

# SENlegal

NEWSLETTER



*Issue 7 - January 2019*

For Professionals, Schools  
and Academies working in  
the SEND sector.



## In this Newsletter:

A quick round-up of 2018.

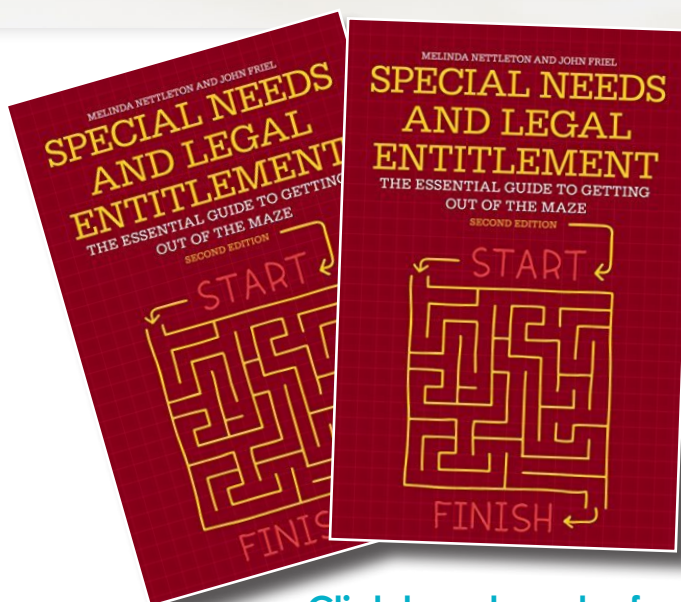
Deal or No Deal? - Tribunal Stats  
from 2017/ 18.

Transport - Can it ever be Special  
Educational Provision?

Don't play the waiting game for  
an EHC Plan.

All dressed up and nowhere to go.

Wales Legislation Update



Click here to order from  
**amazon.co.uk**



# A quick round-up of 2018...

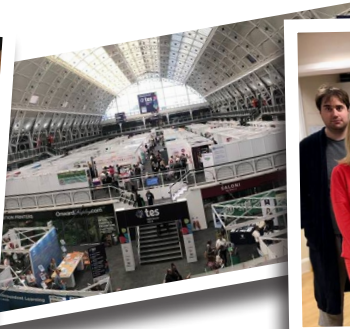
It's been another successful year for the team at SEN Legal and we're delighted to report that after analysing our figures for 2018, we have achieved a success rate of 97%. This has been the result of hard work, dedication and commitment of our whole team. Thank you to everyone who has worked so hard to make this happen.

As well as achieving this fantastic success rate, we have also been involved in a large number of events around the country, meeting so many parents and professionals from around the UK. It has been a real pleasure to see so many of you, and we hope to see you again at some of the events we are attending in 2019.

An important part of our work has also been fundraising for local and national charities, helping them in their mission to provide invaluable services, advice and support to those with Special Educational Needs and their families. As a result, we have made donations to Children in Need, Autism Anglia, The British Dyslexia Association, Sunday Suppers and Hillingdon Autistic Care and Support in 2018. We look to continue this in 2019 - so keep an eye out on our social media pages for details of how you may be able to get involved too!

Finally, we wanted to say a sincere **thank you** to everybody who has contacted us, everybody who has referred their friends, everybody who has followed us on Facebook or Twitter and everybody who is now reading this Newsletter. Though we are small in numbers, SEN Legal is committed to help as many people as possible - whether this be through legal representation or simply providing a source of information or advice. Every person we reach is another we might be able to help, so thank you for helping us make those connections.

From the team at **SENlegal**





In the majority, Parents are largely unrepresented in the SEND Tribunal. Although this benefits families with limited resources who cannot afford the cost of Solicitors, it can be hugely disadvantageous and stressful when the Local Authority has any of the following;

- Experienced Tribunal Team
- Educational Solicitors as part of the in-house legal team
- Have outsourced their Educational cases to an independent firm (it's important to note that SEN Legal do not take instructions from Local Authorities!)

