SENlegal NEWSLETTER

Professional's Newsletter Edition

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Ceasing to maintain an EHC Plan

The End of the Line?

By Nicole Lee, Specialist Solicitor.

We are now fast approaching the end of another academic year, and the (hopefully) lazy, hazy, crazy days of summer stretch out before us, but for some children and young people, the coming of summer has brought an unwanted letter to the doormat – a notice of the Local Authority ceasing to maintain their EHC Plan.

Strictly speaking, an EHC Plan can cease to be maintained at any point of the academic year, but the approach to summer appears to be a particularly busy time for this type of decision. This may be because Paragraph 9.207 of the SEND Code of Practice states that, "Support should generally cease at the end of the academic year, to allow young people to complete their programme of study."

In line with this, we have recently received a huge volume of enquiries relating to ceasing to maintain an EHC Plan. In terms of the facts of these enquiries, there are two key trends emerging:

1. The likelihood of receiving a cease to maintain notification appears to significantly increase if you are a young person transitioning from Children to Adult Services and/ or transitioning from an educational placement which is registered to educated young people to the age of 19;

2. Of the numerous cease to maintain decision letters we have received, **not one** letter references the correct legal considerations for ceasing to maintain an EHC Plan, or follows the correct legal procedure. **NOT ONE!**

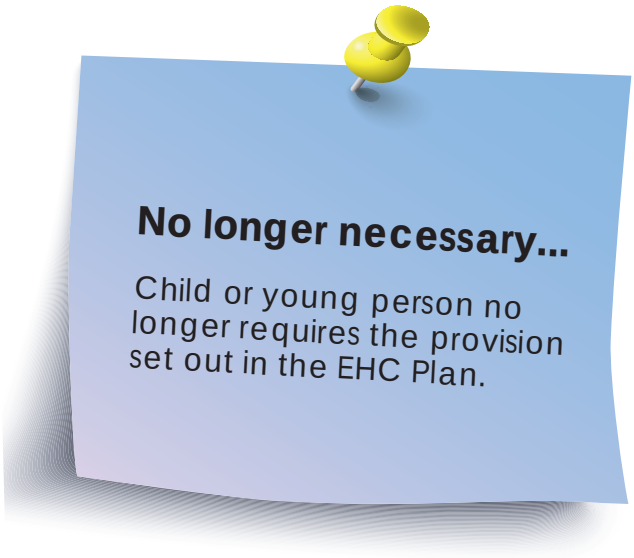
So, can the Local Authority cease to maintain my EHC Plan...?

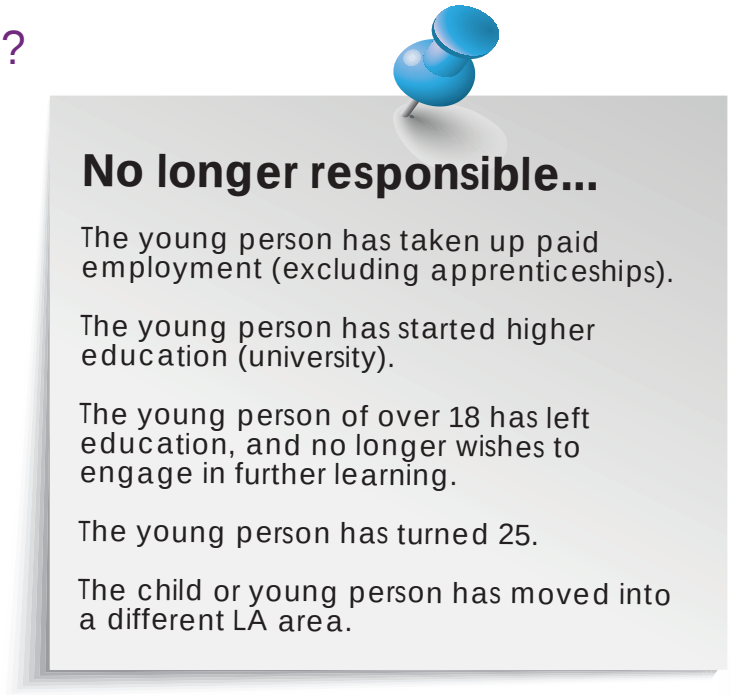
Section 45 of the **Children and Families Act 2014** provides the Local Authority with the power to cease to maintain an EHC Plan. Ceasing to maintain an EHC Plan means that the Plan will come to an end, and the LA will no longer be under a legal duty to ensure that the educational provision specified in the EHC Plan is in place.

