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EXPLORING ISSUES WITH
ACCESS TO EDUCATION AND
HOW TO ADDRESS THEM IN
COURT OF PROTECTION
PROCEEDINGS



23 May 2024

Speakers:
Gemma Hobcraft
Louise Price
Asma Nizami





WHAT WE WILL COVER

1. An overview of Education, Health and Care Plans (EHCPs) – Gemma Hobcraft
2. Enforcing an EHCP – Louise Price
3. EHCP related issues in COP – Asma Nizami

[Questions were taken at the point of registration]

Second webinar in this two-part series: 12 June 2024 (5-6pm)

‘Exploring capacity concerns and how to address them in education proceedings’

AN OVERVIEW OF EDUCATION, HEALTH AND CARE PLANS (EHCPs)





CONTEXT

Education, Health and Care Plans (EHCP)

2022-2023 data relating to special educational needs in England (June 2023)

- Over 1.5 million pupils in England have SEN (special educational needs)
- 13% of pupils have SEN support/SEN without an EHC plan
- 4.3% of pupils have an EHCP

‘The most common type of need among pupils with an EHC plan is autistic spectrum disorder (ASD)

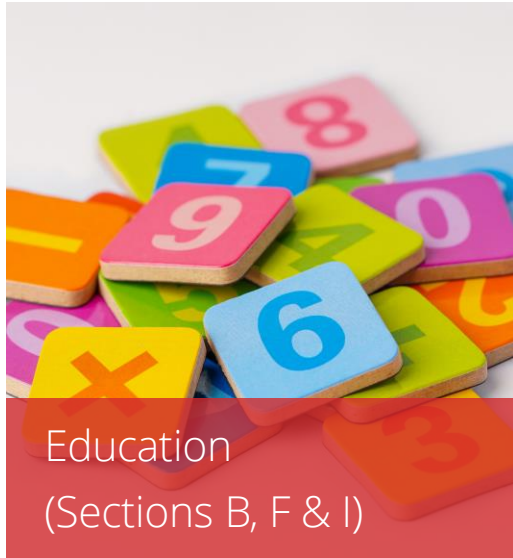
Almost one in three pupils with an EHC plan are identified with a primary need of ASD (116,000 pupils).

The most common type of need among pupils with SEN support are speech, language and communication needs

The primary need identified for 278,600 pupils was speech, language and communication needs. This is followed by social, emotional and mental health needs (229,700 pupils) and moderate learning difficulty (189,400 pupils)’

WHAT'S IN A PLAN - OVERVIEW

'Those with more complex needs will have an integrated assessment and where appropriate a single Education, Health and Care plan for their support.'



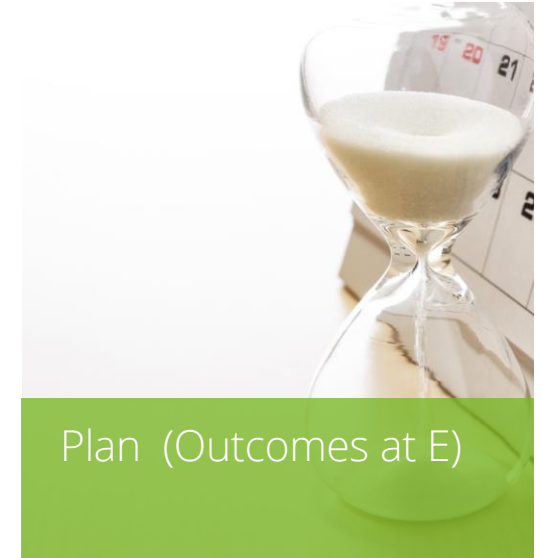
- There is other support available to those with SEN without an EHCP – such as SEN Support and Quality First Teaching
- Provision in an EHCP should be over and above this
- Needs (B), Provision (F), Placement (I)



- Health needs which relates to SEN (C)
- Health provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN (F)



- Social care needs that relate to SEN (D)
- Social care provision that relate to SEN (H)



- Reviewed annually
- Working towards specified outcomes
- 0- 25 age range
- Not for those in Higher Education (University)

OVERVIEW OF TIMEFRAMES/PROCESS FOR AN EHCP

SEN COP: 9.40 'The whole 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.'



