised as having any importance to the issues the FTT had to decide…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 FTT 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 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 FTT did was unfair to the parents and amounted to a material error of law on the part of the FTT in coming to its decision."

More: **Does the FTT just decide who is correct?**

12.115 Can the FTT reach a decision on a point which the parties have not had a chance to respond to?

No. As mentioned in **12.11 Does the FTT just have to decide which expert is right?**) "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 #14**.

In **NE and DE v Southampton CC (SEN) [2019] UKUT 388 (AAC) #13**, the FTT had acted unlawfully when considering how much progress the child in question had made at a particular placement (when considering the suitability the a placement) when it relied on a review report which (whilst in the bundle) was never mentioned in the hearing 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 FTT based its decision was not one which either of the parties or the FTT had ever raised as having any importance to the issues the FTT had to decide…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 FTT 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 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 FTT did was unfair to the parents and amounted to a material error of law on the part of the FTT in coming to its decision."

However, the procedural fairness of a particular FTT decision will depend on the facts. In **TW and KW v Hampshire County Council [2022] UKUT 00305 (AAC) #18**, the UT considered that where an FTT revisited an agreed position from Day 1 on Day 2, this was lawful provided it was adequately raised and the parties had a chance to comment – and in this case for them to be able to do so in written closings submissions (after the hearing of the live evidence) was legally sufficient.

More: **12.11 Does the FTT just have to decide which expert is right?**

12.12 Are there particular time limits for appeals?

Yes. An 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 or, if later, within 1 month from the date of issue of the mediation certificate (**FTT HESC) Rules 2008 r20(1)(c)).**

More: **Is mediation compulsory prior to appealing?**

If an appeal is made after the deadline, the FTT will consider: (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) #11**. These were approved in **CM v Surrey CC (SEN) [2014] UKUT 4 (AAC) #15**, in which emphasis was placed on the fact that it is not only the explanation of the delay that is relevant.

12.13 Is mediation compulsory prior to appealing?

Yes. 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: **Regs2014 r33**.

More: **Does a parent have a right to mediation?**
Who can come to a mediation?

12.14 Does a parent have a right to mediation?

Yes. The parents have a right to mediation, and if the parents seek mediation the LA has a duty to arrange it: **CFA2014 s52-54**.

More: **Is mediation compulsory prior to appealing?**
Who can come to a mediation?

12.15 Who can come to a mediation?

At such a mediation, **Regs2014 r38** provides that certain persons may attend the mediation. This includes “any advocate or other support that the child’s parent or the young person wishes to attend the mediation”, which permits the parents to bring a lawyer even without the LA or mediator’s permission: **L. Kumar v London Borough of Hillingdon [2020] EWHC 3326 (Admin) #36**.

More: **Does a parent have a right to mediation?**

12.16 Are their rules about what amounts to 'evidence' in an FTT?

Yes. Assertions that are made only by representatives cannot be treated as evidence, see e.g. **JS v Worcestershire [2012] UKUT 451 (AAC) #20**: "It is trite law that submissions are not evidence and if a representative puts forward alleged facts that are not otherwise in evidence, the FTT 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."

However, see **CB v Birmingham [2018] UKUT 13 (AAC) #22** 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.

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) #48**.

12.17 Can the FTT 'strike out' an appeal?

Yes. Under **FTT (HESC) Rules 2008 r8** the FTT may strike out the whole or part of proceedings where (1) there has been a failure to comply with a direction that warned the applicant a failure to comply could lead to proceedings being struck out; (2) the applicant has failed to co-operate with the FTT such that the FTT cannot deal with proceedings fairly or justly; (3) there is no reasonable prospect of the applicant's case succeeding.

"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) #23**. It may be preferable for orders to contemplate discretionary barring rather than automatic barring, thus retaining judicial discretion in relation to the consequences of a failure to comply.

See **Camden v FG [2010] UKUT 249 (AAC) #47-53** for an example of an LA being barred from proceedings where there had been failure to comply with Directions. The Court did not agree with the submission that there needed to be "wilful and repeated disobedience" for a barring order to be made.

More: Do parties have to comply with directions issued by the FTT?

