

CHAPTER 4

Education

4.1 Introduction

4.7 The human right to education

4.16 Duty to participate to 18

4.21 The SEN and disability scheme 0–25

4.27 Section 19 – general principles

4.32 Working together and sufficiency duties

4.42 Implementation and transfer to the new system

4.45 Statements of SEN during the transition period

4.51 Local transition plans and timing of transfers

4.56 Transfer process from statements to EHC plans

4.67 Transfer process for young people with learning difficulty assessments

4.72 The local offer

4.79 Duties on schools

4.83 Key duties

4.87 The role of the SENCO

4.90 SEN information reports

4.93 Duty to support pupils with medical conditions

4.95 Duties under the Equality Act 2010

4.103 SEN support – early years, schools, colleges

4.110 Education, health and care needs assessments

4.113 Criteria for assessment

4.123 The assessment process

4.130 Timescales

4.134 Education, health and care plans

4.138 Contents of the EHC plan

4.141 Outcomes

4.147 The draft EHC plan and requests for a particular school, college or other institution

4.149 Placements under EHC plans

4.156 Finalising and maintaining the EHC plan

4.160 Ceasing to maintain the EHC plan

4.164 Reviews

4.180 Re-assessments

4.184 Personal budgets

4.196 Direct payments for SEN provision

4.199 Children and young people in custody

4.202 Residential and out-of-authority placements

4.206 Education otherwise than at school

4.210 Duties to children who are without education (EA 1996 s19)

4.218 School admissions

4.220 Exclusions from school and colleges

4.230 School and college transport

4.242 Appeals to the tribunal

4.249 Other enforcement methods

4.249 Judicial review

4.251 Complaint to the secretary of state

4.252 Complaint to the ombudsman

4.253 Decision-making for young people

4.254 Further advice and support

Key points

- Disabled children have a right to suitable, effective and appropriate education aimed at helping them achieve the 'best possible' outcomes.
- A large proportion of disabled children have 'special educational needs' (SEN). The new scheme to meet those needs is set out in Part 3 of the Children and Families Act (CFA) 2014.
- Local authorities have general duties to promote the welfare of disabled children and children with SEN and to promote the fulfilment by every child of his or her educational potential.
- There is a legal presumption in favour of mainstream education for disabled children and children with SEN.
- Most children with SEN in mainstream schools will have their needs met through a system of 'SEN support' under the SEND Code.
- The route to specialist provision is through a statutory assessment which may lead to an Education, Health and Care plan (EHC plan).
- Children, including children with complex needs, can also be educated at home.
- Children with SEN should not be excluded from school except as a 'last resort'; where they are excluded, their parents can generally appeal to a Governor's Committee and an Independent Review Panel or to the tribunal in some cases where disability discrimination is alleged.
- Local authorities owe a specific duty to children (including disabled children and children with SEN) who are out of school to offer suitable alternative provision.
- Disputes between parents and local authorities in relation to specific aspects of the SEN system can be resolved through an appeal to the First-tier Tribunal (Special Educational Needs and Disability).

Introduction

4.1 This chapter considers the rights of disabled children to education. The right education is fundamental to achieving good outcomes for disabled children, as it is for every child. Although the focus of this chapter is on children with special educational needs (SEN) it also considers the duties of schools towards children with disabilities that do not meet the definition of SEN.

4.2 This chapter focuses on the new SEN and disability scheme for children and young people aged 0–25 that was introduced through Part 3 of the Children and Families Act (CFA) 2014, in force from 1 September 2014. It is important to note however that many children and young people will continue to receive support under the old legal framework until they have transitioned to the new system, which should be completed by 2018.

4.3 At the time of writing (November 2015) there have been no Upper Tribunal decisions under the new scheme in Part 3 of CFA 2014, and there has only been one judicial review judgment considering the scheme.¹ As such this chapter focuses on Part 3 of CFA 2014, the relevant regulations (the SEND Regs 2014²) and the guidance in the Code of Practice which accompanies them.³ Many of the tribunal decisions and case-law in relation to the old scheme under Education Act (EA) 1996 Part 4 covered in the first edition of this book will continue to be relevant to the interpretation of Part 3 of CFA 2014, although this will be tested by the courts and tribunals on a case-by-case basis.

4.4 The purpose of the reforms under Part 3 of the CFA 2014 is to create 'a system which is less confrontational and more efficient'.⁴ However emerging evidence from the specialist charities in the field suggests that one year on, the reforms have not yet made a significant difference to levels of satisfaction with the SEN system.⁵

4.5 At the most fundamental level children with SEN are still hugely more likely to be excluded from school than other children:

¹ *R (L and P) v Warwickshire CC* [2015] EWHC 203 (Admin); (2015) 18 CCLR 458. See S Broach, *CDC Care Law Update 1*, Council for Disabled Children.

² SI No 1530.

³ Department for Education/Department of Health, *Special educational needs and disability code of practice: 0 to 25 years; Statutory guidance for organisations which work with and support children and young people who have special educational needs or disabilities*, January 2015 ('SEND Code').

⁴ SEND Code, Ministerial Foreword, p11.

⁵ For example National Autistic Society, *School report 2015: A health check on how well the new Special Educational Needs and Disability (SEND) system is meeting the needs of children and young people on the autism spectrum*, October 2015; National Deaf Children's Society, *One year on: impact of changes to the special educational needs system on deaf children*, September 2015; Driver Youth Trust, *Joining the dots: Have recent reforms worked for those with SEND?* October 2015.

- Pupils with SEN account for 7 in 10 of all permanent exclusions and 6 in 10 of all fixed period exclusions.
- Pupils with SEN without statements have the highest permanent exclusion rate and are around nine times more likely to receive a permanent exclusion than pupils with no SEN.
- Pupils with statements of SEN have the highest fixed period exclusion rate and are around nine times more likely to receive a fixed period exclusion than pupils with no SEN.⁶

4.6 It is also concerning that there has been a 2.5 per cent decrease in the numbers of children recognised to have SEN in the most recent year for which data has been reported by the Department for Education.⁷ A potential implication of this is that children who would otherwise be identified with SEN are not being identified because of concerns about the resource implications.

⁶ Department for Education, *Statistical First Release: Permanent and Fixed Period Exclusions in England, 2013 to 2014*, July 2015.

⁷ Department for Education, *Statistical First Release: Special educational needs in England*, January 2015.

Key definitions – CFA 2014 Part 3

• Special educational needs (SEN)

A child or young person has SEN if they have a learning difficulty or disability which calls for special educational provision to be made for him or her.⁸

A child of compulsory school age or a young person has a learning difficulty or disability if he or she:

- has a significantly greater difficulty in learning than the majority of others of the same age, or
- 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.⁹

A child under compulsory school age has special educational needs if he or she is likely to fall within the definition above when they reach compulsory school age or would do so if special educational provision was not made for them.¹⁰ Difficulties related solely to learning English as an additional language are not SEN. When identifying and assessing SEN for children and young people whose first language is not English requires particular care and schools should look carefully child or young person's performance in different areas of learning and development or subjects to establish whether lack of progress is due to limitations in their command of English or if it arises from SEN or a disability.¹¹

• Special educational provision

CFA 2014 s21 defines special educational provision for children over two and young people as:

'educational or training provision that is additional to, or different from, that made generally for others of the same age in –

- mainstream schools in England,
- maintained nursery schools in England,
- mainstream post-16 institutions in England, or
- places in England at which relevant early years education is provided.¹²
- Special educational provision for a child aged under two means educational provision of any kind.¹³

⁸ CFA 2014 s20(1).

⁹ CFA 2014 s20(2).

¹⁰CFA 2014 s20(3).

¹¹SEND Code, para 6.24.

¹²CFA 2014 s21(1).

¹³CFA 2014 s21(2).

• **Disability**

The definition of disability is set out in section 6(1) of Equality Act 2010, which states that a person (P) has a disability if:

- a) P has a physical or mental impairment, and
- b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- c) Further detail in relation to this definition of disability is set out in chapter 9 at paras 9.11–9.22.

• **Health care and social care provision**

CFA 2014 s21(3) defines 'Health care provision' as the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006 (see chapter 5 for duties in relation to healthcare provision for disabled children).

Social care provision means the provision made by a local authority in the exercise of its social services functions.¹⁴ This will include provision such as short breaks and domiciliary care in the home. Further information in relation to social care duties can be found in chapter 3.

There can often be difficulties in identifying whether particular provision is special educational provision, health provision or social care provision. Some assistance is given by CFA 2014 s21(5), which makes clear that 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). As such it is likely that the majority of provision delivered to disabled children in schools will be special educational provision. However the relevant tests summarised above should be applied in relation to each and every type of provision a child receives, particularly if they have an EHC plan (see paras 4.134–4.163 below).

The SEND Code states that speech and language therapy and other therapy provision can be regarded as either education or health care provision, or both. It could therefore be included in an EHC plan as either educational or health provision. However, since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing so.¹⁵

¹⁴CFA 2014 s21(4).

¹⁵SEND Code, para 9.74.

● Young person

A 'young person' is a person over compulsory school age but under the age of 25.¹⁶ A child is of compulsory school age from the beginning of the term following their fifth birthday until the last Friday of June in the year in which they become 16, provided that their 16th birthday falls before the start of the next school year.¹⁷ For example, if a child turns 16 in March 2016, they will be over compulsory school age (and therefore a 'young person') after Friday 24 June 2016.

The human right to education

4.7 Education is a fundamental human right. The right is contained in a number of international treaties, but most importantly within article 2 of Protocol 1 to the European Convention on Human Rights ('A2P1'), which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

4.8 The United Kingdom has entered a reservation in respect of A2P1 which provides that the second sentence of the right (relating to parent's wishes) is only accepted in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable expenditure. This qualification reflects the position in Education Act 1996 s9 which gives only a qualified right to parents to have their choices and views respected in relation to their child's education.

4.9 The scope of the right to education under A2P1 in relation to a disabled child has been considered by the Supreme Court in *A v Essex CC*.¹⁸ This was a damages claim under A2P1 in relation to a period of 18 months when A was effectively without any education, apart from irregular speech and language therapy sessions and access to some educational toys. A has complex needs, including severe learning disabilities, autism and epilepsy. His needs were ultimately met successfully in a residential special school placement.

4.10 The Supreme Court held by a majority of 3–2 that it was not arguable that A2P1 gave A an absolute right to education to meet his special needs during the 18 months he was out of school. However, a different 3–2 majority of the Justices found that it was arguable that Essex had failed to provide educational facilities that were available that might have mitigated the consequences of the failure to

¹⁶CFA 2014 s83(2).

¹⁷SEND Code, glossary of terms, page 279.

¹⁸*A v Essex County Council* [2010] UKSC 33; [2011] 1 AC 280.

meet A's special needs during this period. Despite this, the Supreme Court declined to extend time to allow this part of A's claim to proceed to trial. This judgment is complex, with all five Justices giving separate speeches, but it clearly demonstrates that at the very least in order to comply with A2P1 authorities must not neglect the educational needs of children with even the most complex SEN and must do what is possible to provide these children with some education, even if less than suitable education, while a suitable placement for them is being found.

4.11 In relation to children with SEN like A who are out of school, the A2P1 right to education is supplemented by the powerful duties contained in EA 1996 s19 which require suitable alternative education to be provided regardless of resource difficulties – see below at paras 4.210–4.217.

4.12 As discussed in chapter 2 (see paras 2.22–2.37), recent cases¹⁹ show that international human rights conventions are growing in significance in English law. The UN Convention of the Rights of Persons with Disabilities is one such international treaty and Article 24 sets out important rights for disabled children when accessing education.

In particular:

States parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, state parties shall ensure an inclusive education system at all levels and life long learning directed to:

- a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- c) enabling persons with disabilities to participate effectively in a free society.

4.13 Article 24(2) states:

In realising that right, states parties shall ensure that:

- a) persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- b) persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- c) reasonable accommodation of the individual's requirements is provided;
- d) persons with disabilities receive the support required, within the general education system, to facilitate their effective education; and

¹⁹For example, see *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449.

- e) effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

4.14 In addition, there are also a number of important obligations relating to education in the UN Convention on the Rights of the Child including:

Article 28 (right to education)

Article 28 provides that states should recognise that all children shall have an equal right to education and in particular:

- primary education should be compulsory and available free to all
- States should encourage the development of different forms of secondary education including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- higher education should be accessible to all on the basis of capacity by every appropriate means;
- States should make educational and vocational information and guidance available and accessible to all children;
- States should take measures to encourage regular attendance at schools and the reduction of drop-out rates.
- school discipline should be administered in a manner consistent with the children's human dignity.

Article 29 (educational development)

Article 29 provides that a child's education should be aimed at the development of:

- the child's personality, talents and mental and physical abilities to their fullest potential;
- respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and
- the development of respect for the natural environment.

4.15 Although these conventions are 'unincorporated' and so are not formally part of English law, where the obligation or right has a link to a direct right under the ECHR – for example, the right to education under A2P1 – then it is likely that they will be considered very carefully by the courts when deciding whether a public body has acted lawfully. They should also be taken into account in any case where domestic law is ambiguous. See further chapter 2 at paras 2.22–2.37.

Duty to participate to 18

4.16 The Education and Skills Act (ESA) 2008 raises the participation age so that all young people leaving year 11 are required to continue in education or training until at least their 18th birthday.²⁰ This does not necessarily mean that the young person has to remain in school and 'participation' can include:

- full-time study in a school, college or with a training provider;
- full-time work or volunteering (20 hours or more) combined with part-time education or training; or
- an apprenticeship or traineeship.

4.17 Every young person who reaches the age of 16 or 17 in any given academic year is entitled to an offer of a suitable place, by the end of September, to continue in education or training the following year.²¹

4.18 The aim of these duties is to ensure that every young person continues their studies or takes up training and goes on to successful employment or higher education. The Department of Education's statutory guidance for local authorities²² states that:

Most young people already continue in education or training after they finish year 11, because it gives them the best chance to get the skills and qualifications that employers and universities look for. However, the small group of young people not participating includes some of the most vulnerable. We want to give all young people the opportunity to develop the skills they need for adult life and to achieve their full potential.

4.19 There are a number of legal duties on local authorities to encourage and support young people to participate. These include:

- securing sufficient suitable education and training provision for all young people aged 16 to 19 and for those up to age 25 with a learning difficulty assessment (LDA) or Education, Health and Care (EHC) plan in their area;²³
- making available to all young people aged 13–19 and to those up to age 25 with an LDA or EHC plan, support that will encourage, enable or assist them to participate in education or training;²⁴

²⁰ESA 2008 Pt 1.

²¹Department for Education, *Participation of young people in education, employment or training*, September 2014, para 26.

²²Department for Education, *Participation of young people in education, employment or training*, September 2014. See Annex 1 to the statutory guidance for detailed information on duty to participate requirements.

²³Education Act 1996 ss15ZA and 18A (as inserted by the Apprenticeships, Skills, Children and Learning Act 2009) and see also CFA 2014 s27.

²⁴Education and Skills Act 2008 s68, as amended by CFA 2014 s20.