However, the Local Authority cannot cease to maintain an EHC Plan for any old reason. In fact, **Section 45(1)** of the **Children and Families Act 2014** provides just two broad grounds for ceasing to maintain an EHC Plan;

- The LA is **no longer responsible** for the child or young person
- It is **no longer necessary** for the EHC Plan to be maintained

So, what does that actually mean?





The circumstances which would lead to a Local Authority no longer being responsible for an EHC Plan are generally much clearer in that it will be apparent whether the young person has a job, has gone to university, turned 25, has moved area or is over 18 and no longer wishes to remain in education.

However, in relation to "no longer wishes to remain in education", in the case of a young person over the age of 18, you would need to consider whether the young person has the capacity to be able to make or communicate that decision. Disappointingly, we have on previous occasions seen Local Authorities try to cease to maintain EHC Plans under this ground in the case of young people who have then been found by the Court of Protection to not have the capacity to make such a decision.

Whether or not the EHC Plan is "necessary" is much more subjective and will vary on a case by case basis. After all, no child or young person is the same as another. However, broadly, an EHC Plan will no longer be necessary if they no longer need the provision in their EHC Plan, because their needs have changed.

When considering this, **Paragraph 9.200** of the **SEND Code of Practice** provides that the Local Authority *"must take account of whether the education or training outcomes specified in the EHC Plan have been achieved"*. However, if the education or training outcomes have been met, even this does not give the Local Authority free reign to cease to maintain an EHC Plan, as they must first consider if further progress could be made, and if new outcomes should be set.

What can't a Local Authority rely on to cease to maintain an EHC Plan?

This list is not exhaustive, as there could be any number of unlawful criteria a Local Authority may use to try to cease to maintain an EHC Plan. These examples below are reasons we have actually received:

1. *The young person is now transitioning to Adult Social Care, which means his needs are now Social Care, not Educational.*

WRONG, Section 21(5) of the **Children and Families Act 2014** makes clear that provision which educates or trains a child or young person is Educational provision, not Health or Social Care provision, regardless of age.

2. *The young person is now 19, which means that he no longer needs an EHC Plan.*

WRONG, there is no such legal test.

3. *The child or young person has finished their current course of education, so no longer need an EHC Plan.*

WRONG, **Paragraph 9.151** of the **SEND Code of Practice** makes clear that *"Young people with EHC plans may need longer in education or training in order to achieve their outcomes and make an effective transition into adulthood"*

4. *The young person is not working towards qualifications or employment, so their needs are Social Care needs, and an EHC Plan is no longer needed.*

WRONG, the case of **Buckinghamshire County Council v SJ [2016] UKUT 254 (AAC)** makes clear that the Courts reject "any suggestion that the attainment of qualifications is an essential element of education. For many of those to whom the 2014 Act and Regulations apply, attaining any qualifications at all is not an option. That does not mean that they do not require, or would not benefit from, special educational provision."

Where a Local Authority is considering ceasing to maintain an EHC Plan, there is a procedure which the Local Authority **must** follow;

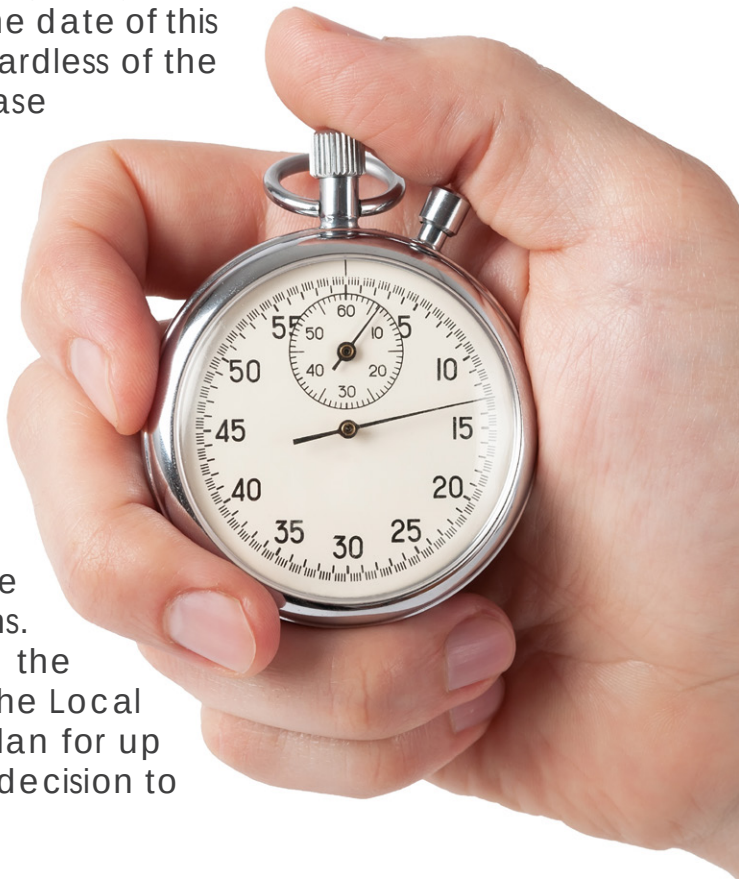
- It must inform the child's parent or young person that it is **considering** ceasing to maintain the EHC Plan, and the reasons why.
- It must consult with the child's parent or young person about whether the Plan should cease to be maintained.
- It must consult with the school or other institution named in the EHC Plan about whether the Plan should cease to be maintained.
- Where the decision concerns a young person in receipt of Adult Services, the Local Authority must ensure that Adult Services are involved in the decision.