12.18 Do parties have to comply with directions issued by the FTT?

Yes. Where a party does not comply the **FTT** may make an order including waiving the requirement, requiring the failure to be remedied, and striking out a party's case: **FTT (HESC) Rules 2008 r7**.

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 (i.e. prevented from taking part in the appeal) they can request reinstatement with an application within 28 days after the date on which the FTT sent them notification of the barring **(r8(6)-(7)).**

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)** #13.

More: Can the FTT 'strike out' an appeal?

12.19 Can evidence be submitted after the deadline set by the FTT?

Yes, however an application will need to be made to rely on the late evidence. See **HJ v Brent [2010] UKUT 15 (AAC) #9-20**: The FTT should have given reasons for its refusal to admit in evidence a video submitted at the hearing. The FTT 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.

12.20 Can the FTT proceed where a party is not present?

Yes. **Barking & Dagenham v SENDIST & MG [2007] EWHC 343:** A FTT 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.

12.21 Are there particular rules for parties who want to rely on expert evidence?

Yes. Some guidance was given in **RB Kensington and Chelsea v CD [2015] UKUT 396** #35-37. Parties should communicate their intention to rely on expert evidence as soon as possible; the **FTT** should consider a joint expert; and in case management directions the FTT judge could helpfully identify precisely the issues which the experts are to address.

12.22 Does the FTT have to give reasons for its decision?

Yes. The FTT has to give reasons for its decision: regs **FTT (HESC) Rules 2008 rule 30**.

But there are limits to what that means. The Senior President of the Tribunal's **Practice Direction** (which applies generally to the FTT not just in SEN cases) states reasons must be "adequate, clear,

appropriately concise, and focused upon the principal controversial issues"; it does not require the FTT to "identify all of the evidence relied upon reaching its findings of fact, to elaborate at length its conclusions on any issue of law, or to express every step of its reasoning"; and the UT will exercise "appropriate restraint" in reasons challenges, taking a "realistic and reasonably benevolent approach".

In **H v East Sussex CC [2009] EWCA Civ 249 #16-17**, the Court of Appeal explained that the FTT "is not required to be an elaborate formalistic product of refined legal draftsmanship [sic], 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."

Despite that concerning an obligation only to give 'summary reasons' the **UT** has applied that approach to FTT decisions: **SG v Somerset [2012] UKUT 353 (AAC) #9**; **DC & DC v Hertfordshire CC [2016] UKUT 379 (AAC) #38**; **Hertfordshire CC v MC and KC [2016] UKUT 0385 (AAC) #16**.

In order to decide whether reasons are sufficient, the UT considers the reasons of the FTT as a whole, will consider what is both explicit and implicit and in context: **AG v LB Brent [2024] UKUT 166 (AAC) #14-15**. The duty does not require the FTT to give reasons that track the full and detailed course of its fact-finding and decision-making: **LB Hillingdon v AP and SP [2024] UKUT 388 #19**.

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) #39**.

The FTT is "entitled to limit its consideration to the matters identified in the working document": **DL v LB Redbridge [2010] UKUT 293 (AAC) #13**.

In **A J v. LB of Croydon [2020] UKUT 246 (AAC)** **#93** the UT considered: "If parents say that a move to another school would be devastating for their child, the FTT is not bound to accept that assertion, but it must explain why it does not agree with it and the basis on which it disagrees with those assertions. It is not sufficient merely to say baldly and without supporting reasons that it was satisfied that (a) both in terms of its overall experience in supporting young people with ASD and consideration of [G's] specific learning difficulties the proposed school was capable of meeting his needs and that (b) it further determined that the proposed placement was able to meet his needs."

The FTT will generally need to make findings on the disputed aspects of the case put such that a party knows why their case on each disputed aspect has been rejected: see e.g. **JJ & EE v Buckinghamshire Council [2022] UKUT 345 (AAC)** **#33**.

12.23 Does the FTT decision dictate to the family courts and vice versa?

No. The Family Division exercising its powers under the **Children Act 1989** could not dictate to the FTT how it was to exercise its statutory jurisdiction under CFA2014 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 FTT 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 EHCP: **X CC v DW, PW and SW [2005] EWHC 162** **#20**.