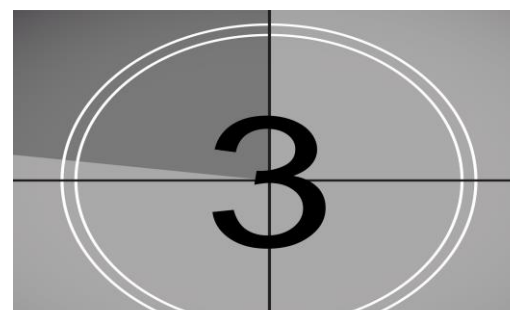
REQUEST NEEDS
ASSESSMENT

Request needs assessment
Weeks 0-6



NEEDS ASSESSMENT
TAKES PLACE

If there is a yes to assess
Weeks 6-16



DECISION WHETHER
TO ISSUE AN EHCP

By week 16 if LA agree to issue
an EHCP



FINAL PLAN

Final plan issued by week 20
(subject to specified
exemptions)
Weeks 16-20

Key law/guidance includes...

- [Children and Families Act 2014 \(Part 3\)](#)
- [Special Educational Needs and Disability Regulations 2014](#)
- [Special Educational Needs and Disability Code of Practice: 0 -25 years](#)

Children and Families Act 2014

Section 20 (1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.

Section 21 what is 'Special educational provision'/SEP?

(1) *"Special educational provision"*, for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in (a) mainstream schools in England...

The tests for an EHC plan

- Children and Families Act 2014 cont'd

Section 36 (8) The local authority must secure an EHC needs assessment for the child or young person if ...the 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.

Section 37 Education, health and care plans

(1) 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—(a) the local authority must secure that an EHC plan is prepared for the child or young person, and
(b) once an EHC plan has been prepared, it must maintain the plan.



SECTION 19

CHILDREN AND FAMILIES ACT 2014

19 Local authority functions: supporting and involving children and young people

In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—

- (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.



SEND CODE OF PRACTICE

[Special Educational Needs and Disability Code of Practice: 0 -25 years](#) – ‘SEND COP’

The statutory code contains:

Details of legal requirements

Statutory guidance

Explains duties of local authorities, health bodies, schools and colleges to provide for those with special educational needs under part 3 of the Children and Families Act 2014

The code (which applies to England), is for:

- headteachers and principals
- governing bodies
- school and college staff
- special educational needs (SEN) co-ordinators
- other education settings
- local authorities
- health and social services staff



CONTENTS OF AN EHCP SECTION 37 (2)

CHILDREN AND FAMILIES ACT 2014

(2) For the purposes of this Part, an EHC plan is a plan specifying—

- (a) the child's or young person's special educational needs;
- (b) the outcomes sought for him or her;
- (c) the special educational provision required by him or her;
- (d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;**
- (e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);**
- (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).**

(3) An EHC plan may also specify other health care and social care provision reasonably required by the child or young person. **(emphasis added)**



CONTENTS OF AN EHCP (1)

SEND REGS 2014, REG 12

Section A: the views, interests and aspirations of the child and their parents, or young person

Section B: Child or young person's special educational needs (SEN)

Section C: the child or young person's health care needs which relate to their special educational needs

Section D: The child or young person's social care needs which relate to their SEN or to a disability

Section E: Outcomes sought for the child or young person

Section F: The special educational provision required by the child or young person



CONTENTS OF AN EHCP (2)

SEND REGS 2014, REG 12

Section G: Any health care provisions reasonably required by the learning difficulties or disabilities which result in the child/young person having SEN (must be agreed by the responsible commissioning body)

Section H1: Any social care provision which must be made for a child/young person under 18 resulting from section 2 of the Chronically Sick and Disabled Act 1970 (CSPDA)

Section H2: Any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN

Section I: Placement

Section J: Personal budget (including arrangements for direct payments) – see Special Educational Needs (Personal Budgets) Regulations 2014

Section K: Appendices to the EHC plan - advice and information gathered during the EHC needs assessment