If the Local Authority decides after the consultation to cease to maintain the EHC Plan, they **must:**

1. Inform the child's parent or young person, in writing, providing them with the Right of Appeal to the SEND Tribunal.
2. Inform the school or other institution named in the EHC Plan.
3. Inform the responsible Care Commissioning Group.
4. Inform Adult Services.
5. **Continue to maintain the EHC Plan until the Right of Appeal has expired, or, where an Appeal is submitted to the SEND Tribunal, until the Appeal has concluded.**

Point 5 above is in bold for a very particular reason. That reason is that every cease to maintain decision letter we have received has attempted to depart from the legal timescales in which an EHC Plan can cease to be maintained.

The unlawful timescales we have seen vary greatly, but generally range anywhere from "15 days from the date of this letter" to "the end of the academic year". Regardless of the timescale given, if the Local Authority try to cease to maintain the EHC Plan before the Right of Appeal has expired (two months from the date of the cease to maintain decision letter, or one month from the date of the Mediation Certificate, whichever is longer), or if the decision is Appealed, the end of the Appeal process, then they are acting unlawfully.



Under no circumstances can the Local Authority cease to maintain the EHC Plan until those timescales have elapsed. If you do not Appeal, that means the Local Authority cannot cease to maintain the EHC Plan for at least 2 months. If you Appeal, allowing time for an Appeal to the SEND Tribunal (currently roughly 12-16 weeks), the Local Authority must continue to maintain the EHC Plan for up to (and possibly more than) 6 months after the decision to cease to maintain the EHC Plan.

In the interim period, they must continue to provide all of the provision contained in the EHC Plan, including the educational placement named in Section I.

(Continued on next page...)