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** **#19**.

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 LA. And, where the SENDIST directed that the LA make him available for assessment, the LA (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** **#66-68**.

In **Bedfordshire CC v Haslam and others [2008] EWHC 1070**, 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 LA. The

parents sought to exercise a power of veto in **Children Act 1989 s20(7)** over the accommodation, thus blocking the LA's preference. The SENDIST acceded to that. The Court ducked the issue, which thus remains to be decided. [But note that the FTT did not grapple with the question of whether the fact that his educational needs could only be met where the school was combined with residential provision meant that the latter was providing education; nor was the point taken on appeal.]

12.24 Does the LA have to comply with an FTT decision?

Yes. If the FTT orders amendments to an EHCP, the LA must make those amendments: **Regs2014 r44**.

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 #30**. See also **R (S) v Camden [2018] EWHC 3354 (Admin) #28, 71-81**.

12.25 Can one party be ordered to pay another party's legal costs following an FTT appeal?

Yes. The general rule is 'no order as to costs', but the FTT may make an order where "a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings": **FTT (HESC) Rules 2008 r10(1).** The power to make a costs order is in respect of conduct during proceedings and not prior conduct (e.g. failing to name a placement): **NS & RS v Kent CC [2021] UKUT 311 (AAC) #100.**

Any application has to be made not later than 14 days after the date on which the FTT sends a decision notice recording the decision which finally disposes of all issues in the proceedings; or notice that a withdrawal ends proceedings has effect: **FTT (HESC) Rules 2008 r10**. The decision notice "finally disposing of all issues in the proceedings" is the decision disposing of the appeal rather than an any application for permission to appeal to the UT: **KM & DM v Cheshire West and Chester Council [2024] UKUT 89 (AAC) #27-28**. Where the parties have agreed matters and the appeal is withdrawn, allows a costs application to be made within 14 days: **UA v LB Haringey [2016] UKUT 0087 (AAC**) **#13**.

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 FTT make an order for costs? and (3) if so what is the quantum of those costs?": **MG v**

Cambridgeshire CC [2017] UKUT 172 (AAC) #28, **LW v Hertfordshire CC (SEN) [2019] UKUT 109 (AAC) #11**.

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 (AAC) #17** and **NS & RS v Kent CC [2021] UKUT 311 (AAC) #146-148.**

"..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. FTT 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) #26**.

At stage 1, the FTT must determine whether there has been "relevant unreasonable conduct" and at this "stage there is no element of discretion": **JW v Wirral MBC (SEN) [2021] UKUT 70 (AAC) #53**.

An example of unreasonable conduct is where the LA had provided inaccurate evidence to the FTT in oral evidence at the hearing: **NK v LB Barnet [2017] UKUT 265 (AAC) #22**. 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 [FTT]'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) #15**.

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)**. Likewise, it was not unreasonable for the LA to propose a school which was a "poor" choice where that was later ruled out of contention before the evidence deadline: **NS & RS v Kent CC [2021] UKUT 311 (AAC) #116-120.**

Where the LA repeatedly raised the issue of placement in a section B and F appeal, this constituted unreasonable conduct: **JW v Wirral MBC (SEN) [2021] UKUT 70 (AAC) #60-65**.

As to (2), the FTT 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) #30**. In **NK v LB Barnet [2017] UKUT 265 (AAC) #26**, 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.

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) #9**, approving **McPherson v BNP Paribas (London Branch) [2004] ICR 1398 #40**. 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) #20-22**.

It will generally be acceptable for a different judge to that hearing the FTT appeal to make a costs decision, except in exceptional cases, and in such cases this should be flagged in the application. In such circumstances, the judge alone can determine the costs application without the full panel being reconvened: **NS & RS v Kent CC [2021] UKUT 311 (AAC) #157-160**.

An appeal to the UT against an FTT costs decision will only succeed where "the Judge's discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong": **NS & RS v Kent CC [2021] UKUT 311 (AAC) #153**.

Extended appeals

12.26 Can I appeal to the FTT about health or social care provision when I appeal the education provision?

Yes. Any decision by an LA since 3 April 2018 has fallen under the **Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017**, which give the FTT the power to make recommendations on health and social care need and provision.