- promoting the effective participation in education and training of 16 and 17 year olds in their area with a view to ensuring that those persons fulfil the duty to participate in education or training;²⁵ and
- making arrangements to identify 16 and 17 year olds who are not participating in education or training.²⁶

4.20 Local authorities are also under a duty to secure participation of young people through their wider functions²⁷ such as developing post-16 transport arrangements which ensure that young people are not prevented from participating because of the cost or availability of transport to their education or training.²⁸ Information in relation to post 16 education and training provision available to young people for children with SEN and disabilities up to the age of 25 must also be included in each local authority's 'local offer'²⁹ as described at paras 4.72–4.78 below. There are also duties on providers to promote good attendance,³⁰ to tell their local authority when a young person is no longer participating³¹ and to secure independent careers guidance.³²

The SEN and disability scheme 0–25

4.21 In March 2011, the government published a Green Paper titled 'Support and Aspiration: A new approach to SEN and disability'. This consultation recognised that the provision of services to families of children with SEND was often fragmented and challenging to navigate, and set out a series of wide ranging reforms to improve the existing scheme for accessing support. The consultation ultimately led to Part 3 of the Children and Families Bill, which received Royal Assent on 13 March 2014 and came into force on 1 September 2014 – arguably too short a timeframe to implement wholesale system reform, notwithstanding that many of the provisions had been the subject of earlier pilot schemes.

4.22 The new scheme is underpinned by a number of important general duties on local authorities, including duties to:

- promote the fulfilment by every child (and young adult for whom an EHC plan is maintained) of their educational potential;³³ and

²⁵ESA 2008 s10.

²⁶ESA 2008 s12.

²⁷ESA 2008 s10.

²⁸Education Act 1996 s509AA.

²⁹CFA 2014 s30 and SEND Regs 2014 Sch 2.

³⁰ESA 2008 s11.

³¹ESA 2008 s13.

³²Department for Education, *Participation of young people in education, employment or training*, September 2014, para 39.

³³Education Act 1996 s13A(1) (c).

- have regard to the need to safeguard and promote the welfare of children in carrying out their educational functions.³⁴

4.23 On the day the new system came into force, Children and Families Minister Edward Timpson MP said:

Today is a landmark moment in improving the lives of children with SEND and their families. These reforms put children and parents at the heart of the system. For too long, families have found themselves battling against a complex and fragmented system. These reforms ensure support fits in with their needs and not the other way round - they will result in a simpler and more joined up system that focuses on children achieving their best. This is the beginning of a journey, and the vast majority of local authorities have told us they are ready and parents have been supportive over the changes.³⁵

4.24 The feature of the new scheme which has received the greatest focus is that statements of Special Educational Needs (Statements) for children in schools and learning difficulty assessments (LDAs) for young people in further education and training are being replaced with a single combined education, health and care plan (EHC plan) which will be available from birth until age 25. Accordingly, the new scheme will extend the current age of eligibility for those with a statement of SEN and still in education from 16 to 25, although importantly it does not create any new legal right to education up to this age. Transitional arrangements are in place to support the implementation of the new system and are described below, see paras 4.42–4.71.

4.25 It is important to note however that only a small minority of children with SEN will have an EHC plan, as was the case with statements. For the reforms to benefit the majority of children with SEN it is therefore important to retain a focus on their other elements. Some of the other key changes include the introduction of a new system for 'SEN support' (replacing 'school action' and 'school action plus' in schools and extending the system to early years and further education) and the new 'local offer'. For children and young people with EHC plans, there are changes to appeal rights and mediation, the introduction of personal budgets and direct payments for education and a focus on outcomes and preparation for adulthood.

4.26 Prior to the implementation of the new system, the government set up pilots with 31 local authorities to test the proposals in the SEND green paper. This was known as the 'Pathfinders Programme'. It ran from October 2011 to September 2014 and its final report was published in July 2015.³⁶ The report found that overall, the data suggested that the process for accessing support has improved

³⁴Education Act 2002 s175. This mirrors the duty in section 11 of the Children Act 2004 in relation to other local authority functions, see chapter 2 at para 2.53.

³⁵Department of Education press release, 1 September 2014.

³⁶Department for Education, *The Special Educational Needs and Disability Pathfinder Programme Evaluation Final Impact Research Report*, July 2015.

for families. However, there was no statistical change in the extent to which families thought the decisions reached were fair and there remained a significant percentage of families who are not satisfied. In addition, the surveys found little evidence of significant improvements in parental outcomes or in either children's health or quality of life. The extent to which the reforms will bring about the positive changes for children and young people with SEND that had been envisaged therefore remains to be seen. It will only be possible to obtain a complete picture of the difference the reforms have made once all children and young people have transitioned to the new system in 2018.

Section 19 – general principles

4.27 The SEND Code states that 'Section 19 of the Children and Families Act 2014 sets out the principles underpinning the legislation and the guidance in this Code of Practice'.³⁷ Section 19 establishes the following core principles which must underpin all decisions taken by local authorities when exercising their functions in relation to children and young people. It requires local authorities to have regard to the following matters:

- a) the views, wishes and feelings of the child and his or her parent, or the young person;
- b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
- c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
- d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

4.28 Whenever a local authority is taking any decision in relation to children and young people with SEN or disabilities under CFA 2014 Part 3, it must have 'regard' to the above principles. In essence, this requires consideration of these principles when all decisions are taken.

4.29 The principles will apply to all decisions taken by local authorities under Part 3 of CFA 2014, from individual decisions as to what provision is required to meet a child or young person's needs in an EHC plan to macro decisions about commissioning of services and any criteria to be applied. While there may be boundary disputes as to whether health or social care decisions are taken in the exercise of the functions under Part 3 of CFA 2014, it is far less likely that there will be any such dispute in relation to educational decisions.

4.30 Although having 'regard' does not create a duty on a local authority to provide the 'best' provision or to agree to do something in accordance with a parent's wishes in every case, it does mean local authorities will need to evidence

³⁷SEND Code chapter 1, p19.

how they have had regard to these principles when making all decisions. Under section 19(d), the aim must be now the 'best possible...outcomes' for children and young people in every case.

4.31 A similar duty to the section 19 duty can be found in section 149 of the Equality Act 2010, the 'Public Sector Equality Duty' (PSED) which is discussed in chapter 9 at paras 9.97–9.115. It is likely that the courts will draw on the extensive PSED case-law in interpreting the section 19 duty.

Working together and sufficiency duties

4.32 CFA 2014 Part 3 includes a number of important duties on local authorities and their partners to work together. These duties continue a theme in children's legislation dating back to the Children Act 1989 (section 27) and the Children Act 2004 (section 10); see further chapter 2 at paras 2.52–2.55.

4.33 In particular, whenever local authorities are exercising any of their functions under Part 3 of CFA 2014, they must do so with a view to ensuring the integration of educational provision with health and social care provision where this would promote the well-being of children or young people in its area who have SEN or a disability or it would improve the quality of special educational provision.³⁸ 'Well-being' of children and young people includes:

- physical and mental health and emotional well-being;
- protection from abuse and neglect;
- control by them over their day-to-day lives;
- participation in education, training or recreation;
- social and economic well-being;
- domestic, family and personal relationships;
- the contribution made by them to society.³⁹

4.34 Similarly, local authorities and their health partners must make joint commissioning arrangements for education, health and care provision for children and young people with SEN and disability.⁴⁰ This must include arrangements for securing EHC needs assessments, securing the education, health and care provision specified in EHC plans and agreeing personal budgets.⁴¹ The duty to have joint commissioning arrangements is an important development, as it requires local authorities and their health partners to be able to demonstrate firm arrangements that are clearly documented.

³⁸CFA 2014 s25(1). See further the SEND Code, para 3.70 requiring councillors and senior officers to 'co-operate ... to ensure the delivery of care and support is effectively integrated in the new SEN system'.

³⁹CFA 2014 s25(2).

⁴⁰CFA 2014 s26(1).

⁴¹CFA2014 s26(4).

4.35 The SEND Code states that joint commissioning arrangements should enable partners to make best use of all the resources available in an area to improve outcomes for children and young people in the most efficient, effective, equitable and sustainable way.⁴² This duty will be particularly important for disabled children who need to access provision holistically from education, health and social care.

4.36 In order to ensure that joint commissioning is informed by a clear assessment of local needs, each local authority must have a Health and Wellbeing Board who have a duty to promote greater integration and partnership working, including through joint commissioning, integrated provision and pooled budgets.⁴³ In order to understand the needs of its local population, Health and Wellbeing Boards must carry out Joint Strategic Needs Assessments (JSNA) which should include consideration of the needs of children and young people with SEN and disability in order to agree outcomes and joint commissioning decisions.⁴⁴

4.37 Local authorities are also under a duty to keep education (and care) provision for children and young people with SEN and disabilities under review and consider the extent to which provision is sufficient to meet the needs of children and young people its area and for whom it is responsible.⁴⁵ They must consult with a range of people and bodies, including children, parents and young people in order to comply with these duties.⁴⁶ This duty will be important for parents and young people where there are concerns in a local area that provision may not be sufficient to meet needs. The assessment of sufficiency under CFA 2014 s27 must be informed by the comments made on the 'local offer' for the relevant area, see paras 4.72–4.78 below. As such it is vital that children, young people and parents use the 'local offer' comment facility to provide feedback on any gaps in the quality or quantity of local provision.

4.38 In addition, health bodies have a duty to bring certain children to the local authority's attention. This duty applies where a CCG, NHS trust or NHS Foundation trust forms the opinion that a child has, or probably has special educational needs or a disability. Where this arises, the health body must inform the child's parent that they have formed that opinion and give them the opportunity to discuss and then bring their opinion to the attention of the appropriate local authority.⁴⁷ By bringing the child to the attention of the local authority, this would then trigger the local authority's duty to consider when an assessment of the education, health and care needs is required (see below at paras 4.110–4.133).⁴⁸

⁴²SEND Code, para 3.4 and Commissioning Support Programme, *Good commissioning: principles and practice*, September 2010.

⁴³SEND Code, para 3.21.

⁴⁴Local Government and Public Involvement in Health Act 2007 s116B.

⁴⁵CFA 2014 s27.

⁴⁶CFA 2014 s27(3).

⁴⁷CFA 2014 s23.

⁴⁸CFA 2014 s36.

4.39 Parents, children and young people frequently face difficulties in ensuring that local authorities and their partners work together effectively and can face delays in accessing provision as result. The working together provisions under CFA 2014 include specific duties in relation to co-operation and assistance. In particular, a local authority must co-operate with its local partners and each of its local partners must co-operate with the local authority when carrying out any functions under CFA 2014 Part 3.⁴⁹ Partners include district councils, schools, youth offending teams and CCGs.⁵⁰

4.40 These duties also extend to officers within the local authority to ensure that there is co-operation between education and social services departments.⁵¹

4.41 Finally, CFA 2014 s31 creates a duty to ensure co-operation in individual cases, similar to the duty imposed by Children Act 1989 s27 in relation to social care decisions for children 'in need' generally (see chapter 2 at para 2.55). Section 31 allows a local authority to request the co-operation of a wide range of partners including health bodies in any individual case. The partner body must comply with the request, unless they consider that doing so would (a) be incompatible with their duties, or (b) otherwise have an adverse effect on the exercise of their functions.⁵² A person or body that decides not to comply with a request under section 31 must give the authority that made the request written reasons for the decision.⁵³

Implementation and transfer to the new system

4.42 From 1 September 2014, all new entrants to the system (children and young people with SEN who do not yet have a statement or LDA) were able to access statutory assessments and plans in accordance with the new scheme under CFA 2014 Part 3. No new requests for assessments for statements under the Education Act ('EA') 1996 or LDAs under the Learning and Skills Act ('LSA') 2000 could be made from this date. The process for requesting EHC needs assessments and plans for new entrants is set out at paras 4.110–4.163 below.

4.43 Children and young people that already have a statement or LDA should be transferred to the new scheme in accordance with the Department of Education's advice 'Transition to the new 0 to 25 special educational needs and disability system: Departmental advice for local authorities and their partners' September 2015 ('transition advice'), currently (November 2015) in its third edition.

⁴⁹CFA 2014 s28(1).

⁵⁰CFA 2014 s28(2).

⁵¹CFA 2014 s28(3).

⁵²CFA 2014 s31(2).

⁵³CFA 2014 s31(3).

4.44 All children and young people with statements of SEN must be transferred to new EHC plans by April 2018.⁵⁴ For young people with LDAs, the deadline for transfer is September 2016.⁵⁵ The legal test for an EHC plan remains the same as that for a statement under the EA 1996.⁵⁶ Accordingly, the government has stated that it expects that 'all those who have a statement of SEN and who would have continued to have one under the current system will be transferred to an EHC plan – no-one should lose their statement and not have it replaced with an EHC plan simply because the system is changing'.⁵⁷

Statements of SEN during the transition period

4.45 Until 1 April 2018, for children and young people with existing statements and LDAs who are awaiting transfer, local authorities must continue to comply with the legal framework under the EA 1996 and the statement and old law continues to have affect until the transfer process has been completed.⁵⁸ During this transition period, local authorities must continue to maintain statements and review them at least annually.

4.46 Parents will also be able to request re-assessments of children and young people with statements under the EA 1996 pending transfer to an EHC plan. In these circumstances, local authorities can agree to conduct an EHC needs assessment instead of a re-assessment under the EA 1996 where it is appropriate to do so and agreed by child's parent or young person.⁵⁹ The transition advice states that local authorities are encouraged to use this power where they can as it will allow children and young people to benefit from the new system earlier than planned and also help to reduce the burden of outstanding transfers.⁶⁰

4.47 Where a request for a re-assessment of a statement is made, local authorities must inform the parents of their decision within six weeks. Re-assessments must be carried out where an assessment has not taken place within the last six months and it is necessary for the local authority to carry out an assessment.⁶¹ This could include where there has been a change in the child's needs or the provision is no longer suitable.⁶²

⁵⁴Transition advice, para 2.1.

⁵⁵Transition advice, para 1.9.

⁵⁶CFA 2014 s37(1), and see further para 4.134 below.

⁵⁷Transition advice, para 1.8.

⁵⁸Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 Pt 5.

⁵⁹Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 art 23.

⁶⁰Transition advice, para 3.9.

⁶¹Education Act 1996 s329.

⁶²Department for Education and Skills, *SEN Code of Practice*, 2001, para 7.68.

4.48 Up until the point where a local authority provides formal notice in writing that the 'Transfer Review' process to an EHC plan has started, parents and young people can continue to exercise rights of appeal to the First-tier Tribunal (Special Educational Needs and Disability) ('the tribunal')⁶³ in relation to:

- the description of needs in Part 2 of the statement;⁶⁴
- the provision in Part 3 of the statement;⁶⁵
- the school named in Part 4 of the statement;⁶⁶
- if no school is named in Part 4 of the statement;⁶⁷
- if the local authority refuses to change the name of the school following a parental request where the statement is at least one year old;⁶⁸
- situations where the local authority refuses to carry out a re-assessment, provided an assessment has not taken place in the last six months;⁶⁹
- situations where the local authority decides not to amend the statement following a re-assessment;⁷⁰
- situations where the local authority decides not to amend the statement following an annual or other review;⁷¹ and
- situations where the local authority ceases to maintain a statement.⁷²

4.49 The procedure and time limits for appeals to the tribunal are described at paras 4.242–4.248 below.

4.50 Where an appeal to the tribunal has been issued, the local authority cannot commence the Transfer Review process until the conclusion of tribunal appeal.⁷³

Local transition plans and timing of transfers

4.51 Provided all transfers take place before 1 April 2018, and subject to specific national requirements described at para 4.53 below, each local authority has discretion to determine when children and young people will be transferred to the

⁶³Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 arts 8-10 and 19.