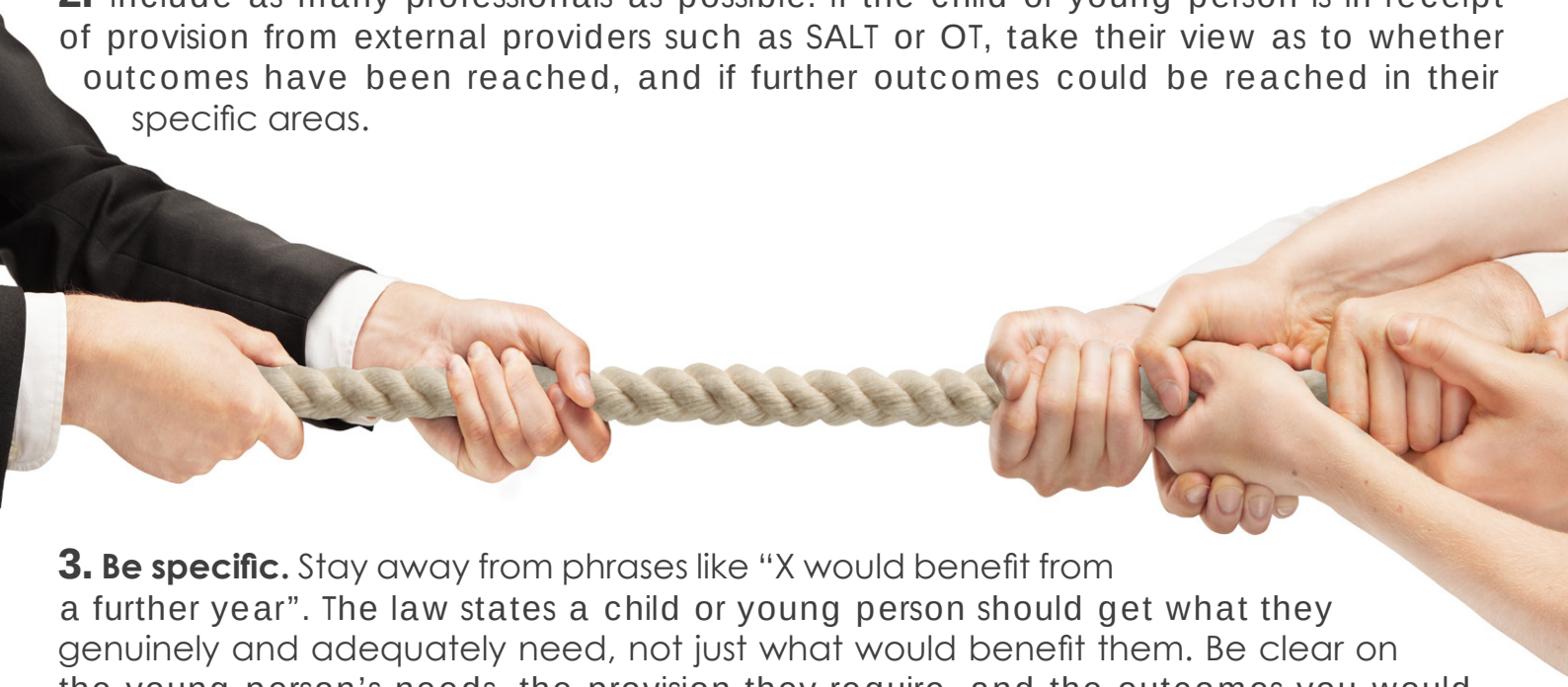
So, how can I support the children and young people who have received these notifications?

Ultimately, regardless of what you do, it may not be possible to change a Local Authority's mind once they have started considering ceasing to maintain the EHC Plan, without an Appeal to the SEND Tribunal being required.

However, any paperwork you do produce can be used to support an Appeal. Therefore;

1. First and foremost, respond to a consultation fully, and in good time. When responding to the consultation, consider the legal tests for ceasing to maintain an EHC Plan. Has the child/young person achieved their outcomes? If they have, could further outcomes be reached if the provision were to remain in place?

2. Include as many professionals as possible. If the child or young person is in receipt of provision from external providers such as SALT or OT, take their view as to whether outcomes have been reached, and if further outcomes could be reached in their specific areas.



3. Be specific. Stay away from phrases like "X would benefit from a further year". The law states a child or young person should get what they genuinely and adequately need, not just what would benefit them. Be clear on the young person's needs, the provision they require, and the outcomes you would expect if the provision remains in place.

4. If the Local Authority are trying to cease to maintain the EHC Plan before the legal timescales, inform the child/young person/parents of the correct timescales.

If the Local Authority are attempting to cease to maintain an EHC Plan, and you think that the EHC Plan is still necessary, then we can assist the child/young person/parents in an Appeal to the SEND Tribunal with a view to requiring the Local Authority to cease to maintain the EHC Plan. As part of this Appeal, we can also consider the content of the educational sections of the EHC Plan (Sections B, F and I) during a cease to maintain Appeal, and, if necessary, rewrite those Sections based on the most up to date evidence.

If, in the interim, the Local Authority unlawfully stop providing the provision placement contained in the EHC Plan, we can help you get the provision put back in place to keep any disruption to an absolute minimum.

Unlawful Exclusions - 'Off-Rolling'

The Government's review of school exclusions by former Child Minister, Edward Timpson, was published in May 2019. The report looks at a range of long standing issues with school exclusions, but importantly raises the issue of unlawful exclusions and 'off-rolling'.

By James Brown, Specialist Solicitor.

Timpson described informal exclusion and off-rolling as "quite simply wrong". Concerns have been raised of the use of off-rolling by parents, teachers, the Chief School's Adjudicator, the Children's Commissioner and HMP Chief Inspector.

The practice of off-rolling and informal exclusions is widespread and continues to grow.

What is 'off-rolling'?

There is no legal definition of what off-rolling actually is, however, Ofsted defines it as:

"Off-rolling is the practice of removing a pupil from the school roll without using a permanent exclusion, when the removal is primarily in the best interests of the school, rather than the best interests of the pupil. Off rolling is a form of 'gaming'."

