

SENlegal

NEWSLETTER

Professional's Newsletter Edition 13



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



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SEN Legal is shortlisted for 'UK Law Firm of the Year' at the British Legal Awards 2021.



Coming in November 2021
more information on page 7...



As the 2020-21 academic year draws to a close, the SEND Tribunal meeting set out some interesting points, both in respect of what has already happened, and what is intended to happen.

Appeal Registrations

It will come as no surprise to parents and practitioners who were submitting Appeals late in the 2020-21 term, that the Tribunal's 10 day aim for registering Appeals became a distant memory, with Appeals taking 25 days on average to be registered. However, the good news is that they are now beyond the worst of it, and the normal 10-day registration service should be resuming as normal, (until the next phase-transfer window at least).

The delays at the Tribunal are predominantly attributed to the continuing rising number of Appeals, and ever-increasing cost pressures. The surge in Appeal submissions has exceeded even the Tribunal's own expectations. They were anticipating around a 10% rise in Appeals, but that has already been exceeded, and the year is not over yet.

Remote Hearings

It has also been confirmed that remote Hearings are here to stay and will be the primary/default Hearing arrangement until at least the New Year. For Tribunal users who need reasonable adjustments to be made, and require a live Hearing, this can be applied for, and we are assured will be accommodated. When live Hearings will become the norm again depends on the COVID-19 situation.

The good news (for some) is that remote Hearings, as an option at least, are here to stay. They have hugely increased efficiency, allowing panels to sit on Hearings from opposite ends of the country, sometimes several on one day, with a peak performance of 34 Appeals in one day. However, you don't have to be a mathematician to note that even performing at that peak, every day, on every school day of the year, the number of Appeals outstrips the number of panels. As such, we have unfortunately started to see some Appeals being vacated due to lack of Judicial availability, and this was confirmed as being a system wide issue.

Recruitment of Judges/ Specialist Members

It is therefore great news that the Tribunal has recruited around 50 new fee-paid Judges, who will be coming to a panel near you in December 21- January 22.

Following a very successful recruitment competition, the Judges are joined by around 70 new specialist members, who have already begun sitting in tranches of 20. There is also another active recruitment happening right now for specialist members to sit on Extended Appeals (Appeals concerned Health and Social Care Sections of the EHC Plan), so if you have a background in Health or Social Care, and think sitting on panels could be for you, go over to the Judicial Appointments Committee and sign up!

Although this ongoing recruitment is great to see, it appears to me that whilst the number of Appeals continues to rise, recruitment remains reactive rather than proactive. Sadly, I do not think we have seen the end of vacated Hearings, though I would be delighted to be proven wrong.

Extended Appeals

The “National Trial” is no more, in the sense that the trial is over, and Appeals seeking recommendations in respect of health and/or social care are here to stay. Any Appeals registered from 1st September onwards including Health and Social Care are now called “Extended Appeals”. I look forward to tripping over the change in terminology for many months to come.

There is no new law surrounding this, and things will continue exactly as they did pre-September 2021. The Tribunal’s intention is to continue to case manage and issue directions at the point of registration, but this will be subject to Judicial availability.

As 2021 nears its close, we eagerly await the publication of the SEND Tribunal statistics, which should provide a clearer picture of the trends we have seen over the last academic year. These should be published on or around the 10th December 2021. We have no doubt that they will continue to paint a worrying picture of both increasing Appeals in terms of number, whilst also showing that the number of Appeals in respect of appealable decisions remains very low.



Thank you.

We are delighted to be ranked in this year's Legal 500.

Thank you to all of our wonderful clients for their kind testimonials, and for continuing to put your confidence in us.



Waking Day Curriculums – are they Education or Social Care?

The SEND Tribunal only has legal power to make binding Orders in relation to the educational sections of an EHC Plan. That is Sections B (needs), F (provision) and I (placement).

It is a common misconception that a waking day curriculum (i.e. a residential placement for educational purposes across all waking hours), is social care provision, and not educational provision. This misconception often arises due to Local Authority funding arrangements, where the residential element of a school placement is wrongly defined as being for social care reasons, in order that social services contribute.

A waking day curriculum is not social care, and never has been. It is an educational provision, regardless of how Local Authorities seek to fund such placements. As it is an educational provision, the advice of an Educational Psychologist is essential in establishing whether there are educational reasons for a waking day curriculum to be written into an EHC Plan.