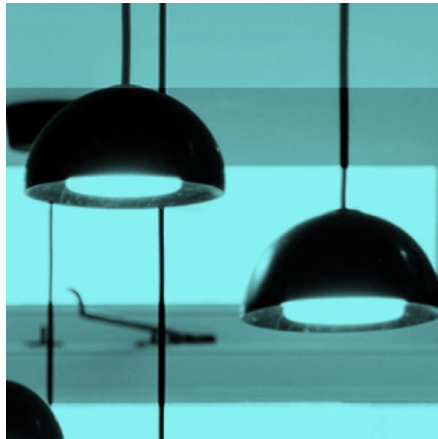
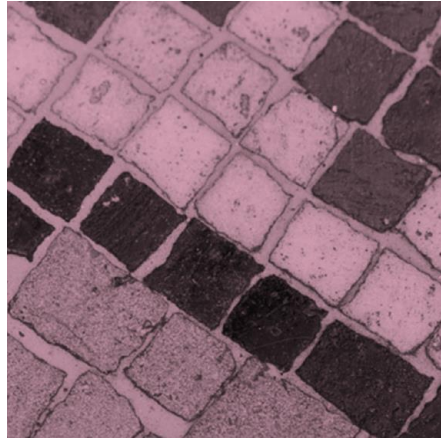
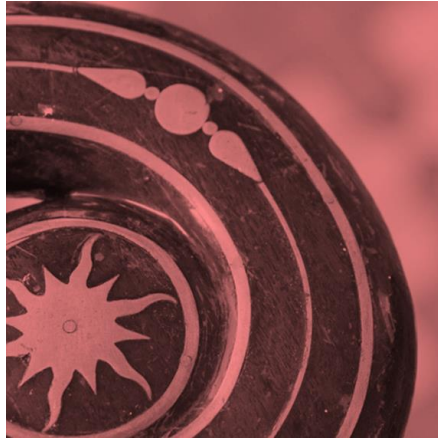
REVIEWING AN EHC PLAN: 'ANNUAL REVIEWS'

^A
Section 44 Children and Families Act 2014

Section 44 - Reviews and re-assessments

- (1) A local authority must review an EHC plan that it maintains—
 - (a) in the period of 12 months starting with the date on which the plan was first made, and
 - (b) in each subsequent period of 12 months starting with the date on which the plan was last reviewed under this section.
- (2) A local authority must secure 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—
 - (a) the child's parent or the young person, or
 - (b) the governing body, proprietor or principal of the school, post-16 institution or other institution which the child or young person attends.
- (3) A local authority may also secure a re-assessment of those needs at any other time if it thinks it necessary.

See also: Regulations 2, 18, 19, 20 & 21 of the SEND Regulations 2014



Ending an EHC plan

Children and Families Act 2014 cont'd

Section 45

(1) A local authority may cease to maintain an EHC plan for a child or young person only if—(a) the authority is no longer responsible for the child or young person, or
(b) the authority determines that it is no longer necessary for the plan to be maintained.

Key parts of the Code of Practice:

3. Working together across education, health and care for joint outcomes

4. The Local Offer

8. Preparing for adulthood from the earliest years

9. Education, Health and Care needs assessments and plans

10. Children and young people in specific circumstances (including detention/custody – see also Special Educational Needs and Disability (Detained Persons) Regulations 2014)

Annex1: Mental Capacity (see separate webinar 12 June 2024)

2.12

"As a child reaches the end of compulsory school age (the end of the academic year in which they turn 16), some rights to participate in decision-making about Education Health and Care (EHC) plans transfer from the parent to the young person, subject to their capacity to do so, as set out in the Mental Capacity Act 2005 (see Chambers 8 for more information.)"

Key parts of the Code of Practice:

3., Working together across education, health and care for joint outcomes:

3.1 – Section 25 of the Children and Families Act 2014 places a duty on local authorities that should ensure integration between educational provision and training provision, health and social care provision, where this would promote wellbeing and improve the quality of provision for disabled young people and those with SEN.

3.2 – The Care Act requires local authorities to ensure co-operation between children's and adults' services to promote the integration of care and support with health services, so that young adults are not left without care and support as they make the transition from children's to adult social care.

3.7 – 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 effective, equitable and sustainable way...Partners must agree how they will work together. They should aim to provide personalised, integrated support that delivers positive outcomes for children and young people, bringing together support across education, health and transition points such as between early years, school and college, between children's and adult social care services, or between paediatric and adult health services.