However, despite the wealth of resources that Local Authorities have at their disposal, the scores on the doors from 2017/18 appeals to the SEND Tribunal are that:



This means that **2700** were concluded without the need for a hearing.

How these 2,700 were concluded will vary considerably. However, from our own experience, a vast majority of appeals are concluded before the Hearing date as all the changes that are required have been agreed through the Working Document during the appeal. You as a Parent will only have access to this document once an appeal has been registered.

# 85%

Appeals found in favour of parents.



# Transport - Can it ever be Special Educational Provision?

## CASE LAW UPDATE

...the short answer is **yes!**

In 2017, the case of **AA v London Borough of Haringey\*** suggested that transport could be considered Special Educational provision. Upper Tribunal Judge H Levenson stated at paragraphs 11 and 12:

*"11. I am unaware of any authority that states in terms that as a matter of law transport needs can never constitute a special educational need and that measure to deal with them can never in any circumstances whatsoever be specified in the plan..."*

It has been argued that this decision left much uncertainty about whether or not transport can ever be considered to be special educational provision, and so the position has now been clarified in **Birmingham City Council v KF\*\***.



In this case, Birmingham City Council Appealed against the First-tier Tribunal's decision to insert provision relating to transport in Section F of a young person's EHC Plan. In considering Birmingham City Council's Appeal, Judge Levenson decided at Paragraph 19 that:

*"School transport is capable of being special educational provision if it educates or trains (Section 21 of the 2014 Act, and also ESCC v JC [2018] UKUT81 (AAC)). It is for the appellant to make the case that the transport fulfils some educational or training function or for the First-tier Tribunal to consider this pursuant to its inquisitorial or quasi-inquisitorial function. The answer will depend on the facts of the particular case."*

In considering all of the previous case law which stated that transport could not be considered to be Special Educational Provision, Judge Levenson had this to say:

*"I acknowledge that Mr Greatorex has submitted a list of authorities which have held or appear to have held that transport cannot possibly be special educational provision but this is a statutory regime, the 2014 Act is new legislation and, although it could easily have done so, it did not exclude that possibility."*

In brief, the Upper Tribunal has highlighted that when drafting the Children and Families Act 2014, the government did not expressly state that transport can not be considered to be special educational provision in any circumstances, which leads the door open to instances where transport may well be considered to be special educational provision.

Whether or not transport can be considered to be special educational provision will rely heavily on the facts of each case. Section 21(5) of the Children and Families Act 2014 states that provision that educates or trains a child is to be considered to be special educational provision. Therefore, if transport is "deemed" to educate or train a child or young person, then it can be written into an EHC Plan as special educational provision.

What sorts of circumstances might lead to transport educating or training a child or young person remains to be tested in the First-tier Tribunal, and potentially in the Upper Tribunal. Perhaps 2019 will provide yet further clarity.

\*[2017] UKUT 241 (AAC) \*\* [2018] UKUT 261 (AAC)

## Wales Legislation Update - Draft Additional Learning Needs Code.



The Additional Learning Needs and Education Tribunal (Wales) Act 2018 is due to come into force in Autumn 2019, and the Welsh assembly Government have moved on to the final phase of the Additional Learning Needs Transformation programme.

The draft Additional Learning Needs Code of Practice has now been published and is open for consultation as of the 10th December 2018, along with draft Regulations about ALNCoS (the Welsh equivalent of a SENCo), draft Regulations about the Education Tribunal for Wales, and suggested revisions to the Social Services and Well-being (Wales) Act 2014, which relates to children who are Looked After and Accommodated by the Local Authority.

**This is your final chance to have a say** on what the legal framework for all children and young people in Wales will look like. We would invite all of our readers, professionals, schools, parents' children and young people, to consult and be heard. For the year 2017/18, there were 137,810 diagnosed and reported additional learning needs across Wales\*. Those children and young people must be given a voice.

\*Some children may have more than one recognised additional learning need. The number of SEN reports will therefore be greater than the number of pupils with SEN.