⁶⁴Education Act 1996 s326(1A) (a) .

⁶⁵Education Act 1996 s326(1A) (b) .

⁶⁶Education Act 1996 s326(1A) (b) .

⁶⁷Education Act 1996 s326(1A) (c) .

⁶⁸Education Act 1996 Sch 27 para 8(3) (b) .

⁶⁹Education Act 1996 s328(3) (b) .

⁷⁰Education Act 1996 s326(1) (c) .

⁷¹Education Act 1996 s328A(3) .

⁷²Education Act 1996 Sch 27 para 11(2) (b) .

⁷³Children and Families Act 2014 (Transitional and Savings Provisions) (No 2) Order 2014 art 16.

new system during the transition period. The process for each local authority should be set out in a 'Local Transition Plan' which should include:

- information about who has been consulted in the development of the plan;
- the numbers of children and young people expected to transfer each year during transition;
- the order in which children and young people will be transferred;
- details of transfer review process;
- sources of independent information and advice.⁷⁴

4.52 Local authorities should publish their Local Transition Plan on their website alongside the local offer (see paras 4.72–4.78 below).⁷⁵

4.53 Between 1 September 2015 and 31 March 2018, local authorities must transfer the following groups of children and young people each year:

- children in year 9;
- children and young people leaving youth custody; and
- children and young people prior to moving from:
 - relevant early years settings to school (including where the child remains at the same institution),
 - infant to junior school,
 - primary to middle school,
 - primary to secondary school,
 - middle to secondary school,
 - school (including school sixth forms) to a post-16 institution or an apprenticeship,
 - mainstream school to special school, or
 - special school to mainstream school.⁷⁶

4.54 In addition to the above, between 1 September 2016 and 31 March 2018, the following groups of children and young people should be transferred:

- all children in Year 6;
- all children in Year 11;
- those moving from one local authority to another;
- children and young people who still have a non-statutory EHC plan (issued as part of the pilot of the new scheme prior to 1 September 2014).⁷⁷

4.55 Where the transfer cannot be completed before 1 April 2018 (for example because of an ongoing tribunal appeal in relation to a statement), the provision set out in Part 3 of the plan will be treated as if it were specified in an EHC plan

⁷⁴Transition advice, para 4.6.

⁷⁵Transition advice, para 4.7.

⁷⁶Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 art 14.

⁷⁷Transition advice, para 4.13.

and the local authority must ensure that an EHC assessment is carried out and concluded as soon as reasonably practicable.⁷⁸

Transfer process from statements to EHC plans

4.56 The process by which statements are transferred to an EHC plan is called the 'Transfer Review'.

4.57 A local authority must notify the child's parent or young person two weeks prior to the start of the transfer review process commencing. Once notice has been provided, the provisions under the EA 1996 in relation to appeals to the tribunal, reviews and re-assessments cease to apply, although a local authority must continue to maintain the statement (and ensure the special educational provision in Part 3 is delivered) until the final EHC plan is issued.⁷⁹

4.58 The transfer review process must then be completed and an EHC plan issued within a further 18 weeks – so 20 weeks in total.⁸⁰ This is the maximum timescale that is allowed and steps must be completed as soon as practicable. Local authorities do not need to comply with these time limits in certain circumstances, including where advice has been requested during summer holidays, exceptional circumstances affecting the child, child's parents or young person, or they have been out of the local authority area for more than four weeks continuously during the transfer period.⁸¹

4.59 The timescales for transfer were originally set at 14 weeks but were extended on 1 September 2015 following an announcement made by the Minister, Edward Timpson MP at the beginning of the summer.⁸² In a letter to Directors of Children's Services in July 2015 the Minister explained his reasons for extending the timescales:

Transferring Statements and LDAs to EHC plans is a significant task that needs to be done well. Simply rebadging statements and LDAs as EHC plans isn't an option. We need to ensure that the needs of children and young people are properly identified and met. ... I have heard that the current timescales are putting a strain on the system that risks undermining the quality of person-centred assessment and EHC plans. We need to ensure that the needs of children and young people are properly identified and met through the provision you put in place; and that the processes enable you to undertake the task efficiently and to a high standard.

⁷⁸Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 art 17.

⁷⁹Transition advice, para 5.7.

⁸⁰Transition advice, para 5.2.

⁸¹Transition advice, para 5.5. See further para 4.133 below.

⁸²Children and Families Act 2014 (Transitional and Saving Provisions) (Amendment) (No.2) Order 2015 SI No 1619.

4.60 The government's transition advice states that in the academic year within which the local authority intends to transfer the child or young person from a statement to the new system, the transfer review should replace the annual review of the statement.⁸³ Where the transfer review does replace the annual review it must be completed within 12 months of the date the statement of SEN was issued or of the previous annual review of the child or young person's statement.⁸⁴

4.61 As part of the transfer review process, the local authority must carry out an EHC needs assessment. The requirements for an EHC needs assessment are set out at paras 4.110–4.133 below. Parents and young people who are transferring from a statement may agree with the local authority to use existing advices and assessments where appropriate although it will be important to ensure that the advices are up to date and properly consider the requirements of an EHC plan and in particular the focus on outcomes. Parents are not obliged to agree to use existing assessments/advices and if they consider that fresh assessments/advices are required then the local authority must obtain these during the transfer review.

4.62 There has been significant confusion about this issue in many local areas but the position is clear – new advice must be obtained as part of the transfer review process unless all parties, including the parent(s), agree that previous advice is sufficient. Parents may well not agree to rely on previous advice, not least because it is unlikely to focus on outcomes, which are central to the new scheme. Previous advice may also be significantly out-of-date.

4.63 There must also be meeting between the local authority and the parents or young person as part of the transfer review process. In practice this meeting is often facilitated by the child or young person's school and will take the place of the annual review meeting. The meeting itself can take place at any stage during the transfer review process. Some local authorities will hold the meeting at the start in order to discuss the process and agree what advices/assessments should be obtained. Alternatively, local authorities might convene the meeting once all of the advices/assessments are received and a draft EHC plan has been issued to enable parents or the young person to provide their views.

4.64 Where a transfer review is conducted within 12 months of a transfer between phases of education, the local authority must complete the transfer review before:

- 31 March in the calendar year of the child or young person's transfer from secondary school to a post-16 institution; and
- 15 February in the calendar year of the child's transfer in any other case.⁸⁵

4.65 During the transition period, a child or young person's statement must remain in place until:

⁸³See DfE Newsletter to Local Authorities at 14, October 2014.

⁸⁴Transition advice, para 4.15.

⁸⁵SEND Regs 2014 reg 18.

- after the period within which a parent can register an appeal with the tribunal following a local authority's decision to cease the statement of SEN; or, if an appeal is registered, after the appeal has been determined;
- the statement of SEN is ceased because the young person leaves school;
- the transfer review has been completed for the child or young person and an EHC plan has been issued; or
- after the period within which a child's parent or young person can register an appeal following a local authority's decision not to secure an EHC plan and to cease to maintain the statement following a transfer review; or, if an appeal is registered, after a determination that an EHC plan is not required.⁸⁶

4.66 The transfer review process will be formally concluded at the point that the finalised EHC plan is sent to the child's parent or young person, the school or other institution named in the plan and the responsible CCG or, where the local authority has notified the child's parent or young person of its decision that an EHC plan will not be issued and that it is proposing to cease to maintain the statement of SEN. From the point that the Transfer Review commences, parents and young people will have appeal rights under the new system. Appeal rights relating to statements of SEN under the 1996 Act will no longer be available to parents.⁸⁷

Transfer process for young people with learning difficulty assessments

4.67 The process for transfer for young people with an LDA is different to that for children with a statement.

4.68 The transition advice states that until 31 August 2016 a young person up to the age of 25 in further education or training who receives support to meet his or her SEN as a result of an LDA and who does not intend to continue in further education or training beyond that period can choose either to:

- continue to receive support as a result of the LDA (where it is still required) until the end of his or her time in further education or training or until 1 September 2016, whichever comes first; or
- request an EHC needs assessment.⁸⁸

4.69 If a young person intends to continue in education beyond 31 August 2016 they can choose either to:

- continue for the time being to receive their support as a result of their LDA (where it is still required); or

⁸⁶Transition advice, para 3.3.

⁸⁷Transition advice, paras 5.16-5.17.

⁸⁸Transition advice, para 4.21.

- request an EHC needs assessment.⁸⁹

4.70 During academic year 2015/16 local authorities must consider whether an EHC needs assessment is required for those young people who continue to receive their support as a result of their LDAs and that they believe will remain in further education or training beyond 31 August 2016.⁹⁰

4.71 There are also separate arrangements for the transfer process for those in youth custody that are described in detail in the transitions advice at Part 6. See the discussion of the new scheme for detained young persons with SEN at paras 4.199–4.201 below.

The local offer

4.72 Under CFA 2014 s30, each local authority must publish a 'local offer' which sets out in one place information about provision they expect to be available across education, health and social care for children and young people in their area who have SEN or are disabled. One of the central purposes of this requirement is to make provision more responsive to local needs by directly involving children and young people and their parents in its development.⁹¹ The 'local offer' is fundamental to the success of the reforms, given that a significant majority of disabled children and children with SEN will not have an EHC plan. A local authority must keep its 'local offer' under review and may from time to time revise it.⁹²

4.73 The information that must be published in the 'local offer' is set out at regulation 53 of and Schedule 2 to the SEND Regs 2014. The regulations require detailed and comprehensive information including:

- the special educational provision and training provision which the local authority expects to be available in its area for children and young people in its area who have special educational needs or a disability;
- arrangements for identifying SEN;
- securing services, provision and equipment;
- approaches to teaching and adapting curriculum;
- provision to assist with preparation for adulthood and independent living;
- transport arrangements;
- sources of information, advice and support;
- complaints procedures and mediation;
- information about availability of personal budgets;

⁸⁹Transition advice, para 4.23.

⁹⁰Transition advice, para 4.24.

⁹¹SEND Code, para 4.2.

⁹²CFA 2014 s30(5).

- information about any criteria that must be satisfied before any provision or service set out in the local offer can be provided.

4.74 When preparing and reviewing its 'local offer', local authorities must consult a wide range of specified persons, including children, young people and parents, but also governing bodies of maintained schools, advisory boards of children's centres and CCGs.⁹³

4.75 The consultation with children, young people and parents must include consultation about:

- the services children and young people with special educational needs or a disability require;
- how the information in the local offer is to be set out when published;
- how the information in the local offer will be available for those people without access to the Internet;
- how the information in the local offer will be accessible to those with special educational needs or a disability; and
- how they can provide comments on the local offer.⁹⁴
- 4.76 The local authority must seek and publish at least annually comments on the 'local offer' from children, young people and parents. Comments can be made on 'the content of [the] local offer, including the quality of the provision that is included and any provision that is not included'.⁹⁵

4.77 The 'local offer' must be published by placing it on the local authority's website.⁹⁶ Arrangements must also be made to enable (i) people without access to the Internet and (ii) different groups, including people with special educational needs or a disability to obtain a copy.⁹⁷

4.78 The importance of ensuring 'local offers' meet these requirements was emphasised by the High Court in *R (L and P) v Warwickshire County Council*, where the local authority's proposed 'local offer' was found to fall 'a considerable distance short of the statutory requirements'.⁹⁸ This was because there was no provision identified in the majority of the categories set out in Schedule 2 to the regulations.

⁹³SEND Regs 2014 reg 54.

⁹⁴SEND Regs 2014 reg 55.

⁹⁵SEND Regs 2014 reg 56.

⁹⁶SEND Regs 2014 reg 57.

⁹⁷SEND Regs 2014 reg 57(b).

⁹⁸[2015] EWHC 203 (Admin); (2015) 18 CCLR 458 at [78].

Duties on schools

4.79 Schools and colleges and other educational institutions have wide ranging duties to identify and support children with SEN and disabilities, whether or not they have an EHC plan.

4.80 The key duties that are described in this chapter only apply to the following schools and other institutions in England unless otherwise stated:

- mainstream schools (which includes mainstream academies);
- maintained nursery schools;
- 16 to 19 academies;
- alternative provision academies;
- institutions within the further education sector;
- pupil referral units.

4.81 There are separate regulations governing non maintained (independent) schools.⁹⁹

4.82 The duties owed by educational institutions are in general the responsibility of the 'appropriate authority'. For a maintained school, maintained nursery school, or institution within the further education sector, this will be the governing body. In the case of an Academy, this will be the proprietor/owner. For pupil referral units, the appropriate authority will be the management committee. It is important to identify who the 'appropriate authority' is in order to ensure that any concerns about compliance with these important duties are raised with the correct body.

Key duties

4.83 Under CFA 2014 s66(2), schools and other educational institutions must use their best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made. This duty applies to all children with SEN, including those without an EHC plan. This duty replaces section 317(1)(a) of the Education Act 1996 and expands its remit to further education institutions, academy schools and 16 to 19 academies. Where special educational provision is made for a child or young people at maintained school, a maintained nursery school, an Academy school, an alternative provision Academy or a pupil referral unit and no EHC plan is in place, the appropriate authority must ensure that the child's parent or the young person is informed.¹⁰⁰

4.84 All schools and post 16 institutions are under a duty to co-operate with each responsible local authority, and each responsible local authority must co-operate with their partners, in the exercise of their functions.¹⁰¹ This would include, for example, a request for advice for the purposes of an EHC needs assessments.

⁹⁹Non-Maintained Special Schools (England) Regulations 2015 SI No 728. See further, Department for Education, *The Non-Maintained (Special) Schools Regulations: Departmental advice for non-maintained special schools*, August 2015.

¹⁰⁰ CFA 2014 s68.

¹⁰¹ CFA 2014 s29(3).

4.85 In addition, maintained nurseries and mainstream schools must ensure that children with SEN engage in the activities of the school together with children who do not have special educational needs.¹⁰² However, this duty applies only in so far as is reasonably practicable and is compatible with:

- the child receiving the special educational provision called for by his or her special educational needs¹⁰³ – for example, the child may need 1:1 or small group work which takes them away from the classroom for certain periods;
- the provision of efficient education for the children with whom he or she will be educated¹⁰⁴ – this exception should only be used rarely where there it is not possible for any adjustments to be made to avoid the incapability;¹⁰⁵ and
- the efficient use of resources.¹⁰⁶

4.86 There are also a number of supplemental obligations on schools which are set out in the SEND Code. These include:

- Equality and inclusion: paragraph 6.8 of the SEND Code says that schools should regularly review and evaluate the breadth and impact of the support they offer or can access. Schools must co-operate with the local authority in reviewing the provision that is available locally and in developing the local offer. Schools should also collaborate with other local education providers to explore how different needs can be met most effectively. They must have due regard to general duties to promote disability equality, in other words the PSED (see chapter 9 at paras 9.97–9.115).
- Careers guidance for children and young people: paragraph 6.13 of the SEND Code states that maintained schools and pupil referral units must ensure that pupils from Year 8 until Year 13 are provided with independent careers guidance. Academies are also subject to this duty through their funding agreements.
- Identifying SEN in schools: paragraphs 6.14 to 6.35 of the SEND Code states all schools should have a clear approach to identifying and responding to SEN and should seek to identify pupils making less than expected progress given their age and individual circumstances, focusing on four broad areas of need:
 - communication and interaction;
 - cognition and learning;

¹⁰² CFA 2014 s35(2).