12.27 Can you enforce an FTT recommendation that health or social care provision is specified in an EHCP?

No. The power in **Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017** is only to make recommendations, following which the LA or CCG has to respond within 5 weeks. Only the procedure (not the provision itself) is enforceable: **VS and RS v Hampshire CC [2021] UKUT 187 (AAC) #41**.

Where a local authority or ICB does not accept recommendations it must provide "cogent reasons" given the recommendation has been made by an expert Tribunal: **R (AT and BT) v LB Barnet [2019] EWHC 3404 (Admin) #13**, **R (LS) v LB Merton [2024] EWHC 584 #57-60.** In reaching a decision, the body must act rationally: **LS #67-70**.

12.275 Does the FTT perform the same role in relation to social care and health care disputes, as educational disputes?

No. In relation to educational disputes, the FTT stands 'in the shoes' of the LA. However, the powers of the FTT do not have the effect of 'importing in' the legal framework for health and social care, but it is good practice for a local authority to provide relevant local criteria. But when an appeal is brought in relation to social care or health care, the FTT must determine those parts of the appeal: **MM v RB Greenwich [2024] UKUT 179 (AAC) #99, 108**. **More: 12.06 Does the FTT just decide who is correct?**

12.28 Does a health or social care recommendation have to have the same level of specificity as special educational provision in Section F?

No. Where it is more specific, the more specific the health or social care body will have to be in responding. However, given the nature of the power, the **FTT** should be "free to make constructive recommendations" and "how specific it feels it can be is essentially a matter for the FTT", and it is permissible to for example recommend a future assessment: **VS and RS v Hampshire CC [2021] UKUT 187 (AAC) #46-47, 57**. However, there is no requirement for any assessment before the FTT can make recommendations: **MM v RB Greenwich [2024] UKUT 179 (AAC) #108**

More: 08.15 Does section F have to specify things like how much provision a child or young person requires, and how often?
08.21 Can an EHCP leave matters in section F by a future assessment?

12.29 Does an ICB have a right to be a party where the FTT is considering health care provision?

No. It is not a necessary requirement of fairness to join an ICB 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) #90-96** (which concerned a CCG, the predecessor to an ICB). The FTT only has power to recommend, and the legal consequences for the ICB are not unduly onerous – it must consider the recommendation 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 ICB's position which was sufficient, and the fact it did not have a legal representative was not necessary in the case as the ICB's legal obligations were not being determined by the FTT. Any dispute between the LA and ICB as to the scope of the ICB's legal obligations was a matter for another jurisdiction.

Challenging an FTT decision

12.30 Are there particular rules about reviews/appeals?

Yes. See **FTT (HESC) Rules 2008 r45-49**.

The **FTT** may "set aside" a decision which was made by the FTT which disposed of proceedings and remake it (normally a different FTT judge is involved in that process) 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 top 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 rule 45**. 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) #13**.

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.

The FTT can undertake a review in two situations: **FTT (HESC) Rules 2008 r49**.

First, it can undertake a review if it is satisfied there is an error of law in the decision: **FTT (HESC) Rules 2008 rule 47(1)** and **rule 49(1)(a).** As to the scope of this power, see **Westminster CC v FTT [2023] UKUT 177 (AAC) #139-142** (quoting **RB v First Tier Tribunal (Review) [2010] UKUT 160 (AAC) #24** and **Point West GR Ltd v Bassi [2020] EWCA Civ 795 #46-60**). It considered, in summary: (i) the

power of review on a point of law was intended, amongst other things, to provide an alternative remedy to appeal, (ii) it was not intended to usurp the UT's function of determining appeals on contentious points of law, (iii) there are occasions when it would be desirable for a case to be considered by the FTT so further findings can be made even if it was likely to go to the UT eventually, (iv) the key question is what would best advance the overriding objective, (v) points of law in this context are not narrowly understood, (vi) it is not a gateway for the FTT to re-write its original decision, rather the purpose of the review is clarificatory, although if having considered the grounds of appeal the FTT is satisfied that one ground will likely succeed it may set aside the decision and redecide the matter, (vii) parties should not take a new point on review. See further **Oxfordshire CC v GB [2001] EWCA Civ 1358 #9**: the FTT 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 rule 48** and **rule 49(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) #12**. If the FTT asks itself whether a change in circumstance "would have affected the decision", this is setting the bar too high: **TN v FTT and East Sussex CC [2021] UKUT 98 (AAC) #12**.

