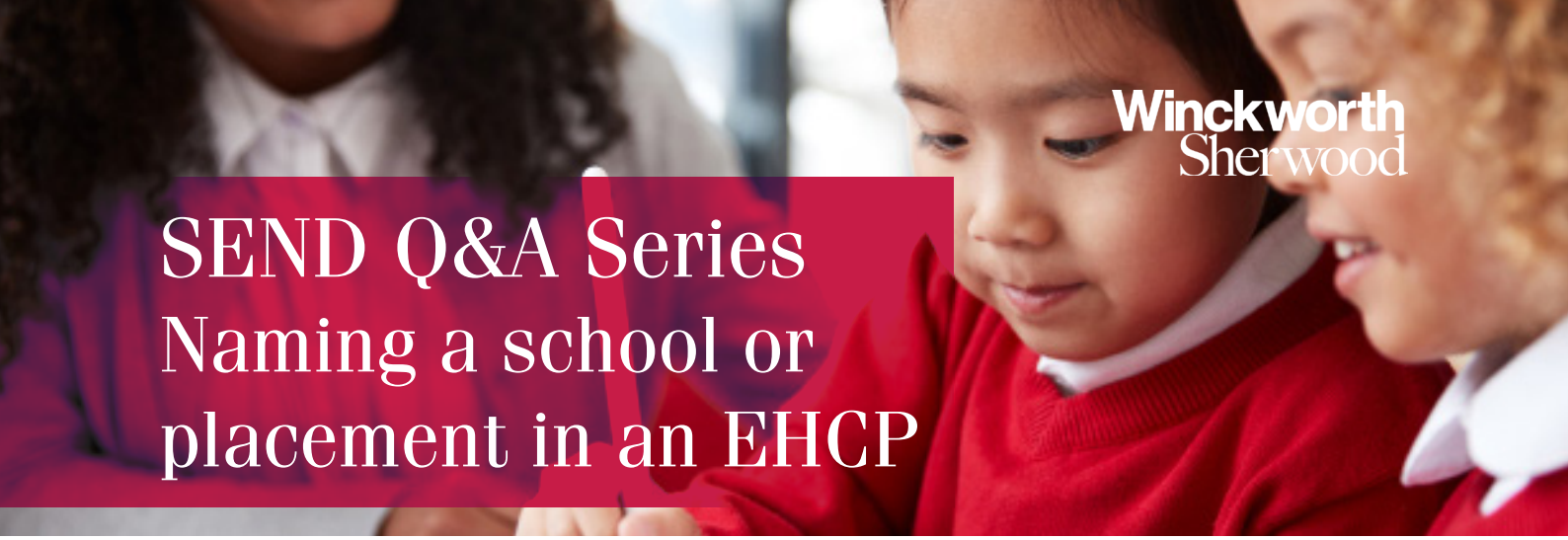

SEND Q&A Series Naming a school or placement in an EHCP

CONTACT OUR AUTHOR FOR MORE INFORMATION AND DETAILS

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If you have been following our SEND Q&A Series, you will know we have explored a range of topics, including school-based SEN support, SEN funding, the legal threshold for EHC needs assessments and Education Health and Care Plans (EHCPs). We have also taken a closer look at the needs and provisions that go into these plans. Now, it's time to turn our attention to placements and section I of EHCPs – a crucial part of the plan that outlines where a child will receive their education.

Placement issues can be broad and complex, and we will prepare different factsheets to address those matters (i.e. seeking a 'waking day' curriculum, residential placements, Education otherwise than at School and so on).

DO PARENTS HAVE LEGAL RIGHT TO REQUEST A PARTICULAR TYPE OF PLACEMENT OR SCHOOL?

Upon issuing a draft EHCP, the Local Authority (LA) will seek parental views on their preferred placement to be named in section I. Under section 38(3) Children and Families Act 2014, parents and carers can request any of the following types of nursery, school or college:

- a maintained school or nursery (mainstream or special)
- an Academy (mainstream or special)
- an institution in the Further Education sector (i.e. further education or sixth form college)
- a non-maintained special school
- a section 41 school, an Independent school or independent specialist college approved for this purpose by the Secretary of State.

Following a request for one of these settings, the LA must consider it, consult with any specific placement proposed (fitting into these categories) and name it in the EHCP unless certain exemptions apply (see below).

WHEN CAN A LA LEGALLY REFUSE TO NAME A SCHOOL?

The LA can only refuse to name a school requested in limited circumstances. The lawful grounds of refusing can be found in section 39 Children and Families Act 2014:

- the setting is unsuitable for the age, ability, aptitude or special educational needs of the child or young person;
- the attendance of the child or young person would be incompatible with the provision of efficient education for others (which I will discuss below); or
- the attendance of your child or young person would be incompatible with the efficient use of resources.

The decision to name a school must be based on proper evidence and the particular needs of the individual child (MMB v Hillingdon [2004] EWHC 513). When the LA is relying on one of the above exemptions, likewise they must be able to produce evidence that the exemption is satisfied. There are many reported legal cases that deal with the exemptions above, but I will not discuss these here as the purpose of this Q&A is to provide a general overview. I will however briefly deal with the issue of costs of placement as it is a common feature in disputes between parents and LAs.

WHAT IS THE SIGNIFICANCE OF PLACEMENT COSTS IN THE CONTEXT OF EFFICIENT USE OF RESOURCES?

It is well established that a LA is not under a duty to provide the best possible education for a child, but rather a school or college that can meet the child's special educational needs (R v Surrey County Council Education Committee ex parte P [1997] ELR 516).

