

Common misconceptions about the legal framework for supporting children and young people with SEND

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About IPSEA

- National charity offering free and independent legally-based information, advice and support to help get the right education for children and young people with special educational needs and/or disabilities (SEND)



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What we do

- Advice to parents, carers and young people – Advice Line, Tribunal Helpline and a Tribunal casework service
- Information on special educational needs and disability on www.ipsea.org.uk
- Training for parents/carers, professionals, schools, colleges and local authorities
- Policy work at regional and national level
- Consultancy service
- Custom advice services
- Legal updates subscription service



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What this session will cover

- Common situations that we see and hear about where local authorities and/or schools are acting outside of the legal framework for supporting children and young people with SEND
- A summary of the legal framework for supporting children with SEND



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Joint Local Area SEND Inspections

- Joint inspections by Ofsted and the CQC to evaluate local areas' effectiveness in fulfilling their duties under the Children and Families Act 2014
- The local area:
 - Local authority
 - Clinical Commissioning Groups (CCGs)
 - Public health
 - NHS England
 - Early year's settings
 - Schools
 - Further education providers



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Joint Local Area SEND Inspections

- How effectively does the local area **identify** children and young people who have special educational needs and/or disabilities?
- How effectively does the local area **assess and meet the needs** of children and young people who have special educational needs and/or disabilities?
- How effectively does the local area **improve outcomes** for children and young people who have special educational needs and/or disabilities?



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Joint Local Area SEND Inspections

- A joint inspection outcome letter is sent to the local authority and CCGs within 28 days of the inspection being completed – setting out the main findings, strengths and weaknesses, and recommendations for improvement
- If there are significant concerns, the local area may be required to produce a Written Statement of Action

Joint Local Area SEND Inspections

- 60 inspection reports have been published
- 26 have been required to produce a written statement of action:
 - Bedford, Brent, Bury, Cheshire East, Dorset, Durham, Hartlepool, Kingston upon Hull, Lancashire, Leicester, Medway, Middlesbrough, Oldham, Oxfordshire, Redcar and Cleveland, Rochdale, Sandwell, Sefton, South Gloucestershire, Suffolk, Surrey, Sutton, Wakefield, Waltham Forest, Windsor and Maidenhead, Worcestershire



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Joint Local Area SEND Inspections

- Concerns about / relevant to schools:
 1. **Failure to identify** children and young people with SEND
 2. **Failure to meet the needs** of children and young people on SEN Support and with EHC plans, indicated by high numbers of children and young people with EHC plans but low numbers of children and young people on SEN Support and **high rates of exclusion** of children and young people with SEND
 3. Inadequacies of the **Local Offer**



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The Legal Framework

- Statute – Children and Families Act 2014, but also other relevant law such as the Equality Act 2010 and the Mental Capacity Act 2005
- Regulations – SEN and Disability Regulations 2014 and SEN (Personal Budgets) Regulations 2014
- Case law – Upper Tribunal, High Court, Court of Appeal and Supreme Court
- Guidance – The SEN and Disability Code of Practice, January 2015

1. Identification and assessment of needs

What the inspections say...

- Bury: “[t]here is a worrying lack of quality and consistency in the accurate identification of children and young people’s needs in schools ... The vast majority of parents and carers who gave their views do not think that their children’s needs were identified early. A significant number felt that needs were only identified after constant fighting and pushing. ‘We have to fight for our child’s rights’ is how one parent put it. Parents and carers feel there is a lack of transparent and understandable criteria. They also consider thresholds for support to be unrealistic and indicative of their children having to be at crisis point before identification happens.”

1. Identification and assessment of needs

- Cheshire East: “[t]he vast majority of parents who contributed to the inspection do not believe that their children’s needs have been identified in a timely manner. They are justified in their view ... The process of requesting an EHC plan is not universally well understood. There is the widespread perception that only educational professionals can request an assessment for an EHC plan. Most parents reported that the responsibility to gather evidence was left to them. Other professionals agreed with this. The process is not clear for parents or some professionals and the parents feel ‘abandoned’ in the process.”