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) #23-24**.

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) #18**.

A review decision is a separate decision from the original decision: **TCEA2007 s9(11)**, **Westminster CC v FTT [2023] UKUT 177 (AAC) #114**. There is no right of appeal against a review decision of the FTT: **TCEA2007 s11(5)(d)**, **AB v Newport CC [2022] UKUT 190 (AAC) #21**.

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).**

Where, following review, the FTT is to re-decide a case it should hold a hearing unless both parties do not want one: **Essex CC v TB [2014] UKUT 559 (AAC)** **#45**.

It is not possible to appeal a refusal of the FTT to review, and the only remedy is judicial review: **Tribunal, Courts and Enforcement Act 2007 s11(1) and (5)(d)**, **TN v FTT and East Sussex CC [2021] UKUT 98 (AAC)** **#5**.

The FTT also has a power at any time to "correct any clerical mistake or other accidental skip or omission": **FTT Rules r44**. However, following a decision of the FTT, this power does not "permit a chance to bring a decision into line with what a tribunal should have decided": **LB Camden v KT [2023] UKUT 225 (AAC)** **#14**.

12.305 Can a party appeal social care or health care recommendations?

Yes. An appeal can be made "on any point of law arising from a decision made by the First-Tier Tribunal" which includes recommendations in social care and health care: **AA v Bristol CC [2025] UKUT 010 (AAC)** **#69**. However, as an LA is not bound to accept a recommendation, it may decide to provide reasons not to adopt it rather than appeal. And an ICB is unlikely to have been a party to the FTT appeal and so could not appeal to the UT anyway.

More: 12.27 Can you enforce an FTT recommendation that health or social care provision is specified in an EHCP?

12.31 Is an FTT decision automatically suspended pending a UT appeal?

No. "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)** **#16**. 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** **#39**.

12.32 Is a UT appeal just a re-run of the FTT?

No. An appeal to the UT is governed by **TCEA 2007 s12** and the **Tribunal Procedure (Upper Tribunal) Rules 2008**. An appeal is against a "point of law". On a point where the FTT has exercised judicial

discretion, the UT will not substitute its discretion unless the FTT has acted outside the bounds of reasonable disagreement: **NS & RS v Kent CC [2021] UKUT 311 (AAC) #96-97.**

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) #17-19**.

The UT has criticised attempts by the FTT to become involved in UT proceedings. In **SG v Denbighshire CC and MB [2018] UKUT 158 #3**, the Tribunal President of SENTW sought to make written submissions, and the UT said it was "quite wrong" in principle for the FTT 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".

At a hearing following an appeal, a second FTT panel is not entitled to simply uphold the first FTT's decision if it has been found to include an error of law: **JS v FTT and LB Greenwich [2011] UKUT 374 (AAC) #11**.

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 LB Bromley [2013] UKUT 619 (AAC) #6**.

12.33 When the UT remits a case to the FTT, does it require a complete rehearing of all the issues?

No. See **NW v Poole & SENDIST [2007] EWCA Civ 1145 #21**: Where a case had been remitted to the FTT 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.

12.34 Can you argue before the UT a point which was not in issue before the FTT?

Yes. However there are limits to the points which may be taken on appeal, one of which is that permission to take a new point will not generally be granted where the new point would have affected the course of evidence in the FTT: **PM v Worcestershire CC [2022] UKUT 53 (AAC) #49, #54-55**, **Westminster CC v FTT [2023] UKUT 177 (AAC) #104** (referring to **Singh v Dass [2019] EWCA Civ 360**).

12.35 Are UT authorities binding on the FTT and UT?

Yes. However, where there is a conflict between two UT authorities, the UT will follow a decision which is "reported" (i.e. is reported in the AACR) rather than "published" (only uploaded to the UT website): **LB Croydon v K-A [2022] UKUT 106 (AAC) #48-49**.