POINTS TO CONSIDER

Is P 25 or under – do they have/have they had an EHCP, if so try and get a copy

Check when it was last reviewed



WEBSITES THAT MAY BE OF ASSISTANCE

[IPSEA](#)

[Special Needs Jungle](#)

X@DoughtyStreet

www.doughtystreet.co.uk

Enforcing an EHC Plan



Louise Price
Doughty Street Chambers



RIGHT TO A PLAN

- When can someone obtain a plan? Children and Families Act 2014.
- Section 20 (1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
- Section 21 what is SEP?
(1) *“Special educational provision”* , for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in (a) mainstream schools in England...



RIGHT TO A PLAN

- Section 36 (8) The local authority must secure an EHC needs assessment for the child or young person if ...the 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.
- Section 37
 - (1) 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—(a) the local authority must secure that an EHC plan is prepared for the child or young person, and
 - (b) once an EHC plan has been prepared, it must maintain the plan.



ENDING A EHC PLAN

- When can the LA cease to maintain a plan?
- Section 45, 2014 Act:
 - (1) A local authority may cease to maintain an EHC plan for a child or young person only if—(a) the authority is no longer responsible for the child or young person, or
 - (b) the authority determines that it is no longer necessary for the plan to be maintained.



OUTLINE OF A PLAN

- What goes in a plan?
- Section B- description of SE need.
- Section F- description of SE provision
- Should be very specific.
- “Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise, including where this support is secured through a Personal Budget”: COP2015 §9.69.
- Useful summary of case law on the issue of specificity and quantification in *Worcestershire County Council v SE* [2020] UKUT 217 (AAC) §74 per UTJ West.



OUTLINE OF A PLAN

- Section I- placement or type of placement.
- Section I must set out the “type of school” which is considered appropriate (e.g. mainstream, special, residential, MLD, EBD, etc.).
- Does not have to name school, unless Section 39 2014 Act parental preference applies (and is not displaced).
- Exceptions are:
 - (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
 - (b) the attendance of the child or young person at the requested school or other institution would be incompatible with (i) the provision of efficient education for others, or (ii) the efficient use of resources.



RIGHT TO APPEAL

- Section 51 contains right of appeal.
- Appeal against:
 - a decision of a local authority not to secure an EHC needs assessment for the child or young person;
 - a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan;
 - where an EHC plan is maintained for the child or young person when finalised or amended:
 - (i) the child's or young person's special educational needs as specified in the plan;
 - (ii) the special educational provision specified in the plan;
 - (iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;
 - (iv) if no school or other institution is named in the plan, that fact;
- decision to cease to maintain;
- decision following annual or other review.



WHO CAN APPEAL

- Parents or young person.
- Section 579 of the Education Act 1996 defines young person.
- Someone over compulsory school age but under the age of 18 years.
- A child ceases to be of compulsory school age on the last Friday in June in the academic year in which he reaches the age of 16 or if he reaches 16 after the last Friday in June but before the start of the new school year, section 8 of the Education Act 1996.



POWERS ON APPEAL

- What can the FtT do?
- Approach as a rehearing type of appeal.
- “stands in the LA’s shoes, re-evaluating the available information in order if necessary to recast the statement [EHCP]”: *LB Bromley v SENT* [1999] ELR 260.
- FTT has an inquisitorial role.
- An appeal is a “general appeal” and the issue for the FTT is whether, on the evidence and submissions before it, the LA came to the correct conclusions on matters of fact, law and judgment, assessed *at the time of the hearing*: *DH & GH v Staffordshire CC* [2018] UKUT 49 (AAC) § 19.
- *Gloucestershire CC v EH (SEN)* [2017] UKUT 85 (AAC) § 47 confirms that for EHCP appeals as for statement appeals, the FTT looks at the position at the date of the hearing and looking forward, not at the time of the appealed decision.



POWER TO RECOMMEND

- Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017/1306
- Power to make recommendations in respect of health and care provision.
- FtT must send copy to health care commissioner.
- Commissioner and LA have five weeks to respond, unless FtT directs a different time limit
- Response must be writing, state if it will comply and if not give reasons.
- Response must be sent to the Secretary of State.