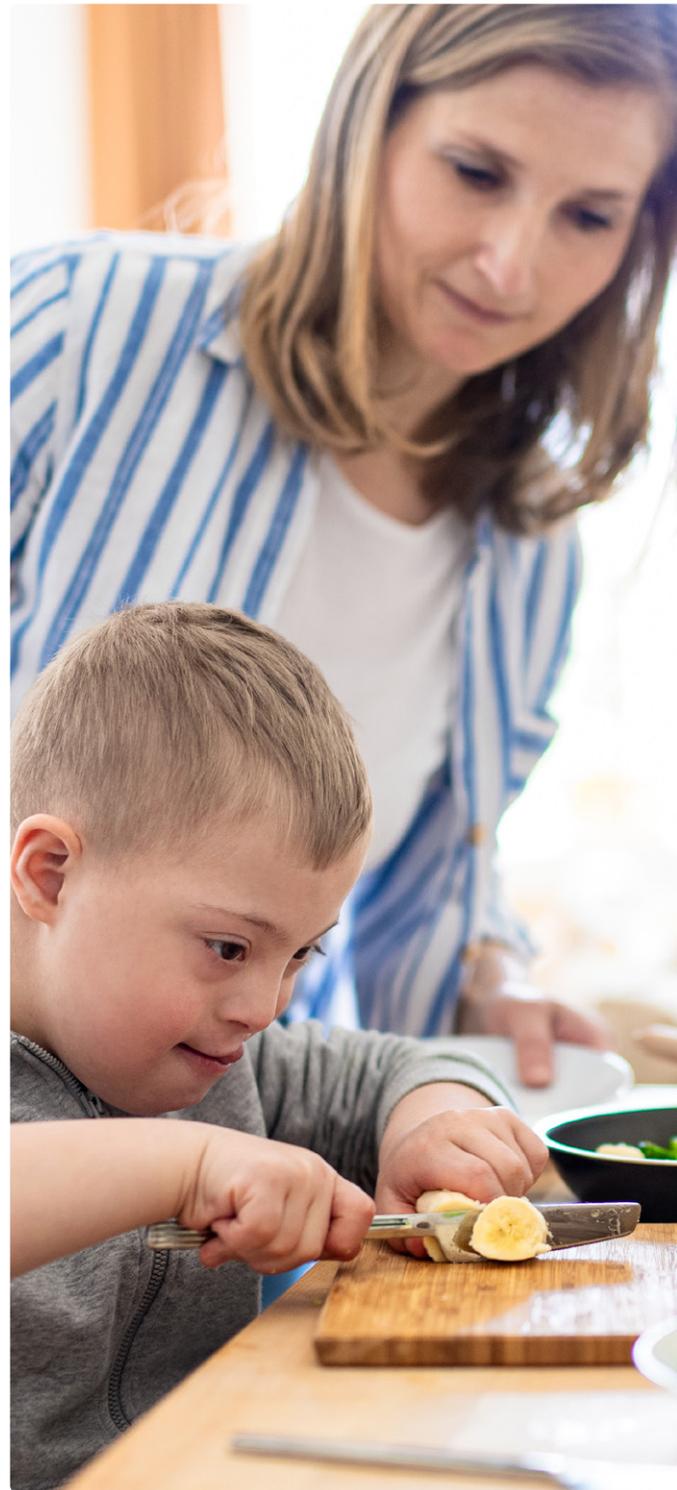
Section 21(5) of the Children and Families Act 2014 sets out the legal basis for a waking day curriculum as being educational. This section reads:

“Healthcare provision or social care provision which educates or trains a child or young person, is to be treated as special educational provision (instead of healthcare provision or social care provision).”

East Sussex County Council v TW (2016) UKUT 0528 AAC describes this as “deemed provision” which should appear in Section F of the EHC Plan. The case goes on to state if it is in the wrong section, it should be moved to Section F

As a waking day provision is educational in nature, a report from an Independent Social Worker is insufficient to support that a waking day curriculum is needed. It is important to bear in mind that an expert can only give evidence from within their own sphere of expertise. Therefore, a social worker is limited to giving evidence about social care needs and provision. They cannot stray into the realms of an Educational Psychologist, who can give evidence as to whether or not the waking day curriculum is required in order to educate or train. Whilst it may be very sensible to obtain the evidence of a social worker in an Appeal concerning waking day, it is only one piece of the puzzle. Without the evidence of an Educational Psychologist, our view is that you are very unlikely to succeed.

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As set out above, the National Trial is no longer a trial it is permanent. Appeals involving Health and Social Care are now 'Extended Appeals'. Under an Extended Appeal, you can ask the Tribunal to consider and make non-binding recommendations about the contents of the Health and Social Care Sections of an EHC Plan.