All of the draft documents & consultation document itself, can be found at:

[www.beta.gov.wales/draft-additional-learning-needs-code](http://www.beta.gov.wales/draft-additional-learning-needs-code)





Upcoming 2019 workshops for parents, carers and professionals

**Saturday 9th February**

**OBTAINING AN EDUCATION,  
HEALTH & CARE PLAN (EHCP)**

**10am - 1pm**

**Saturday 28th February**

**APPROACHING 25 – WHAT  
NEXT? WHAT CAN WE GET?**

**10am - 1pm**

**Speaker: Melinda Nettleton, Principal Solicitor at SEN Legal**

All sessions will be held at HACS Resource Centre, Dudley Place, Hayes UB3 1PB.  
For more information or to book, contact [catherine@hacs.org.uk](mailto:catherine@hacs.org.uk)

## **SENlegal** services for Schools & Colleges.

For those in the know, SEN Legal has discreetly provided advice to schools and colleges for the last 20 years. At our last two Annual Conferences for professionals, our Principal Solicitor Melinda Nettleton has presented a range of topics which have been of recent concern to our clients' schools and colleges, including:

- ✓ Ofsted complaints (inc. Judicial Review & Injunctions where appropriate).
- ✓ Non-payment of fees by LAs.
- ✓ Refusal to pay fee increases.
- ✓ Top up funding/delegated budgets & the LAs' financial obligations
- ✓ Complaints to the Education Funding Agency.
- ✓ The National Contract vs your own.
- ✓ Demands for cost breakdowns.
- ✓ Contractual Default Notices
- ✓ Disability Discrimination & reasonable adjustments.
- ✓ Safeguarding & DBS checks.

We're also great at cutting out excess LA paperwork. We start from the proposition that teachers are best doing what they are trained to do. We can sort out the legal minimum and give you more time to do what you do best!





Don't play the waiting game for an EHC Plan.

A recent report published by the BBC identified that thousands of children in England with special educational needs are being failed by Local Authorities because they are having to wait far too long for an EHC Plan. From 152 Freedom of Information Act requests submitted by the BBC to various Local Authorities, 26,505 applications were found to have taken longer than the statutory timescale of 20 weeks to produce a Final EHC Plan. Staggeringly, the longest wait was recorded at 1,023 days (nearly 3 years) in Suffolk and 1,014 days in Tower Hamlets.

**The BBC found that 26,505 EHC applications were found to have taken longer than 20 weeks.**

\*From 152 Freedom of Information requests to various LAs.

The timescale is set out in The Special Educational Needs and Disability Regulations 2014 (Regulations 3 to 10). It is statutory, not a guideline, nor altered by any Local Authority internal policy. Local Authorities must adhere to the timetable with only limited exceptions permitted.

Once the LA have received a request for an EHC Needs Assessment, they have **6 weeks** to decide whether or not to conduct one.

**The total number\* of requests for needs assessments rose from 16,696 in 2014-15 to 28,507 in 2017-18 (+70%).**

\*Totals from 61 LAs who provided data on number of requests received.

If the LA agree to conduct a statutory assessment, they will contact various bodies to request their advice (including education, medical, psychological, social care and any other advice the LA deems appropriate) as well as consulting with parents. The requested information must be supplied within **6 weeks**.

If, at the end of the advice gathering exercise, the LA decides not to issue an EHC Plan, parents must be notified of the LA's refusal as soon as practicable and within a maximum of **16 weeks** from receipt of the request for the statutory assessment. Again, the LA must notify parents of their decision and convey a right of appeal.

If the LA decides an EHC Plan is necessary, a draft EHC Plan has to be provided allowing at least **15 days** before the end of the **20 week** period to give parents sufficient time to consider and comment on the draft EHC Plan before it should be finalised.

By the end of the **20 week** period, parents should have received a Final EHC Plan with a right of appeal.

Given the timescale is statutory and the Regulations are clear as to the timescales involved, why are so many Local Authorities still failing to comply? The Local Government Ombudsman has recently upheld a number of complaints concerning Councils exceeding the statutory timescale. In two complaints upheld against Norfolk County Council, Norfolk LA agreed to pay financial compensation to the family for the delay, inconvenience and injustice, as well as conducting a review of the Council's processes to ensure it produces EHC Plans within the statutory timescale.