ENFORCING A PLAN

- How useful is a plan?
- Can judicially review failure to secure provision or placement.
- Section 42 of 2014 makes clear that securing the provision in the plan is mandatory.
- Not a best efforts duty.



ENFORCING A PLAN

As the Court of Appeal remarked in *ZK v London Borough of Redbridge* [2020] EWCA Civ 1597

‘This statement reflects the well-established law relating to section 42(2) of the 2014 Act (and its predecessor sections in the earlier legislation) which is part of a scheme for achieving the “best possible educational and other outcomes” for children and young people with special educational needs and disabilities (see section 19(d) of the 2014 Act). It imposes a mandatory duty to secure the special educational provision specified. The word “secure” is an ordinary English word and needs no gloss. What is plain is that the duty has no “reasonable endeavours” escape clause available to excuse failure to secure the provision specified’ [13].



WHICH ROUTE OF CHALLENGE?

- FtT if arguing about what is in plan.
- Judicial review if arguing about non-compliance with a plan.
- Can be grey areas, e.g. when provision is unsuitable, but FtT will take too long.



RECOMMENDATIONS JR

- R(LS) v LB Merton [2024] EHCWC 584.
- The Tribunal decided that LS required accommodation within a specialist residential school for 52 weeks a year where he would receive a consistency of approach. But it then said that it may be possible for LS to have a term time boarding place at the residential school and during the holiday with an appropriate package of social care support (H2 provision).
- Tribunal set out the LA social care support of 20 hours per week .
- LA wrote and refused to provide 52 weeks a year, but set out package of support in the holidays based upon their own social work assessment (one visit only) and the need to keep “parental bonds”.



RECOMMENDATIONS JR

- The court found the Recommendation about a 52 week placement was not part of F, was part of H1 and H2.
- It was only in the context of social care that the FTT looked at 52 week placement.
- The DFE guidance from March 2018 says that the recommendations are not binding but as made by a specialist tribunal they should not be ignored or rejected without careful consideration.
- Judge referred to cases about following the LGO recommendations saying that reasons need to be “more cogent if they come from a specialist Tribunal”.



RECOMMENDATIONS JR

- Claimant had argued that the LA had ignored the totality of evidence of the Tribunal.
- LA said that the letter from them set out the relevant reasons, and that the FTT did not hear oral evidence on social care, and therefore the conclusions reached by the FTT can be given different weight, and so it is not incumbent upon the LA to demonstrate irrationality.
- Judge said that the Tribunal's decision was not the only conclusion that the LA could reach and did not wish to interfere with the response of the LA which is better placed than the court to determine



RECOMMENDATIONS JR

- However, case was multi factorial, but had to consider whether the right matters were taken into account by the LA.
- Court then went on to see if the LA's decision making had taken into account relevant factors.
- Court noted that the decision of the LA had not set out the evaluation, calibration and balancing of the material before it in particular (not considered increased violence in family home, lack of sleep in family home and impact on family, clinical psychological reports before the FTT etc.).

Asma Nizami

EHCP related issues in COP



CONTEXT

Guardian reported on [18 February 2024](#):

“Freedom of information requests found that in some local authorities, children and young people have been waiting more than two years to be issued with an education, health and care plan (EHCP) that details the support they require.

The Fol results suggest that across England more than 20,000 cases were waiting longer than the 20-week limit, and as many as 3,000 for a year or more.

Council leaders say that requests for EHCPs have surged in recent years while funding to meet the children’s needs has not kept pace. Since 2019 the number of plans issued has risen by 72%, so that in 2023 more than 500,000 children and young people had EHCPs, but dedicated funding from central government for special education needs and disabilities (Send) has only risen by 42%.”



WHAT IF P HAS AN EHCP?

- S16 – could be a P aged 16-17 ((s2(5) MCA 2005).
- P may have been DOL'd as a child - order made by the Family Division of the High Court. See BBC News article: *'Children detained under little-known orders are speaking out after turning 18'* (22 May 2024)
- Real need for collaboration (SC+ SEND).
- Education often forgotten/not prioritized.



P HAS AN EHCP...

- COP will need all relevant information before making final decisions on capacity and best interests.
- Importance of EHCP for under 18s in particular.
- Get the EHCP + appendices.
- Permission to share relevant information from COP with SEND department/FtT/High Court.