About the authors

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David Wolfe works as a public lawyer (KC) at Matrix. He has been involved in SEN disputes since 1989, chairing SEN appeal panels even before the SEN Tribunal was invented. David has been a part-time Chair of the Special Educational Needs and Disability Tribunal. He has appeared in many of the leading SEND cases in the Upper Tribunal, High Court and Court of Appeal.

As a public lawyer, David specialises in “judicial review” challenges to the decisions of, among others, government, regulators, local authorities, schools and health bodies. David believes passionately that public bodies should act in a fair and open way, and that the law and lawyers have a key role in ensuring that happens. He contributes regularly to general and specialist publications and radio broadcasts on legal issues.

David also trains lawyers and others, particularly in education and public law. He provides invaluable support to charities Support SEND Kids and IPSEA, where he trains lawyers in SEN law. His work has helped an ever-increasing number of parents overcome challenges in the EHCP process. David’s ‘Noddy No-nonsense Guide’ is considered to be a key guide by the SEND professional community including the Dept of Education, tribunal judges, local authorities and SEND professionals. In 2024, David advised and assisted in the production of the first Noddy No-nonsense Guide to Welsh ALN Law.

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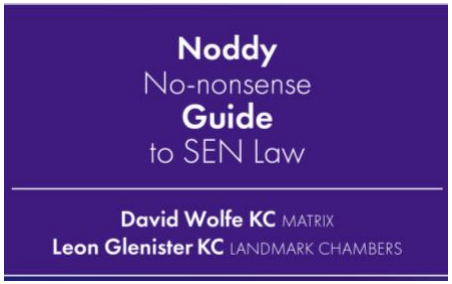
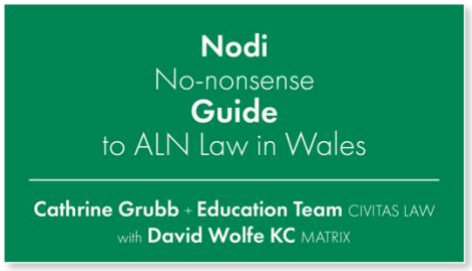
Leon is well established as a leading barrister (appointed KC in March 2026), practising in public, education, healthcare and planning/environmental law. He has specific expertise in the law on special educational needs.

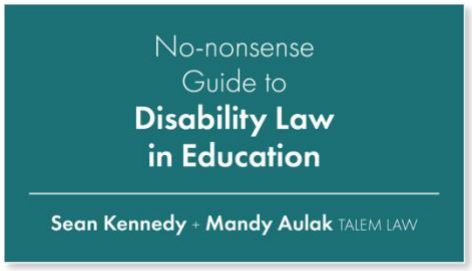
He is ranked in the legal directories across five areas and is described as “one of the best public lawyers of his generation”. He is ‘top ranked’ in Education law in both Chambers and Partners and the Legal 500. He regularly acts in complex cases of a national profile, including in the Supreme Court and European Court of Human Rights. He has been shortlisted for three ‘Junior of the Year’ awards at the Legal 500 UK Bar Awards.

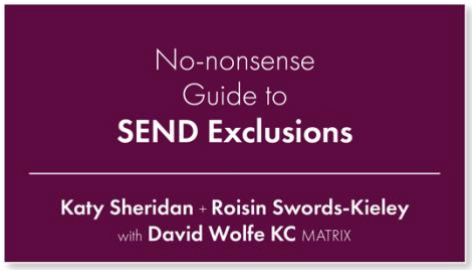
Leon is on the Attorney General’s A Panel of Counsel, the most senior panel appointed to represent central government. He regularly acts for, among others, the Secretary of State for Education. Within the education law field, he regularly acts for parents, students, local authorities, schools and universities.

He is a lead author of ‘NHS Law and Practice’ (LAG, 2024); and a contributing author to 'Children's Social Care Law' (LAG, 2018) and 'Adult Social Care Law' (LAG, 2019). He is a tutor in Administrative Law at the University of Cambridge. Away from law, he is a Governor of Dr Challoner’s Grammar School.









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David Wolfe KC and **Leon Glenister**

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