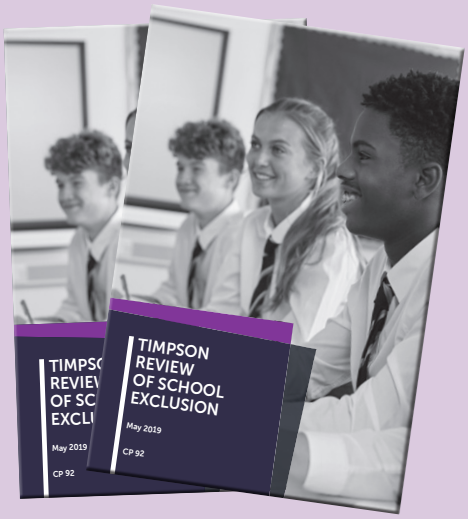
However, there are instances where off-rolling is lawful and a perfectly legitimate action for a school to take. Schools are able to remove a pupil from the school roll when a pupil moves area, parents decide (without coercion) to home educate their child, or a child has been permanently excluded. These examples are lawful and are in line with regulations and statutory guidance.

Managed moves (in the pupil's best interests) and dual-registering a pupil with another school, such as an Alternative Provider are also both not off-rolling.

What is not lawful is schools seeking to remove pupils from the roll due to academic ability or special educational needs, and placing pressure on parents to do this, which is the case in some schools, if this is not in the best interest of the child.

Statistically, children with SEN and low prior attainment are far more likely to be off-rolled than their a-typical peers.

Ofsted Implications



Click here to read the Timpson Report online.

Following the release of the Timpson report, it is apparent Ofsted inspectors are increasingly scrutinising whether schools are unlawfully off-rolling. Last month, two schools were inspected by Ofsted and found to be unlawfully off-rolling. Both schools received an inadequate Ofsted rating.

Ofsted is required under **Section 5(5b)** of the **Education Act 2005** to consider the extent to which the education provided at the school meets the needs of the range of pupils at the school, and, in particular, the needs of the pupils who have a disability for the purposes of the **Equality Act 2010** and pupils who have special educational needs.

If Ofsted find that significant numbers of pupils are being inappropriately off-rolled, Ofsted inspectors may well conclude, and have a duty to report if so, that the education being provided at the school is not meeting the needs of the range of pupils at the school. This is the case with the two schools rated as inadequate last month.

Schools need to also consider that informal exclusions and unlawful off-rolling are likely to amount to disability discrimination. Therefore, off-rolling and inform exclusions should be avoided at all costs.

What should be happening?

**for more information about the law surrounding School Exclusions, please see pages 4 and 5 of our August 2018 Newlsletter by clicking here!*

If a school has concerns about meeting the needs of children with SEN, or a child with SEN is at risk of exclusion, the school should follow the formal exclusion process (*please see previous article of what the process is) and the statutory guidance. Formal exclusion provides a process for review and, crucially, triggers duties that ensure a child is offered an education elsewhere.

For example, if a child at a school has an EHC Plan in place, but is at risk of being excluded, it is likely to suggest the provision isn't suitable. In this situation, the school should be requesting an emergency Annual Review and seeking increased provision from the Local Authority. If schools are unable to fund the provision within an EHC Plan, the Local Authority is under a legal obligation to provide this.

If a child doesn't have an EHC Plan and is at risk of being excluded, schools, alongside parents, should be requesting an EHC Needs Assessment to be carried out by the Local Authority.

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!

SENlegal **Need advice or more information?** Call our friendly team on **01284 723952** to speak with one of our specialist Solicitors, or contact us online by **clicking here.**