¹⁰³ CFA 2014 s35(3)(a).

¹⁰⁴ CFA 2014 s35(3)(b).

¹⁰⁵ See paras 4.95–4.103 below and chapter 9 at paras 9.71–9.78 for the duty to make reasonable adjustments under the Equality Act 2010.

¹⁰⁶ CFA 2014 s35(3)(c).

- social, emotional and mental health difficulties;
- sensory and/or physical needs.
- The SEND Code states at para 6.63 that 'where, despite the school having taken relevant and purposeful action to identify, assess and meet the SEN of the child or young person, the child or young person has not made expected progress, the school or parents should consider requesting an Education, Health and Care needs assessment. To inform its decision the local authority will expect to see evidence of the action taken by the school as part of SEN support.'
- Involving parents and pupils in planning and reviewing progress: paragraphs 6.64 to 6.71 of the SEND Code states that schools must provide an annual report for parents on their child's progress. A record of the outcomes, action and support agreed through the discussion should be kept and shared with all the appropriate school staff. This record should be given to the pupil's parents. The school's management information system should be updated as appropriate.

The role of the SENCO

4.87 In mainstream schools and maintained nursery schools there is a duty on the appropriate authority to designate a member of staff at the school (to be known as the 'SEN co-ordinator' or 'SENCO') as having responsibility for co-ordinating the provision for pupils with special educational needs.¹⁰⁷ The SENCO will play a central role in ensuring that children and young people receive the special educational provision that they require.

4.88 It will be for the appropriate authority of the school to determine the particular role and functions of the SENCO but they may include a range of tasks including selecting, supervising and training learning support assistants, advising teachers at the school about differentiated teaching methods, and identifying the pupil's special educational needs and co-ordinating the making of special educational provision which meets those needs.¹⁰⁸

4.89 SENCOs must also now meet minimum requirements for qualification and experience. This includes that they have been a qualified teacher working at the school and has been a SENCO for at least twelve months or has a postgraduate qualification in special educational needs co-ordination, for the time being known as 'The National Award for Special Educational Needs Co-ordination', awarded by a recognised body.¹⁰⁹

¹⁰⁷ CFA 2014 s67(2).

¹⁰⁸ SEND Regs 2014 reg 50.

¹⁰⁹ SEND Regs 2014 reg 49.

SEN information reports

4.90 The governing bodies of maintained schools and maintained nursery schools and the proprietors of Academy schools are also now required to prepare a report containing SEN information (known as the SEN information report) about the implementation of its policy for pupils at the school with special educational needs.¹¹⁰

4.91 The information that must be contained in the SEN information report is set out in Schedule 1 to the SEND Regs 2014 and includes, for example:

- the kinds of special educational needs for which provision is made at the school;
- information in relation to mainstream schools and maintained nursery schools, about the school's policies for the identification and assessment of pupils with special educational needs;
- information about the school's policies for making provision for pupils with special educational needs whether or not pupils have EHC plans;
- information on where the local authority's local offer is published.

4.92 The SEN information report must be published on the school's website.¹¹¹ It should act as an important reference point for parents and young people when deciding which school they wish to apply to attend or ask to be named in the EHC plan.

Duty to support pupils with medical conditions

4.93 CFA 2014 s100 introduced a new legal duty on maintained schools and academies to make arrangements to support pupils with medical conditions.

4.94 Statutory guidance¹¹² published in April 2014 on 'Supporting pupils at school with medical conditions' sets out arrangements for Individual Healthcare Plans and other key duties including:

- The school should have a named person with overall responsibility for policy implementation;
- All schools must develop a policy for supporting pupils with medical conditions that is reviewed regularly and is readily accessible to parents and school staff. The policy must include:
- the procedures to be followed whenever a school is notified that a pupil has a medical condition

¹¹⁰ SEND Regs 2014 regs 51-52.

¹¹¹ SEND Regs 2014 reg 52.

¹¹² See CFA 2014 s100(2) for the obligation on appropriate authorities to 'have regard' to this guidance.

- the role of individual healthcare plans, and who is responsible for their development, in supporting pupils at school with medical conditions
- arrangements for children who are competent to manage their own health needs and medicines
- the procedures to be followed for managing medicines
- what should happen in an emergency situation
- details of what is considered to be unacceptable practice (examples are provided in the guidance)
- how complaints may be made and will be handled concerning the support provided to pupils with medical conditions.

Duties under the Equality Act 2010

4.95 Many children and young people with SEN will be disabled and will benefit from having the 'protected characteristic' of disability under the Equality Act 2010. This means that they have a right not to be discriminated against and can enforce a legal duty to make reasonable adjustments on a wide range of bodies, including schools and other providers of education.

4.96 This duty is not limited to schools and extends to all educational bodies that a child or young person might attend who are required to make adjustments to their policies and their premises and to provide auxiliary aids and services to avoid young people with disabilities being placed at a substantial disadvantage.

4.97 The reasonable adjustments duty requires those subject to it to anticipate the likely needs of disabled learners and take steps that are reasonable to meet those needs – with the cost of those reasonable steps to be met by the body concerned.

4.98 A failure to make a reasonable adjustment amounts to unlawful discrimination and can be challenged in a court or tribunal.

4.99 The reasonable adjustments duty requires action in the following three areas; policies, physical features and auxiliary aids or services. This means that the education provider must undertake an assessment of the young person's needs and what detriment is being caused to them by the relevant policy or physical feature or the failure to provide the relevant aid.

4.100 In deciding whether an adjustment is reasonable, the educational body can take into account the cost of the adjustment sought, the organisation's resources and size and the availability of financial support.

4.101 Other duties under the Equality Act 2010 include a prohibition on direct discrimination (refusing to provide a service because the person is disabled) and on treating a person less favourably because of a reason connected with their disability without justification (described as 'discrimination arising from disability').

4.102 Further details in relation to duties under Equality Act 2010 are set out in chapter 9 at paras 9.71–9.87. There is a range of guidance about the implications

of the Equality Act 2010 for schools and education providers from the Equality and Human Rights Commission.¹¹³ There is also a guide to the Equality Act 2010 for schools that is specific to disabled children published by the Council for Disabled Children.¹¹⁴

SEN support – early years, schools, colleges

4.103 In January 2015, 15.4 per cent of pupils in schools in England have identified SEN (equating to 1,301,445 pupils) and 2.8 per cent of pupils in schools in England have statements or an EHC plan (equating to 236,165 pupils).¹¹⁵ The majority of children with SEN will therefore not have a statement or EHC plan and their needs will be met through a scheme of 'SEN support',¹¹⁶ a graduated approach to identifying and supporting pupils of SEN which will extend to young people in further education colleges/sixth forms.

4.104 Detailed information in relation to the SEN support system at each stage is set out in SEND Code:

- early years – paragraphs 5.36 to 5.60;
- schools – paragraphs 6.44 to 6.99; and
- further education – paragraphs 7.13 to 7.34.

4.105 All early years settings, schools and post 16 institutions should adopt an 'assess, plan, do, review' cycle. The SEND Code states at para 6.44 that:

where a pupil is identified as having SEN, schools should take action to remove barriers to learning and put effective special educational provision in place. This SEN support should take the form of a four-part cycle through which earlier decisions and actions are revisited, refined and revised with a growing understanding of the pupil's needs and of what supports the pupil in making good progress and securing good outcomes. This is known as the graduated approach. It draws on more detailed approaches, more frequent review and more specialist expertise in successive cycles in order to match interventions to the SEN of children and young people.

4.106 The SEND Code makes clear at para 5.44 that:

This cycle of action should be revisited in increasing detail and with increasing frequency, to identify the best way of securing good progress. At

¹¹³ For example EHRC, *Technical Guidance for Schools in England*, last updated July 2014.

¹¹⁴ P Stobbs, *Disabled Children and the Equality Act 2010: What teachers need to know and what schools need to do, including responsibilities to disabled children and young people under the Children and Families Act 2014*, Council for Disabled Children, March 2015.

¹¹⁵ Department for Education, *Statistical First Release: Special educational needs in England*, January 2015.

¹¹⁶ SEN support replaced School Action and School Action Plus following the implementation of the new scheme from 1 September 2014.

each stage parents should be engaged with the setting, contributing their insights to assessment and planning. Importantly, class and subject teachers are still responsible even when the pupil is away from the main class for parts of their provision.

4.107 All school and academy sixth forms, sixth form colleges, further education colleges and 16–19 academies are provided with resources to support students with additional needs, including young people with SEN and disabilities.¹¹⁷

4.108 SEN support requires support for transitions between schools and phases of education. Paragraph 5.47 of the SEND Code states that:

SEN support should include planning and preparing for transition, before a child moves into another setting or school. This can also include a review of the SEN support being provided or the EHC plan. To support the transition, information should be shared by the current setting (in agreement with parents) with the receiving setting or school.

4.109 The guidance in the SEND Code on when schools or settings should seek an EHC plan is as follows:

Where, despite the setting having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child, the child has not made expected progress, the setting should consider requesting an EHC needs assessment.¹¹⁸

Education, health and care needs assessments

4.110 An EHC needs assessment for a child or young person aged between 0 and 25 can be requested by:

- the child's parent
- a young person over the age of 16 but under the age of 25,¹¹⁹ and
- a person acting on behalf of a school or post-16 institution (the SEND Code states that this should be with the knowledge and agreement of the parent or young person where possible).¹²⁰

¹¹⁷ SEND Code, para 7.28.

¹¹⁸ SEND Code, para 5.49

¹¹⁹ Where a young person lacks capacity, a request for an assessment must be made on their behalf by an 'alternative person', ie a parent or 'representative', see chapter 11 at paras 11.83–11.87.

¹²⁰ CFA 2014 s36(1).

4.111 The SEND Code states at para 9.9 that:

In addition, anyone else can bring a child or young person who has (or may have) SEN to the attention of the local authority, particularly where they think an EHC needs assessment may be necessary. This could include, for example, foster carers, health and social care professionals, early years practitioners, youth offending teams or probation services, those responsible for education in custody, school or college staff or a family friend. This should be done with the knowledge and, where possible, agreement of the child's parent or the young person. Where a child or young person has been brought to the local authority's attention, they must determine whether an EHC needs assessment is required.¹²¹

4.112 There is a right to request an assessment up to the young person's 25th birthday.¹²²

Criteria for assessment

4.113 CFA 2014 s36 provides that when a request for an EHC needs assessment for a child or young person is made, the local 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.

4.114 In making this determination, the local authority must consult the child's parent or the young person as soon as practical after receiving a request and notify the parent or young person that they have the right to express views to the authority (orally or in writing) and submit evidence.¹²³

4.115 Where a local authority is considering whether to secure an EHC needs assessment, it must also notify:

- the responsible CCG;
- the officers of the local authority who exercise the local authority's social services functions for children or young people with special educational needs;
- in relation to a child, the head teacher of the school the child or if the child receives education from a provider of relevant early years education, the person identified as having responsibility for special educational needs (if any) in relation to that provider;
- in relation to a young person, the head teacher of the school or if the young person is a student at a post-16 institution, to the principal of that institution.¹²⁴

¹²¹ CFA 2014 s36(3).

¹²² SEND Code, para 9.115.

¹²³ SEND Regs 2014 reg 3.

¹²⁴ SEND Regs 2014 reg 4(2).

4.116 The local authority must secure an EHC needs assessment for the child or young person if, after regard to the views of the parent or young person and evidence submitted, the local 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.¹²⁵

4.117 In relation to a young person over the age of 18, the local authority must consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.¹²⁶

4.118 Paragraph 9.14 of the SEND Code sets out factors which local authorities must pay particular attention to when determining whether an EHC needs assessment is required. These include:

- academic attainment and rates of progress;
- nature, extent and context of the child or young person's SEN;
- evidence of action already being taken by placement;
- evidence that where progress has been made, it is only as a result of additional intervention and support above that usually provided;
- evidence of physical, emotional and social development and health needs.

4.119 Local authorities may develop criteria to help them decide whether to carry out an EHC assessment but must be prepared to depart from criteria where there are good reasons to do so.¹²⁷ They must not apply a blanket policy to particular groups/types of needs and must consider the child or young person's needs individually and on their merits, applying the tests in section 36.

4.120 Where the local authority determines that it is not necessary for special educational provision to be made in accordance with an EHC plan it must notify the child's parent or young person of:

- the reasons for the determination not to secure an EHC needs assessment;
- their right of appeal;
- the time limits for doing so;
- information concerning mediation;
- the availability of disagreement resolution services and information and advice about matters relating to the special educational needs of children and young people.¹²⁸

¹²⁵ CFA 2014 s36(8).

¹²⁶ CFA 2014 s36(10).

¹²⁷ SEND Code, para 9.16.

¹²⁸ CFA 2014 s36(5) and SEND Regs 2014 reg 5(3).

4.121 The local authority is not required to secure an EHC assessment if the child or young person has been assessed during the previous six months although can do so if it considers necessary.¹²⁹

4.122 The local authority must make its determination regarding whether to secure an EHC needs assessment within six weeks of the request subject to exceptions outlined below.¹³⁰

The assessment process

4.123 Where the local authority secures an EHC needs assessment for a child or young person, it must seek advice and information on the needs of the child or young person, what provision may be required to meet such needs and the outcomes that are intended to be achieved by the child or young person receiving that provision from the following persons on the following topics:

- the child's parent or the young person;
- manager, head teacher or principal of education institution;
- medical advice and information from a health care professional identified by the responsible commissioning body (usually the CCG);
- psychological advice and information from an educational psychologist;
- advice and information in relation to social care;
- any other person the local authority thinks is appropriate;
- any person the child's parents or young person reasonably request the local authority obtain advice from;
- from year 9 onwards – advice to assist with preparation for adulthood and independent living;
- where it appears that the child or young person is either visually or hearing impaired or both, the school or placement should consult with a person who is qualified to teach children or young people with visual or hearing impairment before they provide their advice.¹³¹

4.124 When the local authority is requesting advice, they must provide the person or body with a copy of any representations made by the child's parent or the young person and any evidence submitted.¹³²

4.125 Partners must respond within a maximum of 6 weeks of requests for advice,¹³³ although there are exceptions to the time limits as outlined at para 4.133 below.

¹²⁹ SEND Regs 2014 reg 24.

¹³⁰ SEND Regs 2014 reg 4(1).

¹³¹ SEND Regs 2014 reg 6.

¹³² SEND Regs 2014 reg 6(3).

¹³³ SEND Regs 2014 reg 8(1).

