

SEND Q&A Series

Needs and provisions within EHCPs

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FOR MORE INFORMATION
AND DETAILS**



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In our previous SEND Series, we answered key questions on the benefits of an [Education Health and Care Plan \(EHCP\)](#) and the legal threshold for a plan to be issued for a child or young person.

In this series I will answer commonly asked questions in relation to the description of needs (section B) and provisions in EHCPs (section F). These sections are the fundamental building blocks that will influence the type of placement that is to be named in Section I of an EHCP. I will address types of placements in my next series – watch this space!

Before going further, it is important to note that EHCPs must be drafted in accordance with the rules and requirements set out by the Children and Families Act (CFA) 2014, SEN Code of Practice 2015 (COP 2015) and Local Authorities (LAs) should reflect on judicial guidance derived from reported cases, particularly those before the Upper Tribunal. As a starting point, EHCPs should be “clear, concise, understandable and accessible to parents, children, young people, providers and practitioners”. They should be written so they can be understood by professionals in any local authority: (COP 2015).

WHAT INFORMATION AND LEVEL OF DETAIL SHOULD BE INCLUDED IN SECTION B?

Section B is broken down into 4 sometimes 5 sub-categories. These include a. cognition and learning b. communication and interaction c. social, emotional and mental health (SEMH) d. physical and sensory. Sometimes LAs will include ‘independence and self-help’ separately from physical and sensory, particularly for children and young people over the age of 16.

The LA is legally required to ensure that a child or young person’s EHCP specifies their special educational needs (SEN) that were identified during the EHC needs assessment (section 37(2)(a) CFA and Regulation 12(1)(b) of The Special Educational Needs and Disability Regulations 2014 (The SEND Regulations 2014). I have previously addressed the meaning of SEN in my previous [SEND Q&A on EHC needs assessment](#).

If a child’s needs are omitted from section B, or are not described accurately, this may result in the child not having access to the specific provisions they require (further discussed below) That is why it is very important that the LA is taking information from up- to-date assessments from professionals who have assessed the child or young person, including their school or setting. Typically, professionals who contribute to the formation of EHCPs include Educational Psychologists, Speech and Language Therapists, Occupational Therapists and in some cases mental health professionals. There is no exhaustive list, and it really depends on the needs of the child.

There is a wealth of case law in respect of SEND but I still refer to the case of *R v The Secretary of State for Education and Science ex parte E* [1992] 1 FLR 377, which very clearly sets out that statements (now EHC Plans) must not be vaguely worded and should include all needs identified in assessments.

WHEN IS AN ASSESSMENT REPORT CONSIDERED OUTDATED?

This is not straightforward and there are no prescribed expiry dates on reports but when supporting parents in SEND appeals, I will usually advise on getting updated assessments if existing reports are over 18 months old. However, it may be sooner or later as it very much depends on the child’s changing needs. Conversely, a recent Practice Direction issued by Tribunal explicitly states that “expert reports must not be more than 3 years old, unless required in exceptional circumstances

HOW MUCH PROVISION SHOULD A CHILD OR YOUNG PERSON RECEIVE IN SECTION F?

It is not about the volume of provisions but instead LAs are required to set out the provisions a child or young person requires to meet **all** the SEN specified in section B of their EHCP (section 37(2)(c) CFA 2014 and SEND Regulation 12(1)(f). As noted in the COP 2015, "provision must be specified for each and every need specified in Section B".



WHAT CONSTITUTES A SPECIAL EDUCATIONAL PROVISION?

In short, the definition of a 'special educational provision' is very broad and there is extensive case-law to support this. I will attempt to give a brief overview. For children aged two or more, special educational provision is **educational or training provision** that is **additional to or different from** that made generally for other children or young people of the same age by mainstream schools, maintained nursery schools, mainstream post-16 institutions or by relevant early years providers. For a child under two years of age, special educational provision means educational provision of any kind (see section 21 CFA 2014).

It should be noted that "educational and training provision" does not need to actually "educate or train". Take for example the case of *EAM v East Sussex CC [2022] UKUT 193 (AAC)* where a wired internet connection was considered a special educational provision' for a child who had electromagnetic hypersensitivity. It is not necessary to show that the particular provision, itself, directly educates a pupil, but it must relate to the education of that pupil. The case of *Westminster CC v FTT [2023] UKUT 177 (AAC)* confirmed that something which supports or facilitates education can lawfully be educational provision, such as mentoring support.

Health care or social care provision which educates or trains a child or young person in some way is also capable of being deemed as special educational provision. For example, therapies which train a child or young person to manage anxiety (such as cognitive behavioural therapy or mindfulness) can be considered special educational provision (*DC & DC v Hertfordshire County Council (SEN) [2016] UKUT 0379 (AAC)*). Similarly therapeutical provisions from speech and language therapists, occupational therapists and physiotherapists are capable of being specified in section F and often are.

It is important to note that a provision is not usually considered a special educational provision for the purposes of section F, if it is available for all pupils. Sometimes this is referred to as ordinarily available provisions (OAP) by LAs but I find that phrase unhelpful. In my experience, schools will frequently dispute whether a provision is in fact an OAP and then if it is not specified in section F, schools will not be fully funded or resourced to provide it. If in doubt, ask the LA for evidence.



HOW DETAILED SHOULD SECTION F BE?

There is an array of case law that provides guidance on how section F should be drafted. When I undertake reviews of section F, I tend to have in mind the following:

- The special educational provisions must generally be detailed and specific. They should normally be quantified, for example, in terms of the type, hours and frequency of support. In other words the "who, what, when and how long" - *EC v North East Lincolnshire LA [2015] UKUT 0648 (AAC)*.
- The provisions should not be vague or ambiguous. In general, wording such as "opportunities" and "additional support" has been criticised in case-law as ambiguous - *M v Brighton and Hove City Council [2003] EWHC 1722*.
- The bare provision of programmes would be inadequate as a specification of provision - *BM and BM v Oxfordshire County Council [2018] UKUT 35 (AAC)*. For example, if a plan simply noted "access to speech and language therapy" this would not be sufficient.

- The appropriate qualifications and expertise of staff delivering provisions should be set out. For example, "teacher who is experienced in working with pupils who have significant learning difficulties and autism/communication disorders" - *R v Wandsworth ex parte M* [1998] ELR 424).
- Whilst generally, section F should leave "no room for doubt as to what has been decided and what is needed in the individual case" (*L v Clarke and Somerset* [1998] ELR 12), the "plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time" - *BB v LB Barnet* [2019] UKUT 285. In the case of *London Borough of Redbridge v HO (SEN)* [2020] UKUT 323 (AAC), where I was instructed by the parent, the Judge noted that the "plan is a living document for a developing pupil".
- I also try to remember that "the degree of specificity that is required for an individual child in their EHCP will always have to depend on the facts of that child's case" (*DM v Cornwall County Council* [2022] UKUT 230), therefore, it is always best practice to reflect on professional evidence or instruct independent experts where necessary for advice and guidance.

There are many specific types of provisions for section F where additional judicial guidance is available, for example, where a child requires a "waking day curriculum" (curriculum extended beyond the school day) but I will cover this in a different series.

WHY IS IT IMPORTANT FOR SECTION F TO INCLUDE ALL REQUIRED PROVISIONS AND THE CORRECT SPECIFICATION?

An EHCP is a legal document which places a mandatory duty on the LA issuing the plan to ensure the special educational provisions set out within it are implemented. If provisions are not detailed or specific (or are too generic), they can in essence become unenforceable. If section F does not include all the required provisions, a child may not have their needs met, fail to make progress and in some cases even regress.

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



This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.