GETTING A COPY OF THE EHCP IN COP

- Address it in disclosure directions
- Third party disclosure order – Education department or separate LA?
- Apply to join the body responsible for the EHCP?
- Direct the SEND team to attend court?
- S49 order? NB Letter of Hayden J dated 16 December 2022



- Read the EHCP – is it current?
 - Note Section E
 - Is it being implemented?
- If not, bring it to the relevant LA's attention and the attention of COP.



P IN CUSTODY

- N.B Obligations re EHCP do not cease when a child/young person enters youth custody e.g. *§10.66: If a detained person has an EHC plan before being detained the LA must arrange appropriate special educational provision for the detained person while he or she is detained. In practice the education provision in relevant youth accommodation will be delivered by the education provider under contractual arrangements with the YJB or custodial operator and commissioned centrally.*
- See statutory guidance, DfE's SEND Code of Practice: 0 to 25 years (2014), *§10.*



WHAT IF P DOES NOT HAVE AN EHCP?

- Would P benefit from one?
- Reasons for not having one?
- Consider P's capacity to make decisions about education (see [*A Local Authority v GP \(Capacity – care, support and education\)*](#) [2020] EWCOP 56)



- P has no family willing/able to challenge the EHCP and P lacks capacity to do so, what can P's reps do in COP proceedings?
 - Think creatively
 - Request a review (section 44(3))
 - Consider asking for a BI decision from COP
 - Appoint a responsible person to progress education matters. Consider deputyship.
 - NB alternative persons (r.64, SEND Regulations 2014, s.80, CFA 2014).
 - Within COP, try to trigger statutory process on P's behalf



CAPACITY RE EDUCATION

A Local Authority v GP (Capacity – care, support and education) [2020]
EWCOP 56

- LA sought declarations that GP lacked capacity to make decisions to:
 1. request or refuse an assessment of his education and health care needs for an EHCP pursuant to s36(1) of the CFA 2014; and
 2. make decisions about his education and health care needs pursuant to the act.



HHJ Dodd sitting in COP held:

- Specific decisions were:
 - (i) GP's capacity to request an EHC needs assessment under s36(1) of the 2014 Act and
 - (ii) GP's capacity to make decisions about his education.



CAPACITY RE REQUESTING AN ASSESSMENT OF NEED

The relevant information for that decision was (§25):

- An EHC Plan is a document that says what support a child or young person who has special educational needs should have”;
- “Other people will be consulted during the assessment process including parents, teachers and other professionals”;
- “If assessed as requiring an EHC (sic) the young person has enforceable right to the education set out within their Plan;
- “An EHC Plan is only available up to the age of 25 years.”



CAPACITY RE MAKING DECISIONS ABOUT EDUCATION:

The relevant information was (§34):

- The type of provision
- The type of qualifications if any, on offer
- The cohort of pupils and whether P would match the profile of other pupils at the provision
- That P has additional rights up to the age of 25 because of his SEN



TIPS

1. THINK OUTSIDE THE BOX
2. WORK COLLABORATIVELY
3. GATHER AS MUCH INFORMATION AS POSSIBLE
4. USE ALL TOOLS AT COP's DISPOSAL
5. ASK FOR ADVICE!





NEXT SEMINAR:

Exploring capacity concerns and how to address them in education proceedings

12 June 2024 @ 5 – 6pm

It is important for education practitioners to be aware of and understand the provisions of the Mental Capacity Act 2005, the jurisdiction of the Court of the Protection and what role it can have in relation to education decisions where a young person or their parent/carer lacks or may lack capacity. This webinar aims to assist with developing this understanding.

In this webinar we will:

- Provide an overview of the key parts of the Mental Capacity Act 2005 in relation to capacity and best interests
- Provide an overview of the jurisdiction of the Court of Protection and when it may be appropriate to invoke this jurisdiction in relation to education decisions
- Consider what happens when post-16 there are concerns arising as to a young person's capacity in relation to decisions concerning their education including what steps need to be taken in FtT proceedings
- Provide practical advice as to what steps may need to be taken in FtT proceedings if there are concerns in relation to a young person's capacity to make education decisions.