British Dyslexia Association × Microsoft × SENlegal

BDA's FREE Parent Pop-Up Roadshows

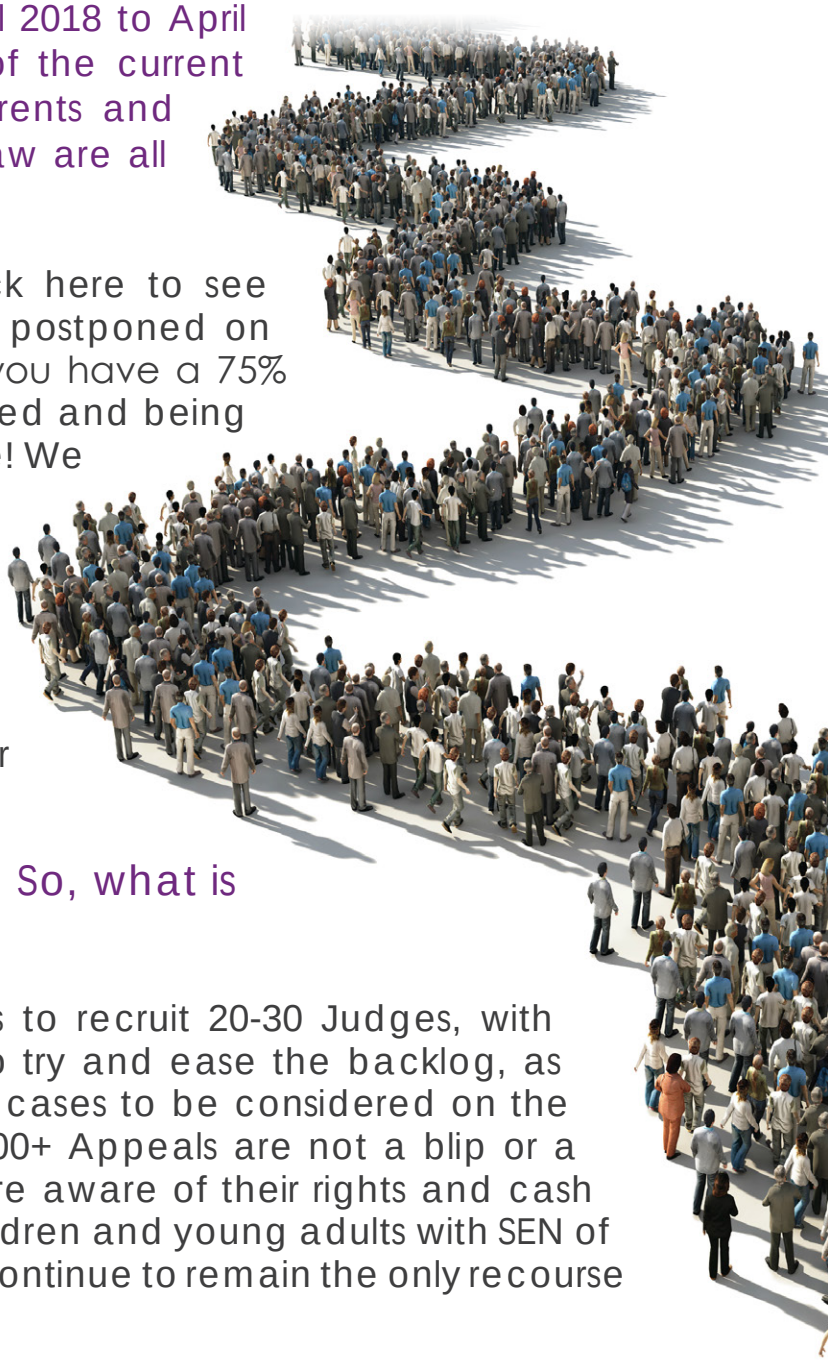
LEEDS	CHESTER	LLANDUDNO
28th Sept 19	12th Oct 19	23rd Nov 19
Visit BDA website to book	Visit BDA website to book	Visit BDA website to book

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

The Doctor won't see you now.

By Richard Nettleton, Trainee Solicitor

Another round of Tribunal statistics has recently been released. This time they run from April 2018 to April 2019 and paint a worrying picture of the current state of the Tribunal system that parents and individuals who work in this area of law are all too familiar with at this point.



In these newly released figures (click here to see the report) it shows 3/4 hearings are postponed on the first listed date. This means that you have a 75% chance of the Hearing being cancelled and being left scrambling for a new Hearing date! We have also begun to see a worrying trend emerge (although no stats exist for this) that, even when a parent has had one date postponed and the Appeal designated as a priority, the Hearing is being cancelled again and parents are left looking for a further date.

That is a lot of doom and gloom! So, what is the solution?

The Tribunal has already taken steps to recruit 20-30 Judges, with some starting in the coming week, to try and ease the backlog, as well as offering the chance for some cases to be considered on the papers in August. It is clear circa 6,000+ Appeals are not a blip or a one off and, as parents become more aware of their rights and cash strapped LA's continue to deprive children and young adults with SEN of basic provision, the SEND Tribunal will continue to remain the only recourse available to correct the problem.

This will no doubt prompt questions in Parliament, and after the recent High Court case against the Government over SEN funding, maybe the tide will turn. Only time will tell!