With prompt and effective communication, delays should be avoided. If you are being given the run around by your Local Authority and the statutory timescale has been exceeded, but all you are being given is one excuse after another, contact us and we will ensure your Local Authority complies with their statutory duty.

## REMINDER – Transfer Review

### Transfer between phases of education.

If your child is transferring between phases of education in September 2019, then the statutory deadline by when your Local Authority should have reviewed, amended, and finalised the EHC Plan so that it names the placement your child will be attending in September 2019, is fast approaching!

For children transferring from:

- (a) relevant early years education to school;
- (b) infant school to junior school;
- (c) primary school to middle school;
- (d) primary school to secondary school;
- (e) middle school to secondary school



The deadline is the **15th February 2019**. For young people transferring from secondary school to a post-16 placement, the deadline is **31st March 2019**.

After the review, the Local Authority have 4 weeks to make a decision, and then a further 8 weeks to finalise the EHC Plan from the date that they provide you with the draft amended EHC Plan. Therefore, in order to guarantee that these statutory deadlines are met, the review should have happened by **23rd November 2018** for children, and by the **4th January 2019** for young people moving on to post-16 placements.



If your child's Transfer Review hasn't happened yet, you must force your Local Authority to complete the review **as a matter of urgency**.





**British Dyslexia**  
Association



Microsoft **SENlegal**

## BDA's FREE Parent Pop-Up Roadshows

**COLCHESTER**

16th February 19

Visit BDA website to book

**BROMLEY**

23rd March 19

Visit BDA website to book

**COVENTRY**

27th April 19

Visit BDA website to book

**CAMBRIDGE**

11th May 19

Visit BDA website to book

**SUFFOLK**

29th June 19

Visit BDA website to book

**HAMPSHIRE**

6th July 19

Visit BDA website to book

Join Helen Boden, BDA Chief Executive, Arran Smith (Microsoft), Hayley Mason (SEN Legal) and John Hicks (Dyslexia Parenting Coach) for these informative events.



**(45) Naidex**

26 & 27  
MARCH | **NEC**  
BIRMINGHAM

**WELCOME TO THE FUTURE OF INDEPENDENT LIVING**



**REGISTER FOR FREE TICKETS | [NAIDEX.CO.UK](http://NAIDEX.CO.UK)**

## All Dressed Up and Nowhere to Go: Increasing numbers of Tribunal Hearings being postponed.

In 2017/2018, over 5,640 Appeals were registered with the Tribunal. It was a considerable increase on the amount in the previous year of 4,725, with a considerable increase in the amount of Appeals going all the way to a Hearing.



With these increases, we have found there has been a significant increase in the amount of Hearings being postponed, often at extremely short notice, due to a lack of judicial availability. In the extreme of this, we have experienced the same case being postponed on three separate occasions because of a lack of judges, with only one day's notice. Unfortunately, the late postponements will of course cause undue stress, anxiety and wasted costs to parents.

*\*It is possible to recover some of the costs associated with the cancellation from the Tribunal itself\**

Once cases have been postponed the Tribunal will assign a priority ranking to the case of either 1, 2 or 3, with a priority 1 case where a child is out of school, the case has been previously postponed, or the Appeal is complex. Priority 3 are cases ready for consideration, but there is not an urgent need for it to be heard (very rare circumstances in our opinion given the nature of the SEND Tribunal).

It is important to note that cases that are poorly prepared and are not ready for consideration will slip down the rating and will not be given priority to be heard. This means if your case is not fully prepared there is a greater risk of your Hearing being postponed and Hearings being given priority to be listed before it. Therefore, getting your ducks in a row and ensuring your case is as best prepared as possible is key!

The postponing of Hearings is something out of our control and is only something we see increasing as Appeal numbers continue to rise. However, we can help to ensure your Appeal is as best prepared as possible, reducing the chances of the Hearing being postponed in the first instance or any further.

The October 2018 edition of our newsletter contains a useful article highlighting some top tips to ensure your Appeal is as best prepared as possible. [Click here to read it!](#)