The situation often arises when the parental preference will cost more than the LA's choice of school. The LA's position might be that, as both schools are suitable, naming the parental preference will be incompatible with 'efficient use of resources' because it costs more. This would be an incorrect application of this exemption. The issue that needs to be considered is not whether the placement simply cost more, but rather whether the extra cost is significant or disproportionate (Essex CC v SENDIST [2006] EWHC 1105 (Admin) - a difference of between £2000-£4000 was not found to be 'incompatible').

In the case London Borough of Croydon v K.A. [2022] UKUT 106 (AAC), where I was very pleased to be instructed by the parent, £70,000 additional costs were not considered an unreasonable use of public funds due to the additional health and social care benefits that it brought to the child. The LA and Tribunal (upon appeal) must take a holistic approach and must weigh additional cost against any benefits the placement may bring to the child or young person. This might include health and social care benefits.

DOES MY CHILD HAVE A RIGHT TO MAINSTREAM EDUCATION IF THIS IS MY PREFERENCE?

In line with section 33 Children and Families Act 2014, the LA must provide mainstream education when requested by a parent of carer, unless:

1. a mainstream placement would be incompatible with the efficient education of others, and
2. there are no reasonable steps the LA could take to avoid this.

What constitutes a reasonable step will depend on all the circumstances of the case, and factors include: whether taking the step would be effective in removing incompatibility, whether the step is practical, what steps have already been taken, financial implications, and disruption caused by the measures (see paragraph 9.91 to 9.94 of the SEN Code of Practice 2014, where examples of reasonable steps that might be taken in different circumstances can be found).

The LA cannot refuse on the basis that a child's needs are too significant for a mainstream setting. The SEN Code of Practice makes it clear that "a decision not to educate a child or young person in a mainstream setting against the wishes of the child's parent or the young person should not be taken lightly".

CAN I APPEAL FOR AN INDEPENDENT OR PRIVATE SCHOOL?

Yes, and if requested, the LA must "have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure" (section 9 Education Act 1996). Similarly, when requested by a young person, the LA should consider it as part of their duty to consider the young person's views, wishes and feelings (section 19 Children and Families Act 2014).

Before an Independent school is named, it would need to establish that the LA's proposed school cannot meet needs or that it would not constitute an unreasonable public expenditure. This would include a similar balancing exercise between the additional cost against any benefits the placement may bring to the child or young person. This is not an easy task if the additional cost of the independent school is substantial, and in my experience, the prospects of securing an independent school are greater when it can be established that the LA's proposed school cannot meet needs.

To demonstrate that the LA's proposed school cannot meet needs, professional evidence is usually required (for example from an Educational Psychologist, Speech and Language Therapist or Occupational Therapist). If the LA's proposed school expresses concern in meeting needs, this can be useful – see below on the importance of consultation responses.

DOES AN INDEPENDENT SCHOOL NEED TO BE SECTION 41 APPROVED?

The relevance of a school or college gaining section 41 approval (under the Children's and Families Act 2014) means that they voluntarily agree to be treated in the same way as maintained schools, academies and further education institutions when it comes to EHCPs. If they are approved, the Department for Education will add them to the list of section 41 approved schools.

If the LA names an Independent school that is section 41 approved, or a Tribunal directs them to, that school must admit a child or young person (save for exceptional reasons not to). Whilst an independent school can be named in an EHCP that is not section 41 approved, it is very important to note that LAs and the Tribunal cannot name it in section I of an EHCP unless the school has agreed (meaning they have offered the child a place).

Winckworth Sherwood

WHY IS THE SCHOOL CONSULTATION PROCESS SO IMPORTANT?

The LA must consult with a placement before naming it in an EHCP (sections s39(2) and s40(3) the Children and Families Act 2014). The consultation process must comply with what is known as the 'Sedley criteria' or alternatively the "Gunning Principles".

- The consultation must occur when the proposal to name the school is at a formative stage.
- Sufficient information must be given to permit the school to intelligently consider and respond.
- The school must be given adequate time in which to respond. The SEND Code of Practice says that schools should respond within 15 days, please note that this includes school holiday periods.
- The consultation response must be conscientiously considered by the LA

It's important to recognise that a clear, detailed and accurate response from schools during the consultation process benefits everyone involved, especially the child. For parents, this helps ensure that schools being considered are genuinely equipped to meet their child's needs. For schools, it provides an opportunity to identify what additional support might be required, including whether additional funding or resources would be necessary. This transparency supports well-informed placement decisions.

I have been involved in countless appeals where the LA names a school that cannot meet needs, and both the parents and named school have objections, however, the consultation response lacks details and is neither helpful to the parents nor the school. Consultation responses should demonstrate an understanding of the child's needs and reflection on whether section F provisions or recommendations in recent reports can be provided at the school. If the school believes that the child's attendance will be incompatible with the efficient education of children already attending, detailed and specific reasons should be provided. The school should also consider what additional resources and support they may need from the LA to meet the child's needs or reduce incompatibilities.

CAN I APPEAL IF THE LOCAL AUTHORITY DOES NOT AGREE WITH MY PREFERRED SCHOOL OR PLACEMENT?

Yes. An appeal can be lodged to the First Tier Tribunal (special educational needs and disabilities). The deadline for appealing to the Tribunal is within two months of the final EHCP or final amended EHCP being issued, or one month from the date you obtain a mediation certificate, whichever is the later.

A right to appeal against the placement named in section I will also follow an Annual Review of the EHCP. I will be discussing the Annual Review process in a different SEND Q&A Series – stayed tuned!

To speak with one of our expert special educational needs solicitors about your child's EHCP or if you are a school seeking advice on consultation responses, please do not hesitate to contact us on sendsupport@wslaw.co.uk or scan the QR code below