4.126 SEND Regs 2014 reg 7 states that when securing an EHC needs assessment a local authority must:

- consult the child and the child's parent, or the young person and take into account their views, wishes and feelings;
- consider any information provided to the local authority by or at the request of the child, the child's parent or the young person;
- consider the information and advice obtained;
- engage the child and the child's parent, or the young person and ensure they are able to participate in decisions; and
- minimise disruption for the child, the child's parent, the young person and their family.

4.127 There is an emphasis in the SEND Code on ensuring all assessments have a person centred approach and there is effective co-ordination. Paragraph 9.22 states that the assessment and planning process should:

- focus on the child or young person as an individual;
- enable children and young people and their parents to express their views, wishes and feelings;
- enable children and young people and their parents to be part of the decision-making process;
- be easy for children, young people and their parents or carers to understand, and use clear ordinary language and images rather than professional jargon;
- highlight the child or young person's strengths and capabilities;
- enable the child or young person, and those that know them best to say what they have done, what they are interested in and what outcomes they are seeking in the future;
- tailor support to the needs of the individual;
- organise assessments to minimise demands on families;
- bring together relevant professionals to discuss and agree together the overall approach;
- deliver an outcomes-focused and co-ordinated plan for the child or young person and their parent;
- support and encourage the involvement of children, young people and parents or carers by:
 - providing them with access to the relevant information in accessible formats
 - giving them time to prepare for discussions and meetings, and
 - dedicating time in discussions and meetings to hear their views.

4.128 In addition, the local authority must not seek any of the advice referred to above if such advice has previously been provided for any purpose and the person providing that advice, the local authority and the child's parent or the young person are all satisfied that it is sufficient for the purposes of an EHC needs

assessment.¹³⁴ See paras 4.61–4.62 above for the application of this provision to ‘Transfer Reviews’.

4.129 When securing an EHC needs assessment the local authority must also consider whether the child’s parent or the young person requires any information, advice and support in order to enable them to take part effectively in the EHC needs assessment, and if it considers that such information, advice or support is necessary, it must provide it.¹³⁵

Timescales

4.130 If a local authority decides, following an EHC needs assessment, not to issue an EHC plan, it must inform the child’s parent or young person within a maximum of 16 weeks from the request for an EHC needs assessment.¹³⁶

4.131 Where the local authority decides to issue an EHC plan, the child’s parent or young person must be provided with a draft plan and given 15 days to provide their views.¹³⁷

4.132 The entire process of EHC needs assessment and EHC plan development, from the point when an assessment is requested (or a child or young person is brought to the local authority’s attention) until the final EHC plan is issued, must take no more than 20 weeks.¹³⁸

4.133 Where there are exceptional circumstances, it may not be reasonable to expect local authorities and others partners to comply with the time limits above. The SEND Regs 2014 set out specific exemptions. These include where:

- the local authority has requested advice from the head teacher or principal of a school or post-16 institution during a period beginning one week before any date on which that school or institution was closed for a continuous period of not less than four weeks from that date and ending one week before the date on which it re-opens;
- exceptional personal circumstances affect the child, the child’s parent, or the young person during the time period; or
- the child, the child’s parent, or the young person, are absent from the area of the authority for a continuous period of not less than four weeks during the time period referred to in paragraph.¹³⁹

¹³⁴ SEND Regs 2014 reg 6(4).

¹³⁵ SEND Regs 2014 reg 4(9).

¹³⁶ SEND Regs 2014 reg 10(1).

¹³⁷ SEND Regs 2014 reg 13(1)(a).

¹³⁸ SEND Regs 2014 reg 13(2).

¹³⁹ SEND Regs 2014 regs 10(4) and 13(3).

Education, health and care plans

4.134 CFA 2014 s37 states that a local authority must issue an EHC plan 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.

4.135 Paragraph 9.54 and 9.55 of the SEND Code sets out the factors which local authorities should consider when deciding whether to issue a plan. These include:

- the child or young person's SEN and the special educational provision made for the child or young person;
- whether the information from the EHC needs assessment confirms the information available on the nature and extent of the child or young person's SEN prior to the EHC needs assessment; and
- whether the special educational provision made prior to the EHC needs assessment was well matched to the SEN of the child or young person.

4.136 Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account:

- whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions; or
- whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan.¹⁴⁰

4.137 Where a local authority decides it is necessary to issue an EHC plan, it must notify the child's parent or the young person and give the reasons for its decision.¹⁴¹ The local authority should ensure it allows enough time to prepare the draft plan and complete the remaining steps in the process within the 20-week overall time limit within which it must issue the finalised EHC plan.¹⁴²

Contents of the EHC plan

4.138 Paragraph 9.61 of the SEND Code sets out the key requirements and principles which apply to local authorities and those contributing to the preparation of an EHC plan. These include:

¹⁴⁰ SEND Code, para 9.56

¹⁴¹ CFA 2014 s36(9).

¹⁴² SEND Regs 2014 reg 13(2).

- EHC plans should be clear, concise, understandable and accessible and written so they can be understood by professionals in any local authority;
- 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.

4.139 The SEND Code states at para 9.62 that:

As a statutory minimum, EHC plans must include the following sections, which must be separately labelled from each other. The sections do not have to be in the order below and local authorities may use an action plan in tabular format to include different sections and demonstrate how provision will be integrated, as long as the sections are separately labelled.

Format of EHC plan:

- A the views, interests and aspirations of the child and his parents or the young person;
- B the child or young person’s special educational needs;
- C the child or young person’s health care needs which relate to their special educational needs;
- D the child or young person’s social care needs which relate to their special educational needs or to a disability;
- E the outcomes sought for him or her;
- F the special educational provision required by the child or young person;
- G any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs;
- H1 any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 and
- H2 any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);
- I 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; and
- 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.

4.140 In addition, from year 9, the EHC plan must include (in sections F, G, H1 or H2 as appropriate) the provision required to assist in preparation for adulthood and independent living, for example, support for finding employment, housing or for participation in society.¹⁴³

Outcomes

4.141 EHC plans must specify the outcomes sought for the child or young person in Section E.¹⁴⁴ This is a significant change from statements which lacked a focus on agreed outcomes. The outcomes section of an EHC plan is very important because the duty to maintain the plan after a young person's 18th birthday depends on whether the outcomes have been achieved. Despite their importance the outcomes section cannot however be appealed to the tribunal; the only legal remedy in relation to a flawed outcomes section of a plan is judicial review.

4.142 The SEND Code suggests at para 9.64 that:

EHC plans should be focused on education and training, health and care outcomes that will enable children and young people to progress in their learning and, as they get older, to be well prepared for adulthood.

The SEND Code goes on to give the following general guidance on outcomes:

EHC plans can also include wider outcomes such as positive social relationships and emotional resilience and stability. Outcomes should always enable children and young people to move towards the long-term aspirations of employment or higher education, independent living and community participation.

4.143 Paragraph 9.66 of the SEND Code provides a definition of outcomes as follows:

An outcome can be defined as the benefit or difference made to an individual as a result of an intervention. It should be personal and not expressed from a service perspective; it should be something that those involved have control and influence over, and while it does not always have to be formal or accredited, it should be specific, measurable, achievable, realistic and time bound (SMART). When an outcome is focused on education or training, it will describe what the expected benefit will be to the individual as a result of the educational or training intervention provided.

4.144 Outcomes are not a description of the service being provided – for example the provision of speech and language therapy is not an outcome. The outcome is

¹⁴³ SEND Regs 2014 reg 12(3).

¹⁴⁴ SEND Code, para 9.64.

what it is intended that the speech and language therapy will help the individual to do that they cannot do now and by when this will be achieved.¹⁴⁵

4.145 In all cases, EHC plans must specify the special educational provision required to meet each of the child or young person's special educational needs. The provision should enable the outcomes to be achieved.¹⁴⁶

4.146 The SEND Code addresses the relationship between shorter term targets and longer term outcomes at para 9.69:

The EHC plan should also specify the arrangements for setting shorter term targets at the level of the school or other institution where the child or young person is placed. Professionals working with children and young people during the EHC needs assessment and EHC plan development process may agree shorter term targets that are not part of the EHC plan. These can be reviewed and, if necessary, amended regularly to ensure that the individual remains on track to achieve the outcomes specified in their EHC plan. Professionals should, wherever possible, append these shorter term plans and targets to the EHC plan so that regular progress monitoring is always considered in the light of the longer term outcomes and aspirations that the child or young person wants to achieve. In some exceptional cases, progress against these targets may well lead to an individual outcome within the EHC plan being amended at times other than following the annual review.

The draft EHC plan and requests for a particular school, college or other institution

4.147 Before issuing the final EHC plan, child's parents or the young person must be sent plans in draft and given 15 days to make representations including on particular school named.¹⁴⁷

4.148 The SEND Code states at para 9.77 that when the local authority sends the draft EHC plan to the child's parent or the young person the following apply:

The local authority must notify the child's parent or the young person that during this period they can request that a particular school or other institution, or type of school or other institution, be named in the plan. The draft plan must not contain the name of the school, maintained nursery school, post-16 institution or other institution or the type of school or other institution to be attended by the child or young person.¹⁴⁸

The local authority must advise the child's parent or the young person where they can find information about the schools and colleges that are

¹⁴⁵ SEND Code, para 9.66. For practical guidance, see Council for Disabled Children, *EHC Outcomes Pyramid*, September 2014.

¹⁴⁶ SEND Code, para 9.68.

¹⁴⁷ SEND Regs 2014 reg 13(1).

¹⁴⁸ SEND Regs 2014 reg 13(1) (a) (i).

available for the child or young person to attend, for example through the local offer.¹⁴⁹ The local authority should also seek agreement of any Personal Budget specified in the draft plan.¹⁵⁰

Placements under EHC plans

4.149 Where a particular school is requested, the local authority must consult with governing body and relevant local authority if out of area.¹⁵¹

4.150 The child's parent or the young person has the right to request a particular school, college or other institution of the following type to be named in their EHC plan:

- maintained nursery school;
- maintained school and any form of academy or free school (mainstream or special);
- further education or sixth form college;
- independent special school or independent specialist colleges (where they have been approved for this purpose by the Secretary of State and published in a list available to all parents and young people).¹⁵²

4.151 CFA 2014 s39 provides that the local authority must name the requested school or other institution in the EHC plan names the school or other institution specified in the request, unless:

- the school is unsuitable for the age, ability, aptitude or SEN of the child or young person concerned; or
- the attendance of the child or young person at the requested school or other institution would be incompatible with:
- the provision of efficient education for others, or
- the efficient use of resources.

4.152 In determining whether attendance would be incompatible with the efficient use of resources, the local authority must consider the cost to the public purse generally when comparing the costs of the parents' requested school with the LA's own provision. The Upper Tribunal has clarified that:

- for maintained special schools and maintained specialist units, the place funding is ignored for the purposes of calculating relative placement cost;

¹⁴⁹ SEND Regs 2014 reg 13(1)(b).

¹⁵⁰ SEND Code, para 9.77.

¹⁵¹ CFA 2014 s39(2).

¹⁵² CFA 2014 ss38(3) and 41. Parents may also make representations for places in non-maintained early years provision and independent schools or colleges not on the approved list. These requests must be considered in accordance with EA 1996 s9. See SEND Code at para 9.84.

- for maintained mainstream schools, the Age Weighted Pupil Unit (AWPU) is taken into account as an additional cost, as is any further funding provided to meet the child's needs.¹⁵³

4.153 The SEND Code states at para 9.88 that where a parent or young person does not make a request for a particular nursery, school or college, or does so and their request is not met, the local authority must specify mainstream provision in the EHC plan unless it would be:

- against the wishes of the parent or young person; or
- incompatible with the efficient education of others.¹⁵⁴

4.154 Mainstream education cannot be refused by a local authority on the grounds that it is not suitable: SEND Code, para 9.89.

4.155 If the local authority considers a particular mainstream place to be incompatible with the efficient education of others it must demonstrate that there are no reasonable steps that it, or the school or college, could take to prevent that incompatibility.¹⁵⁵

Finalising and maintaining the EHC plan

4.156 Regulation 14 of the SEND Regs 2014 provides that the finalised EHC plan must be in the form of the draft plan, or in a form modified in the light of the representations made by the child's parent or young person.

4.157 When sending a copy of the finalised EHC plan to the child's parent or the young person, the local authority must notify them of:

- their right to appeal matters within the EHC plan;
- the time limits for doing so;
- the information concerning mediation;
- the availability of:
- disagreement resolution services; and
- advice and information about matters relating to the special educational needs of children and young people.¹⁵⁶

4.158 CFA 2014 s42(2) provides that local authorities must secure the specified special educational provision in the EHC plan. Section 43 requires any of a wide range of schools, colleges and institutions to admit a child or young person if named in their EHC plan. If a local authority names an independent school or

¹⁵³ *Hammersmith and Fulham LBC v L and F; O and H v Lancashire CC* [2015] UKUT 0523 (AAC), see summary at [6]-[9]. Although this was a decision in the context of Education Act 1996 s9 it would appear also to apply where the relevant statutory provision is CFA 2014 s39.

¹⁵⁴ CFA 2014 s33(2).

¹⁵⁵ CFA 2014 s33(3) and SEND Code, para 9.90.

¹⁵⁶ SEND Regs 2014 reg 14(2).

independent college in the plan as special educational provision it must also meet the costs of the fees, including any boarding and lodging where relevant.¹⁵⁷

4.159 The specific duties in relation to maintaining the health and social care aspects of the plans are summarised in chapters 5 and 3 respectively.

Ceasing to maintain the EHC plan

4.160 Decisions to cease to maintain an EHC plan are governed by CFA 2014 s45. There are only two bases on which a local authority can decide to cease to maintain a plan:

- the authority is no longer responsible for the child or young person; or
- the authority determines that it is no longer necessary for the plan to be maintained.¹⁵⁸ The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan.¹⁵⁹

4.161 Importantly, section 45(3) is clear that in deciding whether a young person over 18 no longer requires the special educational provision specified in the plan, 'a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved'. This is why the outcomes section of any plan is of critical importance, particularly a plan for a child who is approaching transition to adulthood.

4.162 If there is a decision to cease to maintain a plan, it must continue to be maintained until the end of the period allowed for bringing an appeal under section 51 against its decision to cease to maintain the plan or until the appeal is finally determined.¹⁶⁰

4.163 Specific circumstances where a local authority must not cease to maintain a plan are set out in regulations 29–30 of the SEND Regs 2014. The procedure which must be followed in determining whether to cease to maintain a plan is mandated by regulation 31. In particular, the local authority must:

- inform the child's parent or the young person that it is considering ceasing to maintain the child or young person's EHC plan;
- consult the child's parent or the young person; and
- consult the head teacher, principal or equivalent person at the educational institution that is named in the EHC plan.

¹⁵⁷ SEND Code, para 9.131.

¹⁵⁸ CFA 2014 s45(1).

¹⁵⁹ CFA 2014 s45(2).