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1. Identification and assessment of needs

- Oldham: “[t]he education, health and care (EHC) process in Oldham is fundamentally flawed, does not comply with the Code of Practice and there is possible illegal practice ... There is a lack of clarity about thresholds for agreeing EHC needs assessments ... Parents told inspectors that some schools are too quick to refuse to engage in the referral process for EHC plans. Children and young people wait too long for their needs to be identified. In some cases, a child’s needs are only identified once they move from primary to secondary school.”

1. Identification and assessment of needs

- Sefton: “[t]he timely identification of needs across the local area is unclear and leaves parents and some school leaders confused. This is because there is a lack of transparency about the systems leading to statutory assessment. Parents and some school leaders think that decisions about statutory assessment can take years and that the systems are inflexible.”

1. Identification and assessment of needs

- South Gloucestershire: “[p]arents and carers report that the assessment process is not clear to them.”
- Windsor and Maidenhead: “[t]he effectiveness of early identification in schools is too varied ... In some schools, leaders are a barrier to children’s and young people’s needs being identified.”

1. Identification and assessment of needs

- Worcestershire: “[s]ome schools work in ways that are in complete contrast to the spirit of the SEND reforms ... School leaders are sometimes allowing funding to be a factor in their request for an EHC plan assessment.”

The law on EHC needs assessments

- Local authorities often draft internal policies that apply a different test or standard to that set out in law
- This is unlawful
- Law trumps policy!



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The law on EHC needs assessments

The test for an EHC needs assessment:

- The LA **must assess** where:
 - the child or young person **has or may have** **special educational needs**, and
 - it **may be** necessary for **special educational provision** to be made for the child or young person in accordance with an EHC plan



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The law on EHC needs assessments

Section 20(1) Children and Families Act
2014:

A child or young person has special educational needs if he or she has a learning difficulty or a disability which calls for special educational provision to be made for him or her



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The law on EHC needs assessments

Section 20(2) Children and Families Act 2014:

A child of compulsory school age or a young person has 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**



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The law on EHC needs assessments

Section 21 Children and Families Act 2014:

Special educational provision 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



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2. Meeting needs

What the inspections say...

- Kingston upon Hull: “[i]n some mainstream schools and settings, staff do not have the knowledge and skills needed to provide an effective and graduated response to children and young people’s special educational needs.”

2. Meeting needs

- Medway: “[t]he extent to which pupils who have SEN and/or disabilities have their needs met well in maintained schools is too variable ... not all mainstream primary schools identify and meet pupils’ SEN early enough. This means that pupils do not always get the support they need from the beginning. As a result, some parents believe that the EHC process is the only way to ensure that their children’s needs are met. The recent spike in requests for children to be assessed for an EHC plan signals that this is a growing concern.”



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2. Meeting needs

- Middlesbrough: “[i]n some schools and settings, staff do not have sufficient knowledge of the disability and special educational needs reforms.”
- Oldham: “[t]he education, health and care (EHC) process in Oldham is fundamentally flawed, does not comply with the Code of Practice and there is possible illegal practice.”

2. Meeting needs

- Redcar and Cleveland: “[h]igh levels of absence and persistence absence, increasing levels of exclusion and declining academic progress indicate that the needs of too many children and young people who have SEN and/or disabilities are not being effectively met in mainstream secondary schools. SEN support plans and EHC plans for children and young people in these schools often lack the detail and specificity required.”



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2. Meeting needs

- Sefton: “[a] significant number of parents report that there is a lack of consistency between schools in the support that they offer to children who have special educational needs and/or disabilities. There is exemplary practice in some schools in Sefton, but this has not been harnessed and shared with other settings to help ensure that needs are met more consistently in all schools.”