However, Health and Social Care cannot be looked at by the SEND Tribunal, unless there is an educational appeal. You cannot Appeal solely against the Health and Social Care Sections. Further, all the Tribunal has power to do is make recommendations in respect of the Health and Social Care Sections, which may be disregarded by the Local Authority. This is another reason why waking day should never be dealt with solely as Social Care.

If the Local Authority ignore a recommendation relating to Social Care given by the SEND Tribunal, the recourse is to Judicially Review the Local Authority in the Administrative Division of the High Court, on the basis of irrationality. Judicial Review claims can be lengthy, time consuming and ultimately expensive.

Therefore, it is essential when parents and professionals are considering the issue of waking day, it is considered whether there is an educating/training basis for the provision, and therefore, whether it is in fact educational in nature.



**THE
BRITISH
LEGAL
AWARDS
2021**

SHORTLISTED FOR

**UK LAW FIRM
OF THE YEAR**

AT THE BRITISH LEGAL AWARDS 2021

#BritishLegalAwards

Financing the SENCO role in EHC Plans.



All schools are required to have a SENCO by virtue of **Section 67 of the Children and Families Act 2014**. The wording of **Section 67** requires only the appointment of a single SENCO, regardless of the size of the school, or the number of children with additional needs within that school.

It will come as little surprise that this often means that the workload of a SENCO will be significantly outstripped by the contractual hours available to them. Overloading SENCO posts inevitably affects the ability of SENCOs to perform their role.

Where the SENCO's time is oversubscribed, either the children suffer a shortfall in the support they should be receiving, or the school / academy funds extra time out of its own resources. Ultimately, if a school / academy does fund additional hours from its own resources, it is subsidising the Local Authority.

The demands on a SENCO's time are numerous. For pupils on the SEN Register without EHC Plans, a significant number of hours are required for the 'Assess, Plan, Do, Review, process, indicated by the Code of Practice. Following this, if an EHC Needs Assessment request is submitted, SENCOs will almost always complete the extensive and time consuming forms and evidence gathering set out in Local Authority policy.

For pupils who then obtain EHC Plans, SENCO input is still required in order to arrange and prepare for the Annual Review, attend the meeting and write up and submit the paperwork afterwards.

On a whole school basis, there is also termly provision mapping and reviewing of a student SEN profile / progress. In addition, termly updates of training and sharing provision with staff, communicating with parents, discussion and problem solving, support of resource planning for LSA/ TA staff, and observations of TA staff supporting EHC Plan students take place. It is no small undertaking, and it is not difficult to envisage that there simply are not enough hours in the day to get it all done effectively.



What if the total number of hours required to deliver the provision exceeds the post holder's contracted hours?

We take the view that in a situation in which SENCO time is fully utilised, and the work required for an additional EHCP cannot therefore be undertaken by the SENCO, additional SENCO time should be funded. This raises the question, where does that funding come from?

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We would argue that where additional SENCO time is required in respect of EHC Plans, (making requests for EHC Needs Assessments, Annual Reviews and providing provision set out in the EHC Plan) this should be designated as special educational provision which is specific to the child who is the subject of the EHC Plan.

Therefore, this additional SENCO time should be specified in Section F of the child's EHCP and then funded by the Local Authority under **Section 42(2) of the Children and Families Act 2014**. This is currently a view which is unsurprisingly resisted by Local Authorities and litigation may well be required to settle the point.

SENlegal
WEBINARS

Free Legal Advice Webinars for
Parents, Schools & Professionals.

Coming this November...

Tues | Hayley Mason,
2nd | Senior Solicitor

Preparing for
Adulthood

LIVE ●

Thurs | Melinda Eriksen,
4th | Specialist OT

What is Sensory
Integration?

REC ●

Tues | Nicole Lee,
9th | Senior Solicitor

Social Care- Child to
Adult Transition

LIVE ●

Thurs | Juanita Hurley,
11th | S.A.L.T

ASD vs DSD

LIVE ●

Tues | Melinda Nettleton,
16th | Principal Solicitor

Taking Back
Control

REC ●

Thurs | Various Guest
18th | Speakers

SEND
Signposting

REC ●

Tues | Richard Nettleton,
23rd | Solicitor

Non-SEND Tribunal
Remedies

LIVE ●

Thurs | Cathleen Long,
25th | Social Worker

SEND parents accused of
fabricating/inducing their
child's illness.

LIVE ●

Tues | James Brown,
30th | Solicitor

Transport

LIVE ●

For more information, go to senlegal.co.uk/legal-webinars