¹⁶⁰ CFA 2014 s45(4),

Reviews

4.164 CFA 2014 s44 requires local authorities to review EHC plans every 12 months starting on the date the plan was first made. Regulation 18 of the SEND Regs 2014 provides further specific circumstances where plans must be reviewed (see paras 4.165–4.167)

4.165 Where a child or young person is within 12 months of a transfer between phases of education, the local authority must review and amend the plan to include the placement the child or young person will attend following transfer no later than:

- 31 March in the calendar year of the child or young person's transfer from secondary school to a post-16 institution; and
- 15 February in the calendar year of the child's transfer in any other case.¹⁶¹

4.166 Where it is proposed that a young person transfers from one post-16 institution to another post-16 institution at any other time, the local authority must review and amend the EHC plan at least five months before that transfer takes place so that it names the post-16 institution that the young person will attend following the transfer.¹⁶²

4.167 Where a child or young person is due to transfer from a secondary school to a post-16 institution on 1 September 2015 the local authority must amend and review the EHC plan before 31 May 2015.¹⁶³

4.168 Local authorities should consider reviewing an EHC plan for a child under five at least every three to six months to ensure that the provision continues to be appropriate. Such reviews would be in addition to the annual review and are not subject to the same requirements regarding invitations and obtaining advice. However, the child's parent must be fully consulted on any proposed changes to the EHC plan and made aware of their right to appeal to the tribunal – both if they do not agree with the proposed changes and if no changes are made.¹⁶⁴

4.169 When undertaking a review of an EHC plan, a local authority must:

- consult the child and the child's parent or the young person, and take account of their views, wishes and feelings;
- consider the child or young person's progress towards achieving the outcomes specified in the EHC plan and whether these outcomes remain appropriate for the child or young person; and

¹⁶¹ SEND Regs 2014 reg 18(1).

¹⁶² SEND Regs 2014 reg 18(2).

¹⁶³ SEND Regs 2014 reg 18(3).

¹⁶⁴ SEND Code, para 9.178.

- consult the school or other institution attended by the child or young person.¹⁶⁵

4.170 Where the child or young person attends a school, the local authority can require the head teacher or principal of the school to arrange and hold the meeting. The local authority can ask a further education college to convene the review.¹⁶⁶

4.171 The following persons must be invited to attend with at least two weeks' notice:

- the child's parent or the young person;
- the provider of the relevant early years education or the head teacher or principal of the school, post-16 or other institution attended by the child or young person;
- relevant local authority officers in relation to SEN and social care functions; and
- a health care professional identified by the responsible commissioning body to provide advice about health care provision in relation to the child or young person.¹⁶⁷

4.172 The person arranging the review meeting must obtain advice and information about the child or young person from the persons invited to attend and must circulate it to those persons at least two weeks in advance of the review meeting.¹⁶⁸

4.173 The child or young person's progress towards achieving the outcomes specified in the EHC plan must be considered at the meeting.¹⁶⁹ This requirement is particularly important for young people aged over 18 as the educational and training outcomes will determine whether the EHC plan ceases.

4.174 When the child or young person is in or beyond year 9, the review meeting must consider what provision is required to assist the child or young person in preparation for adulthood and independent living.¹⁷⁰

4.175 Following the review, the head teacher or principal of the school or educational institution must prepare a written report which sets out any recommendations or amendments to be made to the EHC plan. The report must

¹⁶⁵ SEND Regs 2014 reg 19.

¹⁶⁶ SEND Regs 2014 reg 20.

¹⁶⁷ SEND Regs 2014 reg 20(2) and (3).

¹⁶⁸ SEND Regs 2014 reg 20(4).

¹⁶⁹ SEND Regs 2014 reg 20(5).

¹⁷⁰ SEND Regs 2014 reg 20(6).

include the advice and information obtained prior to the annual review.¹⁷¹ The report must be prepared within two weeks of the review meeting and sent to everyone who was invited to attend/prepared advice.¹⁷²

4.176 When the local authority receives the report they must decide whether to:

- continue to maintain the EHC plan in its current form;
- amend it; or
- cease to maintain it.¹⁷³

4.177 The local authority must notify the child's parent or the young person of their decision within four weeks of the review meeting and, if the decision is to continue the plan in its previous form or cease to maintain it, inform them of:

- their right to appeal;
- the time limits for doing so; and
- information concerning mediation and the availability of disagreement resolution services and information and advice.¹⁷⁴

4.178 Where a local authority decides to make amendments following the annual review it must:

- send the child's parent or the young person a copy of the EHC plan together with a notice specifying the proposed amendments, together with copies of any evidence which supports those amendments;
- provide the child's parent or the young person with notice of their right to request that a particular school or other institution is named in the plan;
- give them at least 15 days, beginning with the day on which the draft plan was served, in which to:
 - make representations about the content of the draft plan;
 - request that a particular school or other institution be named in the plan;
 - request a meeting with an officer of the local authority; and
- advise them where they can find information about the schools and colleges.¹⁷⁵

4.179 The local authority must then send the finalised EHC plan to the child's parent or young person, the governing body or principal of the school or educational institution and the CCG, as soon as possible and in any event within

¹⁷¹ SEND Regs 2014 reg 20(7) and (9).

¹⁷² SEND Regs 2014 reg 20(9).

¹⁷³ SEND Regs 2014 reg 20(10).

¹⁷⁴ SEND Regs 2014 reg 20(11).

¹⁷⁵ SEND Regs 2014 reg 22.

eight weeks of first sending the plan and proposed amendments to the parent and notify them of the matters specified at para 4.177 above.¹⁷⁶

Re-assessments

4.180 Provided that an assessment has not been undertaken within the previous 6 months, and the local authority considers it is necessary, the local authority must carry out a re-assessment of the educational, health care and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by:

- the child's parent or the young person;
- governing body, proprietor or principal of the school or institution which the child or young person attends; or
- the responsible CCG.¹⁷⁷

4.181 The local authority may also secure a re-assessment of those needs at any other time if it thinks it necessary.¹⁷⁸

4.182 The local authority must notify the child's parent or the young person whether or not it is necessary to reassess the child or young person within 15 days of receiving the request to re-assess.¹⁷⁹ Where the local authority does not consider it is necessary to re-assess they must notify them of:

- their right to appeal;
- the time limits for doing so;
- information concerning mediation and the availability of disagreement resolution services and information and advice.¹⁸⁰

4.183 If, at any time, a local authority proposes to amend an EHC plan, it shall proceed as if the proposed amendment were an amendment proposed after a review, with parents or young people having the same appeal rights and entitlement to notification.¹⁸¹

Personal budgets

4.184 The SEND Code states at para 9.95 that: 'A personal budget is an amount of money identified by the local authority to deliver provision set out in an EHC

¹⁷⁶ SEND Regs 2014 reg 22.

¹⁷⁷ CFA 2014 s44(2) and SEND Regs 2014 reg 24.

¹⁷⁸ CFA 2014 s44(3).

¹⁷⁹ SEND Regs 2014 reg 25(1).

¹⁸⁰ SEND Regs 2014 reg 25(2).

¹⁸¹ SEND Regs 2014 reg 28.

plan where the parent or young person is involved in securing that provision.¹⁸² It can include funding for education, health and social care.

4.185 The new right to a personal budget and right to request a direct payment in respect of SEN provision offer new opportunities to parents and young people to be able to use funding available to access specialist interventions which may not ordinarily be commissioned or available within local authorities.

4.186 This is recognised in the SEND Code, which says at paragraph 9.61 that where a young person or parent is seeking an innovative or alternative way to receive their support services – particularly through a Personal Budget, but not exclusively so – then the planning process should include the consideration of those solutions with support and advice available to assist the parent or young person in deciding how best to receive their support.

4.187 It is therefore important that parents, young people and professionals working with them understand how personal budgets and direct payments work, and when they can be accessed.

4.188 Parents and young people have a right to request a personal budget figure be included on the EHC plan.¹⁸³ Each local authority must have a policy on personal budgets as part of their local offer which should include:

- a description of the services across education, health and social care that currently lend themselves to the use of Personal Budgets;
- how that funding will be made available;
- clear and simple statements of eligibility criteria and the decision-making processes.¹⁸⁴

4.189 The local authority is not required to prepare a personal budget for special educational provision which is secured by the local authority under an arrangement with a third party (such as the NHS) where the local authority pays an aggregate sum for the provision and a notional amount for that child's particular provision cannot be disaggregated without having an adverse impact on other services or if it would not be an efficient use of the local authority's resources.¹⁸⁵ This amendment appears to have been made to alleviate local authority concerns about the burden of having to prepare a personal budget in such cases.

4.190 A request for a personal budget can be made at any time during the EHC needs assessment process or when a draft EHC plan is prepared.¹⁸⁶

¹⁸² CFA 2014 s49(2).

¹⁸³ CFA 2014 s49(1).

¹⁸⁴ SEND Code, para 9.96.

¹⁸⁵ Special Educational Needs (Personal Budgets) Regulations 2014 SI No 1652 reg 4A.

¹⁸⁶ Special Educational Needs (Personal Budgets) Regulations 2014 reg 4(1).

4.191 There are four ways in which a personal budget can be delivered:

1. direct payments – where individuals receive the cash to contract, purchase and manage services themselves;
2. an arrangement – whereby the local authority, school or college holds the funds and commissions the support specified in the plan (these are sometimes called notional budgets);
3. third party arrangements – where funds (direct payments) are paid to and managed by an individual or organisation on behalf of the child’s parent or the young person;
4. a combination of the above.¹⁸⁷

4.192 The first step in setting a personal budget figure is for the local authority to provide an indication of the level of funding required. This is called an ‘indicative budget’ or ‘indicative figure’. It can be calculated through a resource allocation scheme or banded funding system but this should only be a starting point and local authorities should be clear that any figure discussed at this stage an indicative amount only.¹⁸⁸

4.193 The final allocation of funding budget must be sufficient to secure the agreed provision specified in the EHC plan and must be set out as part of that provision.¹⁸⁹

4.194 Local authorities must consider each request for a personal budget on its own individual merits. If a local authority is unable to identify a sum of money for a particular provision they should inform the child’s parent or young person of the reasons.¹⁹⁰

4.195 The SEND Code states (para 9.106) that demand from parents and young people for funds that cannot, at present, be disaggregated should inform joint commissioning arrangements for greater choice and control.

Direct payments for SEN provision

4.196 As explained above, one of the ways in which funding from a personal budget can be accessed is through a ‘direct payment’. A direct payment is a cash payment made by the local authority to the child’s parent or young person to contract, purchase and manage services themselves.

4.197 A local authority may only make direct payments where they are satisfied that:

¹⁸⁷ SEND Code, para 9.101.

¹⁸⁸ See by close analogy *R (KM) v Cambridgshire CC* [2012] UKSC 23; (2012) 15 CCLR 374, discussed at chapter 3 at para 3.107.

¹⁸⁹ SEND Code, para 9.102.

¹⁹⁰ SEND Code, para 9.106

- the recipient will use them to secure the agreed provision in an appropriate way;
- where the recipient is the child's parent or a nominee, that person will act in the best interests of the child or the young person when securing the proposed agreed provision;
- the direct payments will not have an adverse impact on other services which the local authority provides or arranges for children and young people with an EHC plan which the authority maintains; and
- securing the proposed agreed provision by direct payments is an efficient use of the authority's resources. This means in practice a local authority will only agree to make direct payment for special educational provision where it will not cost them anymore than if they provided the provision themselves or through their existing contracting arrangements.¹⁹¹

4.198 Where a direct payment is proposed for special educational provision, the early years setting, school or college must agree to a direct payment being used before it can go ahead.¹⁹²

Children and young people in custody

4.199 Sections 70–75 of the CFA 2014 apply the scheme in a modified form to children and young people in custody up to the age of 18. This is an extremely important development given the widespread acknowledgment that outcomes for this group are even worse than those for other children and young people with SEN.

4.200 The SEND Code addresses these provisions at paras 10.60–10.150. Practice guidance is also available from the Council for Disabled Children.¹⁹³

4.201 The central requirement of the scheme for detained children and young people are as follows:

- Local authorities must not cease an EHC plan when a child or young person enters custody. They must keep it while the detained person is detained and maintain and review it when the detained person is released.
- If a detained person has an EHC plan before being detained (or one is completed while the detained person is in the relevant youth accommodation) the local authority must arrange appropriate special educational provision for the detained person while he or she is detained.

¹⁹¹ Special Educational Needs (Personal Budgets) Regulations 2014 reg 6(1).

¹⁹² Special Educational Needs (Personal Budgets) Regulations 2014 reg 9.

¹⁹³ Council for Disabled Children, *Children and Families Act 2014: Children and young people with SEN in youth custody, Implementation Support Materials*, March 2015.

- If it is not practicable to arrange the provision specified in the EHC plan, provision corresponding as closely as possible to that in the EHC plan must be arranged.
- Where a detained person does not have an EHC plan, the appropriate person¹⁹⁴ or the person in charge of the relevant youth accommodation can request an assessment of the detained person's post-detention EHC needs from the 'home' local authority. When considering a request the local authority must consult the appropriate person and the person in charge of the relevant youth accommodation. There is a right to appeal to the tribunal for the appropriate person.
- The local authority must secure an assessment of post-detention needs if the detained person has or may have SEN and it may be necessary for special educational provision to be made in accordance with an EHC plan on their release from detention.
- Advice and information must be sought from the usual range of sources as part of the assessment process, see para 4.123 above.
- The standard 20-week timescale for the completion of the EHC planning process applies, see para 4.132 above.
- Anyone else, including Youth Offending Teams and education providers in custody, has a right to bring the detained person to the notice of the local authority as someone who may have special educational needs and the local authority must consider whether an assessment of their post-detention EHC needs is necessary
- The local authority must promote the fulfilment of the detained person's learning potential while they are in custody and on their release, whether they have an EHC plan or not.
- The duties in the CFA 2014 no longer apply once a young person is transferred to the adult secure estate.

Residential and out-of-authority placements

4.202 Children with complex needs may at some stage require residential schooling – whether as a result of the complexity of their needs, family breakdown or indeed a combination of the two. When considering whether an educational need for a residential school placement arises the question asked is often whether the child needs a 'waking day' curriculum, and there are a number of court and tribunal decisions under the old scheme addressed to this question. However, the joined-up approach across education, health and social care which is supposed to be at the heart of the new scheme should reduce the tendency to focus on children's needs in silos. In practice an argument for residential schooling which has tended to gain more support in tribunal appeals is that there is no local provision that can meet the child's needs.

¹⁹⁴ The detained person's parent, where the detained person is a child, or the young person, where the detained person is a young person.

4.203 Where there is social care input into a residential school placement, it is likely that it will be made under CA 1989 s20 and the child will become 'looked after'.¹⁹⁵ In other cases where a child is placed in a residential special school with the intention that he or she should remain there for longer than three months, the Director of Children's Services must be notified.¹⁹⁶ The Director must then 'take such steps as are reasonably practicable to enable them to determine whether the child's welfare is adequately safeguarded and promoted' and consider whether to exercise any of their functions under CA 1989 in relation to that child.¹⁹⁷

4.204 Many children in residential schools will be placed out of their 'home' authority. Other disabled children will be placed out of authority either as a result of family breakdown or to meet their social care needs. Responsibility for meeting these children's SEN remains with the authority where they are ordinarily resident. So if a child moves to a settled placement with foster parents then the responsibility for their SEN moves to the local authority in whose area the foster parents live.