2. Meeting needs

- Suffolk: “[t]oo often parents say that they feel they are a burden to schools and providers because of the costs incurred in seeking external specialist support for assessing and addressing pupils’ needs. In addition, when applications for an EHC plan are turned down, there is no explanation of why this decision has been made, or any follow-up advice and support. This leaves parents, and sometimes schools, feeling unsupported and unable to meet children’s and young people’s needs.”



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2. Meeting needs

- Surrey: “[c]ompared with similar council areas, Surrey schools identify a lower proportion of pupils requiring school support for special educational needs. However, a relatively high proportion of pupils in Surrey are identified as needing a statement of special educational needs or an EHC plan. Area leaders have identified this weakness and have begun working with schools to support earlier and more accurate identification of need.”

The law on meeting needs

- SEN Support, or
- Education, Health and Care (EHC) plans



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SEN Support

“Cycle of action” – SEND Code of Practice, paragraphs 6.45-6.56:

- **Assess** – Clear analysis of needs – assessed by class/subject teacher – external support services
- **Plan** – Interventions & support, expected impact on progress, development or behaviour – clear date for review
- **Do** – Class/subject teacher supported by SENCO
- **Review** – Revise plan in consultation with parents

SEN Support

Involvement of specialists – SEND Code of Practice, paragraphs 6.58-6.62

- Where a pupil makes “less than expected progress, despite evidence-based support and interventions matched to the pupil’s area of need”, consideration should be given to the involvement of specialists
- Parents should always be involved in discussions about whether to seek specialist involvement
- Specialist involvement could be from:
 - an educational psychologist
 - Child and Adolescent Mental Health Services (CAMHS)
 - Specialist support teachers/services
 - Therapists – SALT, OT, Physiotherapists



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SEN Support

Reporting – SEND Code of Practice,
paragraphs 6.64-6.71

- An annual report must be provided to parents
- Schools should meet parents at least 3 times each year
- A record of the outcomes, action and support agreed should be prepared and shared with the pupil's parents and school staff

SEN Support

Section 66 Children and Families Act 2014:

- Duty on the governing body, proprietors or management committee of a mainstream school, college or pupil referral unit to use their “best endeavours” to secure special educational provision for all children and young people for whom they are responsible

EHC plans

Section 42 Children and Families Act 2014:

(1) This section applies where a local authority maintains an EHC plan for a child or young person

(2) The local authority must secure the specified special educational provision for the child or young person



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EHC plans

The importance of specificity...

- Provision can only be enforced if it is clear what should be provided

How specific should it be?

- L v Clarke & Somerset CC [1998] ELR 129:
“...so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often specification of hours per week will no doubt be necessary and there will be a need for that to be done.”
- See also paragraph 9.69 SEND Code of Practice
- Beware of funding bands

High rates of exclusion

What the inspections say...

- Bury: “[t]oo many children and young people who have SEN support or a statement or EHC plan are being permanently excluded. The number of exclusions in primary schools is a cause for concern. Leaders have identified inaccurate identification of these children and young people’s needs as a significant contributing factor. There is an acknowledgment that, historically, children and young people who displayed challenging behaviour were seen as ‘naughty children’ as opposed to their behaviour being a symptom of a special educational need.”

High rates of exclusion

- Kingston upon Hull: “[l]evels of absence and persistent absence for children and young people who have SEN and/or disabilities are increasing and levels of fixed-term and permanent exclusion from primary and secondary schools are high.”

High rates of exclusion

- Medway: “[s]ome mainstream schools are not effectively meeting the needs of children and young people with SEN and/or disabilities. This is particularly evident in the high level of permanent and fixed-term exclusions of children who have SEN but do not have an EHC plan Effective challenge and support to some schools, initiated by the local authority, have led to a notable reduction in the number of pupils who have SEN and/or disabilities experiencing exclusion. However, some schools have proved hard to engage with and are not doing enough to improve outcomes for pupils at risk of exclusion.”



