

## Special Educational Needs and Disability

### Introduction

Every education setting must consider children and young people who have or may have special educational needs (“SEN”) to make sure that their needs are properly identified and provided for. SEN is an area in which we are seeing an increase in complexity and legal challenge, particularly against the backdrop of significant and long term funding difficulties.

Our specialist SEN team has extensive experience in advising schools and academies on all issues related to SEN and disability. Our solicitors also have experience of working within local authorities and understand the challenges faced by both LAs and schools.

### Developing policies

Maintained schools and academies are required to review their SEND policies on an annual basis. This is in addition to the SEN information report which must be published on a school’s website and updated annually and the accessibility plan which should be reviewed every 3 years. Schools must ensure that their policies reflect their duties under the Equality Act 2010; children and young people who have SEN may also fall within the definition of disability contained within the Equality Act regardless of whether or not they have any sort of diagnosis, or whether they have an Education, Health and Care Plan (“EHCP”). In particular, pupils with SEN need to be considered within the context of the school’s behaviour policy.

We are able to assist schools and academy trusts with both developing and reviewing policies.

### Being named in an EHCP

Schools often pride themselves on being inclusive, but this can sometimes lead to challenges when certain schools get inundated with requests for places for pupils with SEN, particularly at key phase transfer periods, and sometimes a school will need to inform the local authority that it cannot meet the needs of a particular pupil. This can be particularly sensitive, especially if the pupil is already at the school but their needs have changed and the setting is no longer appropriate. We can advise education settings on responding appropriately to LA consultations, and on all aspects of the annual review process.

### Exclusions

The Timpson review published in 2019 revealed that children and young people with SEN are 3 times<sup>1</sup> more likely to be excluded than those who do not have SEN. Often, underlying SEN in pupils who are excluded (whether on a fixed term basis or permanently) has not been fully identified or addressed, and this can lead to complexities when a decision to exclude is challenged. Schools face particular difficulties when finding it hard to meet the needs of a child with SEN where that child exhibits distress or anxiety in school and staff feel that it is in the child’s best interests to go home: this can result in the school being challenged on an unofficial exclusion.

### Disability Discrimination Claims

If a parent considers that their child has been discriminated against as a result of behaviour arising from a disability, they may bring a claim on

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<sup>1</sup> This figure is slightly lower for pupils who have EHCPs.

behalf of the child against the Trust (in the case of academies) or the Governing Board (in the case of maintained schools) in the SEND Tribunal.

Disability discrimination claims often arise as a result of a disciplinary sanction such as exclusions (either fixed term or permanent), or perhaps where a pupil has not been able to participate in an activity or trip for example. Sometimes the matter will have been through the exclusions appeal process and/or the school's complaints procedure, but not always. A claim for disability discrimination can be brought within 6 months of the incident of alleged discrimination.

If a disability discrimination claim is received, it is imperative that you seek legal advice straight away, as the timetable for the Tribunal is relatively short. It is particularly important for schools to have a system in place for monitoring incoming post during the school holidays and other periods of closure, as otherwise claims may arrive and not be actioned. We have considerable experience in advising on disability discrimination claims brought by parents against maintained schools and academies (both mainstream and special schools) in the SEND Tribunal. Please see the case study below for more details.

### Schools Funding

We are acutely aware of the challenges facing both local authorities and schools in relation to SEND funding. We are able to advise on matters relating to school finance, including challenging school budget shares and potential remedies such as applications to the Education and Skills Funding Agency and judicial review.

### Case Study

We acted for a primary school in defending a disability discrimination claim brought by the parent of a pupil who had been issued with several fixed term exclusions for persistently disruptive and violent behaviour. The last exclusion was for a significant period of time, and so it meant that the child also missed a course of swimming lessons. The parent claimed that the exclusions, inability to participate in swimming lessons and an alleged failure of the school to make reasonable adjustments amounted to unlawful disability discrimination. Initially the claim was allocated to the SEND Tribunal fast track but we successfully applied to have this removed on the basis that the

fixed term exclusion would have come to an end by the time the matter was heard.

The pupil did not have an EHCP (although a statutory assessment had been requested) or any diagnosed condition at the time that the claim was registered, but it was clear that they did have a range of special educational needs. We established that the school had put in place a significant level of support over a sustained period of time, and had exceeded the notional SEN support budget. By the date of the hearing the local authority had issued an EHCP with a significant level of funding in place which served to demonstrate the extent of the child's needs.

The Tribunal found that the school's action in excluding the child was proportionate on each occasion and that despite having done all it could to support the child in school, the child's behaviour was putting other pupils and staff at risk. The Tribunal dismissed the parent's claim.

**For further information, please contact our School Support Service Team on 0345 070 7437 or [schoolsupport@wslaw.co.uk](mailto:schoolsupport@wslaw.co.uk)**