4.205 Regulation 15 of the SEND Regs 2014 makes provision for the transfer of responsibility for EHC plans where a child or young person moves between local authorities.

Education otherwise than at school

4.206 Under section 7 of the Education Act 1996 parents have the right to educate children, including children with SEN, at home. However in practice a decision to home educate a child with SEN can often give rise to conflict between the local authority and the family. Moreover a family should never feel forced to home educate a child with SEN, given the duties on schools and local authorities covered in this chapter to ensure that those needs are met otherwise than at home.

4.207 Guidance on this sensitive area is given in the SEND Code at paras 10.30–10.38. The Code emphasises that:

- Home education must be suitable to the child's age, ability, aptitude and SEN.
- Local authorities should work in partnership with, and support, parents to ensure that the SEN of these children are met where the local authority already knows the children have SEN or the parents have drawn the children's special needs to the authority's attention.

¹⁹⁵ *R (O) v East Riding of Yorkshire CC* [2011] EWCA Civ 196. See chapter 3 at paras 3.144–3.147 for the consequence of 'looked after' status.

¹⁹⁶ CA 1989 s85. See further chapter 3 at paras 3.148–3.149.

¹⁹⁷ CA 1989 s85(4).

- Local authorities should fund the SEN needs of home-educated children where it is appropriate to do so.¹⁹⁸
- In cases where local authorities and parents agree that home education is the right provision for a child or young person with an EHC plan, the plan should make clear that the child or young person will be educated at home. If it does then under CFA 2014 s42(2) the local authority must arrange the special educational provision set out in the plan, working with the parents.
- In cases where the EHC plan gives the name of a school or type of school where the child will be educated and the parents decide to educate at home, the local authority is not under a duty to make the special educational provision set out in the plan provided it is satisfied that the arrangements made by the parents are suitable. The local authority must review the plan annually to assure itself that the provision set out in it continues to be appropriate and that the child's SEN continue to be met.
- Where a child or young person is a registered pupil and the parent decides to home educate, the parent must notify the school in writing that the child or young person is receiving education otherwise than at school and the school must then remove the pupil's name from the admission register.
- The local authority is required to intervene through the school attendance order framework 'if it appears ... that a child of compulsory school age is not receiving suitable education'.

4.208 Importantly, the SEND Code notes at para 10.34 that:

Local authorities do not have the right of entry to the family home to check that the provision being made by the parents is appropriate and may only enter the home at the invitation of the parents. Parents should be encouraged to see this process as part of the authority's overall approach to home education of pupils with SEN, including the provision of appropriate support, rather than an attempt to undermine the parents' right to home educate.

4.209 The power for local authorities to arrange for special educational provision to be made otherwise than at school or college is contained in CFA 2014 s61. The local authority must be satisfied that 'it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place'.¹⁹⁹ Before reaching its decision the local authority must consult the parent or young person.²⁰⁰ It is important to note that the local authority may decide to arrange part of the

¹⁹⁸ The Code notes at para 10.30 that 'The high needs block of the Dedicated Schools Grant is intended to fund provision for all relevant children and young people in the authority's area, including home-educated children'. See further the Department for Education's undated document 'Revised Funding Guidance for Local Authorities on Home Educated Children'.

¹⁹⁹ CFA 2014 s61(2).

²⁰⁰ CFA 2014 s61(3).

provision otherwise than at school – for example it may be appropriate for certain therapies to be provided in another setting while the remainder of the special educational provision is made at school.

Duties to children who are without education (EA 1996 s19)

4.210 Any child (regardless of disability or SEN) who is out of the education system for any reason is owed the duty in EA 1996 s19 by their local authority. This duty is to 'make arrangements for the provision of suitable education at school or otherwise' for such a child. 'Suitable education' means 'efficient education suitable to his age, ability and aptitude and to any special educational needs he may have'.²⁰¹ As a consequence, a failure to provide adequate home tuition while a child is not in mainstream schooling will be maladministration.²⁰²

4.211 Given the number of children with SEN who are, for one reason or another 'out of the education system' it is of no surprise that there has been considerable attention as to the nature, extent and enforceability of the section 19 duty on LEAs. Any failure to comply with the section 19 duty will generally need to be remedied through judicial review, given the urgency of getting the child back into education. The nature of the section 19 duty has been clarified by a number of court and local government ombudsman decisions. These have established in particular that LEAs cannot plead a 'shortage of resources' as a reason for not making suitable arrangements for disabled children in such cases. More importantly still, in the landmark case of *Tandy*,²⁰³ the House of Lords held that the duty under EA 1996 s19 is owed to each individual child who falls within the definition in the section and that 'suitable education' must be determined purely by educational considerations, disregarding any resource constraints an LEA may face.

4.212 The Department of Education has issued statutory guidance on 'Alternative Provision' for children who are out of school.²⁰⁴ The first three key points made in this guidance are as follows:

1. Local authorities are responsible for arranging suitable education for permanently excluded pupils²⁰⁵, and for other pupils who – because of illness or other reasons – would not receive suitable education without such arrangements being made.

²⁰¹ Education Act 1996 s19(6).

²⁰² See, for example, Local Government Ombudsman's Digest of Cases (Education) 2007/08, Report 05A15425 5192, where it was recommended that compensation of £7,000 be paid for the failure of support.

²⁰³ *R v East Sussex CC ex p Tandy* [1998] AC 714.

²⁰⁴ Department for Education, *Alternative Provision: Statutory guidance for local authorities*, January 2013.

²⁰⁵ See paras 4.220-4.229 below in relation to school exclusions.

2. Governing bodies of schools are responsible for arranging suitable full-time education from the sixth day of a fixed period exclusion.
3. Schools may also direct pupils off-site for education, to help improve their behaviour.

4.213 The guidance goes on to state that 'While there is no statutory requirement as to when suitable full-time education should begin for pupils placed in alternative provision for reasons other than exclusion, local authorities should ensure that such pupils are placed as quickly as possible'.²⁰⁶

4.214 Further advice has been given by government on 'Ensuring a good education for children who cannot attend school because of health needs'.²⁰⁷ The key points in this guidance are as follows:

Local authorities must:

- Arrange suitable full-time education (or as much education as the child's health condition allows) for children of compulsory school age who, because of illness, would otherwise not receive suitable education.

Local authorities should:

- Provide such education as soon as it is clear that the child will be away from school for 15 days or more, whether consecutive or cumulative. They should liaise with appropriate medical professionals to ensure minimal delay in arranging appropriate provision for the child.
- Ensure that the education children receive is of good quality ... allows them to take appropriate qualifications, prevents them from slipping behind their peers in school and allows them to reintegrate successfully back into school as soon as possible.
- Address the needs of individual children in arranging provision. 'Hard and fast' rules are inappropriate: they may limit the offer of education to children with a given condition and prevent their access to the right level of educational support which they are well enough to receive. Strict rules that limit the offer of education a child receives may also breach statutory requirements.

Local authorities should not:

- Have processes or policies in place which prevent a child from getting the right type of provision and a good education.
- Withhold or reduce the provision, or type of provision, for a child because of how much it will cost (meeting the child's needs and providing a good education must be the determining factors).

²⁰⁶ Department for Education, *Alternative Provision: Statutory guidance for local authorities*, January 2013, para 2.

²⁰⁷ Department for Education, *Ensuring a good education for children who cannot attend school because of health needs: Statutory guidance for local authorities*, January 2013.

- Have policies based upon the percentage of time a child is able to attend school rather than whether the child is receiving a suitable education during that attendance.
- Have lists of health conditions which dictate whether or not they will arrange education for children or inflexible policies which result in children going without suitable full-time education (or as much education as their health condition allows them to participate in).

4.215 Many disabled children are failed by their schools either due to bullying or due to the inability of the school to provide suitable education. On occasions this results in their parents withdrawing them and subsequently making a complaint to the courts or local government ombudsmen. In *R (G) v Westminster CC*,²⁰⁸ however, the Court of Appeal held that a father had not acted reasonably in withdrawing his son from school on the grounds he was being bullied when the school was taking reasonable steps to address his bullying. The court did hold that where a child was not receiving suitable education and there was no suitable education available that was reasonably practicable for the child, the authority would be in breach of EA 1996 s19.²⁰⁹

4.216 The ombudsman has, however, held in a different case that parents acted reasonably in removing their son from a school (and educating him at home) when the LEA and the school had comprehensively failed to comply with his statement of SEN, and indeed their associated SEN obligations under the EA 1996.²¹⁰ Likewise in a 2007 complaint the local government ombudsman considered that a mother's removal of her disabled son due to bullying was not unreasonable, given the LEA's maladministration in failing to use its mediation process to help to address the bullying and its failure to provide assistance to reintroduce child to his school or to find an alternative.²¹¹

4.217 The EA 1996 s19 duty has been considered by the High Court in cases involving children with SEN. In *R (B) v Barnet LBC*,²¹² the court held that it was not reasonably practicable for a child to attend a school which the headteacher had said was unsuitable for her and as such there had been a breach of the section 19 duty. In a case such as this, there is then a duty on the LEA to make alternative provision which the court enforced in relation to B by way of a mandatory order. By contrast, in *R (HR) v Medway Council*,²¹³ the court approved the Barnet case but held that on the facts, the LEA had discharged its EA 1996 s19 duty by offering a placement in a hospital special school, even though an independent educational

²⁰⁸ [2004] EWCA Civ 45; [2004] 1 WLR 1113.

²⁰⁹ Judgment at [46].

²¹⁰ Local Government Ombudsman's Digest of Cases (Education) 2003/04, Report 02/A/13068.

²¹¹ Local Government Ombudsman's Digest of Cases (Education) 2006/07, Report 05/B/11513.

²¹² [2009] EWHC 2842 (Admin); (2009) 12 CCLR 679.

²¹³ [2010] EWHC 731 (Admin).

psychologist has said that this school was not suitable for HR. This was essentially because it was not sufficiently obvious that the school was unsuitable, given the LEA's evidence to the contrary. These two cases together suggest that even where a disabled child is out of school for a significant period the court will only intervene when it is obvious that the LEA has not offered 'suitable' education, particularly if there is an ongoing tribunal appeal pending (as there was in relation to both B and HR).

School admissions

4.218 Children with SEN but without a statement/EHC plan must apply for school admission in the usual way. This means that parents will need to address the relevant over-subscription criteria for schools where the demand for places exceeds the available supply. In most cases this means that preference is given to children living nearer the school, unless the child is adopted or looked after by the local authority or has a sibling at the school or there is an exceptional medical or social need for them to attend the particular school.

4.219 Parents can appeal to the independent appeal panel responsible for their particular admissions authority (usually the local authority) if they disagree with a school admissions decision. These appeals and the prior decision making by the local authority are regulated by two Codes of Practice, issued under School Standards and Framework Act 1998 s84.²¹⁴ Relevant bodies including admissions authorities and independent appeal panels must 'act in accordance' with the codes.²¹⁵

Exclusions from school and colleges

4.220 As noted above, pupils with SEN account for 7 in 10 of all permanent exclusions and 6 in 10 of all fixed period exclusions from English schools. This statistic alone suggests, at the very least, indirect discrimination against disabled children contrary to the Equality Act 2010.²¹⁶ Exclusion, particularly for disabled children and children with SEN, should be regarded as 'a draconian remedy of last resort'.²¹⁷ This is reinforced (although perhaps not as strongly as previously) in

²¹⁴ Department for Education, *School Admissions Code: Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels*, December 2014; Department for Education, *School Admission Appeals Code: Statutory guidance for school leaders, governing bodies and local authorities*, February 2012.

²¹⁵ School Standards and Framework Act 1998 s84(3).

²¹⁶ See in this context, the Local Government Ombudsman's Digest of Cases (Education) 2007/08, Report 06C06190, concerning an exclusion of a young person with SEN and the ombudsman's finding that the LEA had failed to have regard to the likelihood that the case facts engaged its general duties under the Disability Discrimination Act 1995.

²¹⁷ J Ford et al, *Education law and practice*, 3rd edn, Jordans, 2010, para 8.38.

the regulations²¹⁸ and statutory exclusions guidance for schools in England.²¹⁹ In particular the guidance states that:

- head teachers²²⁰ should, as far as possible, avoid excluding permanently any child with a statement of SEN or a looked after child (para 22);²²¹
- where a school has concerns about the behaviour, or risk of exclusion, of a child with additional needs a pupil with a statement of SEN 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 (para 24); and
- early intervention to address underlying causes of disruptive behaviour should include an assessment of whether appropriate provision is in place to support any SEN or disability that a pupil may have (para 18).

4.221 At para 15, the guidance states that a decision to exclude a pupil permanently should only be taken in response to serious or persistent breaches of the school's behaviour policy and where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school. By using the word 'only', the guidance creates a discrete and exclusive test for when a permanent exclusion is a justified and a lawful response. When asking whether the pupil acted as alleged, the standard of proof is the balance of probabilities and this means whether something is 'more likely than not' to have occurred.²²²

4.222 The guidance recognises (at para 22) that pupils with statements of SEN and looked after children are particularly vulnerable to the impacts of exclusion as well as having disproportionately high rates of exclusion. As such, it is essential that schools and local authorities comply with the guidance in relation to children with SEN and looked after children who are at risk of exclusion or who have been excluded.

4.223 For both fixed period and permanent exclusions, there is a duty to provide alternative education for the pupil from the sixth day of the exclusion. For a child with a statement of SEN or EHC plan, the local authority must identify an appropriate full-time placement in consultation with the child's parents who retain the right to express a preference for a school they wish their child to attend or make representations for a placement in any other school (para 45).

²¹⁸ School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI No 1033.

²¹⁹ Department for Education *Exclusion from maintained schools, Academies and pupil referral units in England*, 2012. An updated version of this guidance was published in January 2015 and then withdrawn after threatened legal action, including in relation to failure to consult on important changes from the previous guidance. As such the 2012 guidance remains in force.

²²⁰ The term 'Headteacher' in the guidance and in this section applies also to a teacher in charge of a pupil referral unit and to a principal of an academy.

²²¹ This must now be read as including a child with an EHC plan.

²²² *Re B (Children) (Sexual Abuse: Standard of Proof)* [2009] 1 AC 11.

4.224 Notwithstanding these time-specific duties, it has been and is still all too often the case that provision of education for excluded children is inadequate. A 2004 local government ombudsman report,²²³ for example, concerned a child who was excluded for violent and disruptive behaviour while the LEA was in the process of assessing his SEN. He was out of school for over a year. For the first half term no education was provided and after this he received tuition which varied between six and 12 hours a week. In the ombudsman's opinion this was grossly inadequate and could not be described as 'suitable education'.

4.225 A similar finding emerges from a 2010 report,²²⁴ which concerned a six-month exclusion of a child who had mental health difficulties (and for whom an application for a statement of SEN was then made). The ombudsman found that during the exclusion period the education provided 'was well below the requirements of the statutory guidance', and observed (para 30):

According to section 19 of the Education Act 1996, the Council was responsible for this once it became impossible for [the child] to attend School A Therefore, it is not sufficient for the Council to say that [she] remained on the school roll and so the local authority was not responsible for her education. That fails to reflect the reality of the situation: that the school had become unsuitable for [her] and it was impossible for her to attend. Accordingly, the Council was responsible for arranging suitable educational provision.