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High rates of exclusion

- Oldham: “[w]hile the proportion of permanent exclusions has reduced across the secondary phase, the proportion of fixed-term exclusions has risen significantly.”
- Oxfordshire: “[t]he needs of children and young people with social, emotional and mental health needs who do not have a statement of special educational needs or an EHC plan are typically not met well enough in mainstream schools. This is evident in the high level of fixed-term exclusions, which contribute to poor attendance. Some schools resort to reduced timetables for such pupils.”



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High rates of exclusion

- South Gloucestershire: “[t]he proportion of pupils who have SEN and/or disabilities who have fixed-term exclusions is high ... The proportion of pupils with SEN support that have permanent exclusions from secondary schools is also high.”
- Suffolk: “[m]any parents report that their children are absent or unofficially excluded from school because their needs are not diagnosed or met.”

High rates of exclusion

- Surrey: “[f]ixed-term exclusion rates for pupils who have special educational needs in Surrey’s mainstream schools, at school support and with statements or EHC plans, remained above national figures in 2015, with exclusions for pupils receiving school support showing a rising trend. The rate of permanent exclusion for both groups of pupils also shows a continuing increase, rising to above the latest nationally published figure for pupils with a statement or EHC plan.”

High rates of exclusion

- Sutton: “[t]oo many children and young people who have SEN and/or disabilities have been excluded, especially at primary school, over time.”
- Waltham Forest: “[m]ore pupils with a statement of special educational needs or an EHC plan are absent or temporarily excluded from schools in Waltham Forest, compared to all other pupils within the area and nationally.”

High rates of exclusion

- Worcestershire: “[a] number of schools are carrying out ‘grey’ exclusions through their use of part-time timetables ... Absence and persistent absence rates for children and young people who have SEN and/or disabilities are higher than the national averages. The rates of permanent exclusions for these children and young people are rising sharply, and are well above the national averages.”

The law on exclusions

Children are either:

- in school – full-time

OR

- excluded – fixed-term or permanently

Informal exclusions / sending pupils home to ‘cool off’ are unlawful



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The law on exclusions

Section 2 statutory guidance on exclusions:

“Disruptive behaviour can be an indication of unmet needs. Where a school has concerns about a pupil’s behaviour, it should try to identify whether there are any causal factors and intervene early in order to reduce the need for a subsequent exclusion. In this situation, schools should consider whether a multi-agency assessment that goes beyond the pupil’s educational needs is required.”



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The law on exclusions

Paragraph 25 of the Guidance:

“Where a school has concerns about the behaviour, or risk of exclusion, of a child with additional needs, a pupil with an EHC plan or a looked after child, it should, in partnership with others (including the local authority as necessary), consider what additional support or alternative placement may be required. This should involve assessing the suitability of provision for a pupil’s SEN. Where a pupil has an EHC plan, schools should consider requesting an early annual review or interim/emergency review.”



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3. Inadequacies of the Local Offer

What the inspections say...

- Dorset: “[p]arents and carers of children and young people who have special educational needs and/or disabilities spoke of the delays and their concerns at having to struggle to have their child’s needs assessed.

Overwhelmingly, they described a lack of understanding of how to get the help and support they need in the local area to improve outcomes for children and young people.”

3. Inadequacies of the Local Offer

- Sefton: “[t]here is a lack of support for parents further to the diagnosis of a special educational need. A significant number of parents report that they have to find out what support is available for themselves or they find out from other parents.”

The law on the Local Offer

- Local authorities are required to publish a Local Offer setting out the support they expect to be available across education, health and social care for children and young people with SEND in their area – section 30 Children and Families Act 2014
- Paragraph 4.2 SEND Code of Practice: “[t]o provide clear, comprehensive, accessible and up-to-date information about the available provision and how to access it”

Conclusion

- Schools have a crucial role to play in identifying children with SEND
- Essential that school staff understand the legal framework for supporting pupils with SEND
- Remember:
 - Law trumps policy!
 - Law trumps the SEN Code of Practice!
 - Starting point must always be the statute and accompanying regulations



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