4.226 The school's governing body must consider the reinstatement of an excluded pupil within 15 school days of receiving notice of an exclusion which brings the pupil's total number of excluded days to more than 15 in a term; or of a permanent exclusion; or of any exclusion which would result in a pupil missing a public examination or a national curriculum test. Parents of children who are permanently excluded (and excluded pupils aged 18 or over) can ask for the governing body's decision to be reviewed by an *Independent Review Panel* (IRP). The time limits are set out in paras 72 and 84 of the statutory guidance. There is also a right to make a claim under the Equality Act 2010 to the First-tier Tribunal (Special Educational Needs and Disability) if parents believe the permanent exclusion was the result of disability discrimination. This appeal right also exists for fixed term exclusions (see chapter 11, para 11.70 below). The tribunal has issued guidance on how to bring a disability discrimination claim in light of the changes.²²⁵

²²³ Local Government Ombudsman's Digest of Cases (Education) 2003/04, Report 01/B/6663, where it was recommended that compensation of over £2,000 be paid for the failure of support. See also the Digest of Cases (Education) 2007/08, Report 06C06190, which concerned the exclusion (for behavioural reasons) from a mainstream school of a young person with a statement of SEN. The ombudsman found there to be maladministration, not least because requests for a reassessment of his needs were ignored by the LEA because he was approaching year 11. The ombudsman also noted the failure of the LEA to have regard to the likelihood that these facts engaged its general duties under the Disability Discrimination Act 1995.

²²⁴ Complaint no 07A14912 against Barnet LBC, April 19 2010.

²²⁵ HM Courts and Tribunals Service, *How to claim against disability discrimination in schools - a guide for parents*, 2013.

4.227 In their application for an IRP hearing, parents have a right to request that the local authority/academy trust appoints and pays for an SEN expert (para 117), regardless of whether or not the school recognises that their child has SEN (para 119). The statutory guidance sets out the nature of the SEN expert's role as 'analogous to an expert witness, providing impartial advice to the panel on how special educational needs might be relevant to the exclusion' (para 155). The focus of their advice should be on 'whether the school's policies which relate to SEN, or the application of these policies in relation to the excluded pupil, were legal, reasonable and procedurally fair' (para 156) and if a school does not recognise the pupils has SEN, also address this issue (para 157). The panel members should apply the tests of illegality, irrationality and procedural impropriety in relation to the decision to exclude (para 148).

4.228 Unlike an Independent Appeal Panel under the previous scheme, an IRP can only uphold the exclusion decision, recommend that the governing body reconsiders their decision or quash the decision if it considers it was flawed when considered in light of judicial review principles and direct that the governing body considers the exclusion again. However it cannot direct reinstatement, be this immediate or at some later date. If the IRP directs a governing body to reconsider its decision and the governing body does not offer to reinstate a pupil, the IRP can order a readjustment of the school's budget (or payment in the case of an academy) so that money follows the excluded pupil; a panel does not have this power where it has only made a recommendation. The main power in relation to exclusions therefore now vests in the school rather than in an independent body, which is a concerning development for excluded pupils. However, if a parent brings a claim of disability discrimination in relation to the permanent exclusion, the tribunal will expedite the timetable (unless the exclusion is being considered by an IRP) so that a decision can be reached in no more than six weeks; if successful, the tribunal can order reinstatement.

4.229 An example of an Independent Appeal Panel (the forerunner to the IRP) considering proportionality is found in *W v Bexley LBC Independent Appeal Panel*,²²⁶ a case in which the IAP accepted the school's evidence that W had cut another student's folder with a knife and sliced this student's shirt with the knife while the student was wearing it. However, despite making this finding, the IAP concluded that permanent exclusion was a disproportionate response and that a fixed-term exclusion would have been more appropriate. As the IAP had no power to order a fixed-term exclusion, reinstatement was ordered.

School and college transport

4.230 The statutory provisions in relation to school transport in England are found in EA 1996 ss508A–509A. The school transport duties on local authorities in England are further explained in the relevant guidance.²²⁷ There is separate guidance for post 16 transport which covers learners of sixth form age attending

²²⁶ [2008] EWHC 758 (Admin).

²²⁷ Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014.

schools as well as sixth form colleges and other Further and Higher education institutions.²²⁸

4.231 Under section 508B, local authorities must arrange free suitable home-to-school travel arrangements for 'eligible' children of compulsory school age for whom no, or no suitable, free travel arrangements have been provided. Eligibility is generally determined by distance from school. However, other groups of children can also be 'eligible', including here children with SEN, a disability or mobility problems who as a result of their difficulties cannot reasonably be expected to walk to school.²²⁹

4.232 Where a parent chooses to send his or her child to a school which is not the nearest appropriate school and is not named as the 'appropriate school' in the child's statement/EHC plan, the local authority may choose not to provide assistance with transport. This will arise where the local authority has made suitable arrangements for the child to become a registered pupil at a school nearer to his home.²³⁰ Local authorities should not, therefore, adopt general transport policies that seek to limit the schools for which parents of children with statement/EHC plans may express a preference if free transport is to be provided. In most cases local authorities will have clear general policies relating to transport for children with statements/EHC plans; these should be made available to parents and more often than not are well publicised on local authority websites.

4.233 However, it is acceptable for the local authority to name the school preferred by the child's parents in the statement/EHC plan on condition that the parents agree to meet all of or part of the transport costs, so long as there is a nearer school which is held to be suitable. If there is no nearer suitable school the local authority is likely to owe the EA 1996 s508B duty to arrange free, suitable transport.

4.234 Home-to-school transport should not cause the child undue stress, strain or difficulty that would prevent the child benefiting from the education the school has to offer. The statutory guidance states that 'For arrangements to be suitable, they must also be safe and reasonably stress free, to enable the child to arrive at school ready for a day of study'.²³¹ Proper safeguarding procedures should be in place in relation to drivers and escorts.

4.235 If a child is not eligible for free home-to-school transport, the local authority may still make transport arrangements for them.²³² This includes children who are

²²⁸ Department for Education, *Post-16 transport to education and training: Statutory guidance for local authorities*, February 2014.

²²⁹ Education Act 1996 Sch 35 para 2.

²³⁰ Education Act 1996 Sch 35B, para 2(c). Such children will therefore not be 'eligible' children for the purposes of section 508B.

²³¹ Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014 para 35.

²³² See Education Act 1996 s508C. Guidance on the exercise of the section 508C power is given in Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014 at paras 36 and 37.

older or younger than compulsory school age. Such arrangements do not have to be free of charge, but whether or not there will be a charge should be made clear in the authority's school travel policy. Local authorities may put in place school travel schemes in which case different rules in relation to eligibility for free home to school transport will apply .

4.236 Local authorities are under a duty to publish a post-16 Transport Policy Statement.²³³ This must include specific provision for disabled learners.²³⁴ In particular, it must 'specify arrangements for persons with learning difficulties or disabilities receiving education or training at establishments other than schools maintained by the authority which are no less favourable than arrangements specified for pupils of the same age with learning difficulties or disabilities attending such schools'.²³⁵ The relevant statutory guidance expressly states that the overall intention of the 16 to 18 transport duty is to 'ensure that learners of sixth form age are able to access the education and training of their choice; and ensure that, if support for access is required, that this will be assessed and provided where necessary'.²³⁶

4.237 Education Act 1996 ss508F–H provide additional duties in relation to adult learners. Essentially, section 508F states that the local authorities should provide transport in order to facilitate the attendance of adults at further education or higher education institutions. They should also facilitate the attendance of an adult for whom an EHC plan is maintained. Any transport provided under section 508F should be provided free of charge.²³⁷ This means that for many disabled young people the only ages at which they can be charged for school or college transport will be 16 and 17, ie when they are no longer 'eligible' children for the purposes of section 508B and before the adult transport duty under section 508F applies to them.

4.238 Disputes in relation to school transport will generally be resolved by local education transport panels, such panels being required to act fairly and to take into account any educational needs an individual learner may have.

4.239 The statutory guidance states as follows in relation to resolving school transport disputes:

Local authorities should have in place both complaints and appeals procedures for parents to follow should they have cause for complaint about the service, or wish to appeal about the eligibility of their child for travel support. The procedure should be published alongside the local authority travel policy statement. If an appellant considers that there has been a

²³³ Education Act 1996 s509AA.

²³⁴ Education Act 1996 s509AB.

²³⁵ Education Act 1996 s509AB(2).

²³⁶ Department for Education, *Post-16 transport to education and training: Statutory guidance for local authorities*, February 2014 para 2.

²³⁷ Education Act 1996 s508F(1).

failure to comply with the procedural rules or if there are any other irregularities in the way an appeal was handled they may have a right to refer the matter to the Local Government Ombudsman. If an appellant considers the decision of the independent appeals panel to be flawed on public law grounds, they may apply for a judicial review.²³⁸

4.240 Whereas previously each local authority was free to adopt its own procedure for school transport appeals, the statutory guidance now includes at annex 2 a 'recommended review/appeals process'. This suggests that:

- At stage 1, a parent has 20 working days from receipt of the local authority's home to school transport decision to make a written request asking for a review of the decision.
- The written request should detail why the parent believes the decision should be reviewed and give details of any personal and/or family circumstances the parent believes should be considered when the decision is reviewed.
- Within 20 working days of receipt of the parent's written request a senior officer reviews the original decision and sends the parent a detailed written notification of the outcome of their review.
- A parent has 20 working days from receipt of the local authority's stage one written decision notification to make a written request to escalate the matter to stage two.
- Within 40 working days of receipt of the parents request an independent appeal panel considers written and verbal representations from both the parent and officers involved in the case and gives a detailed written notification of the outcome (within five working days).

4.241 There is a flow chart setting out the recommended process in the statutory guidance at page 36. However parents will need to check with their local authority whether the recommended process has been adopted or if a decision has been taken to depart from the guidance.

Appeals to the tribunal

4.242 As with the previous scheme under Part 4 of the Education Act 1996, the principal remedy in relation to disputes under CFA 2014 Part 3 is an appeal to the First-tier Tribunal (Special Educational Needs and Disability). The appeal right lies with parents in relation to children. For young people, those who have capacity in relation to the relevant decision can appeal in their own name while for young people who lack the relevant capacity the appeal can be brought by any 'representative' or their parent; see further paras 11.81–11.87.

4.243 The following decisions can be appealed to the tribunal:²³⁹

²³⁸ Department for Education, *Home to school travel and transport guidance: Statutory guidance for local authorities*, July 2014, para 35.

²³⁹ CFA 2014 s51.

- a refusal to carry out an EHC needs assessment following a request;
- a refusal to make an EHC plan following an assessment;
- disputes in relation to sections B, F or I of the EHC plan (see para 4.139 above for these sections, which concern SEN issues only);
- a refusal to make requested amendments to an EHC plan following an annual review;
- a refusal to carry out a re-assessment following a request;
- a decision to cease to maintain an EHC plan.

4.244 In addition to the above, there is a pilot scheme from April 2015 in relation to certain local authorities²⁴⁰ that provides the tribunal with the power to recommend the health care and social care needs and health and social care provision that should be specified in the EHC plan.²⁴¹

4.245 It is important to note that a tribunal appeal must be lodged within two months of the decision letter from the local authority confirming one of the decisions above has been made.

4.246 Parents and young people who wish to make an appeal to the tribunal may do so only after they have contacted an independent mediation adviser and discussed whether mediation might be a suitable way of resolving the disagreement.²⁴² This requirement does not apply where the appeal is solely about the name or type of the school, college or other institution named on the plan. It is important to note that there is no requirement to mediate before appealing to the tribunal, merely to consider mediation.

4.247 Where a parent or young person is required to obtain a mediation certificate, he or she must contact the mediation adviser within two months of written notice of the local authority's decision being sent, inform the mediation adviser that he or she wishes to appeal and inform the mediation adviser whether they wish to pursue mediation.²⁴³

4.248 Further information in relation to the tribunal process is set out in chapter 11, see paras 11.60–11.87.

²⁴⁰ The local authorities included in the Pilot Scheme are: Barking and Dagenham London Borough Council, Bedford Borough Council, Blackpool Council, Cheshire West and Chester Council, Ealing London Borough Council., East Riding of Yorkshire Council, Hackney London Borough Council, Kent County Council, Lambeth London Borough Council, Liverpool City Council, Sandwell Metropolitan Borough Council, Stockport Metropolitan Borough Council, Wokingham Borough Council.

²⁴¹ This scheme is governed by the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 SI No 358. See further, chapter 11 at paras 11.75–11.80.

²⁴² CFA 2014 s55(3). See further, chapter 11 at paras 11.48–11.59.

²⁴³ Special Education Needs and Disability Regulations 2014 reg 33.

Other enforcement methods

Judicial review

4.249 As explained in chapter 11 (see paras 11.88–11.103), where a child is suffering an ongoing disadvantage as a result of a school or local authority's breach of duty, for instance the duty on local authorities to provide suitable education for children out of school, it may be possible to achieve a remedy through an application for judicial review in the High Court. Care must be taken, however, to ensure that no other effective remedy can be obtained through another route, in particular through a tribunal appeal, otherwise the High Court is likely to either refuse permission for the judicial review to proceed or refuse to grant any relief at the end of the proceedings.

4.250 Judicial review proceedings should be brought as soon as possible and in any event, no later than three months after the decision complained about; the time limit can be extended in exceptional circumstances. As such families should take advice from a specialist solicitor as quickly as possible if an application for judicial review may be required. Legal aid may be available to meet the costs of an application for judicial review, depending on both the merits of the proposed application and an assessment of the financial means of the child, young person and/or parent(s). See further chapter 11 at paras 11.108–11.116 for a more extensive discussion of legal aid eligibility.

Complaint to the secretary of state

4.251 Alternatively, a parent or child may make a complaint to the secretary of state if a local authority or governing body of a maintained school in England has acted unreasonably or is in breach of its duties. It is usually necessary to follow all internal complaints procedures before making a written complaint to the secretary of state and the complaint will not normally be able to be investigated if the child has left the school in question. An investigation by the secretary of state can take in excess of six months so this should not be used as a remedy in urgent cases. If the complaint is upheld, however, the secretary of state can issue directions to require the local authority or school to carry out its legal obligations properly. See chapter 11 at paras 11.22–11.35 for further information.

Complaint to the ombudsman

4.252 Complaints in relation to maladministration by local authorities can also be made to the local government ombudsman (www.lgo.org.uk) in England. Further information in relation to the role of the ombudsman in resolving disputes in relation to education issues can be found in chapter 11 at paras 11.36–11.43.

Decision-making for young people

4.253 CFA 2014 s80 and the related regulations²⁴⁴ govern how decisions are made by and for young people aged over 16 under CFA 2014 Part 3. These provisions are discussed in chapter 11 at paras 11.81–11.87.

Further advice and support

4.254 Education law is notoriously complex and even in this lengthy chapter it has not been possible to cover all relevant issues. Parents, young people and others are strongly advised to seek independent advice on their own case.

4.255 Details of where further advice and support can be obtained can be found in chapter 11 at paras 11.118–11.128 along with information as to the availability of legal aid.

²⁴⁴ SEND Regs 2014 Part 6.