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NEWSLETTER

Parent's Newsletter Edition 14



Dyslexia

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25th - 26th March 2022
NEC, Birmingham

In this Newsletter:

Phase Transfer Deadlines

Funding of EHC Plans

Moving Local Authorities

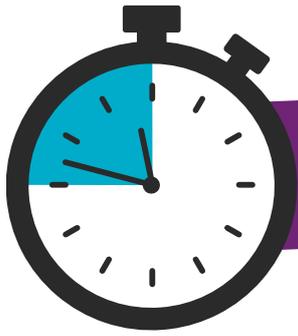
Deputyship - why is it important?

Papworth Trust - James & Allys are taking on the Cambridge Half Marathon!

The Dyslexia Show 2022



more info on page 7...



PHASE TRANSFER DEADLINES



by Sophie Norris, SEN Legal Paralegal

Why might 15th February & 31st March be significant dates for children and young people with an EHC Plan?

If your child has an EHC Plan and is approaching a year of phase transfer (i.e. they will be transferring from infant school to junior school, primary school to secondary school and so on) your Local Authority must review, amend, and finalise the EHC Plan naming a new placement by:

15th February for transfers 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

Or **31st March** if the transfer is from Secondary School to a post-16 placement.

These deadlines remain the same each year.

So, if you think that this applies to you, make sure that steps have been taken by your Local Authority to hit those deadlines. For those of you who have not yet been through a year of phase transfer, this is how the process should go...

1 - Transition Review
(around Autumn)



2 - LA sends amendment notice and draft plan to comment on
(Section I, placement, left blank)



3 - You have 15 days to comment on the plan and request a particular setting named in Section I



4 - The LA must issue the finalised plan in accordance with phase transfer deadlines and with a placement named in Section I

If you have not received the final EHC Plan by **15th February** or **31st March**, it is very important that this is followed up. We can force your Local Authority to provide you with the EHC Plan.

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Forward planning is always the best way to approach a year of phase transfer and we would suggest that you do your research on schools/ other educational settings well in advance to ensure that you are well prepared. Not sure on where to start with researching schools/ other educational settings? Perhaps start by looking at what types of settings are available to you. These are listed under **Section 38(3) of the Children and Families Act 2014**. You can secure an offer from an independent school and present this to your Local Authority, however, it is likely to require an SEND Tribunal appeal to secure this placement.

However, it should be noted, that the Local Authority may not always agree with your choice of setting and could name somewhere else in Section I of the EHC Plan. If you are not in agreement with the setting named in Section I and you believe that they cannot meet your child's needs, you can submit an appeal to the SEND Tribunal. When the Local Authority sends the finalised plan to you, they must inform you of your right to appeal (but they don't always - look out for any unlawful decision letters!). We advise that an appeal is submitted as soon as possible if you are not in agreement with the LA's placement, to ensure that the issue is resolved before September. Timing is crucial when it comes to dealing with the issue of phase transfer and it is important to act early. For support and advice on appealing an EHC Plan or actioning a missed deadline, we can help.

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Funding of EHC Plans

By Rebecca de Winter, Trainee Solicitor

A common misconception held by many parents is that schools, colleges or other educational institutions are responsible for securing and funding a child or young person's EHC Plan. This is not true; the body responsible for securing and funding the provision in a child or young person's EHC Plan is the Local Authority.

Which Local Authority?

The Local Authority responsible for funding is the one where the child or young person's parent(s) or main caregiver lives, even if the child or young person is placed in an out of area residential placement fully funded by the EHC Plan. A Local Authority is legally responsible for funding a child or young person's EHC Plan if the child or young person is in their area, pursuant to **Section 24(1) of the Children and Families Act 2014** which reads as follows:

"(1)A local authority in England is responsible for a child or young person if he or she is in the authority's area and has been—

- (a)identified by the authority as someone who has or may have special educational needs, or*
- (b)brought to the authority's attention by any person as someone who has or may have special educational needs".*

The Local Authority's "area" is defined by its geographical boundaries, which can usually be found on its website. If a child or young person's main caregiver or parent(s) live within these boundaries it is this Local Authority who are legally responsible for funding their EHC Plan.

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Matters can appear more complex in cases where the child or young person attends a school or educational setting that is out of the area. In reality, the law is the same, funding remains the duty of the Local Authority in which their main caregiver or parent(s) live. This applies even if the child or young person is attending an out of area educational setting on a residential basis, as if it were not for the residential placement the child or young person would be living with their main caregiver or parent(s).

Funding Bands

In terms of the money used to fund an EHC Plan's provision, each school is given a set amount of funding from the Local Authority per child with SEN needs, termed the "notional budget". This is often not enough to support the provision set out in an EHC Plan, so Local Authorities allocate levels of "top-up" funding.

Some Local Authorities use a banding system rather than simply funding the specified provision within the EHC Plan. Banding systems can lead to underfunding of provision as they are not specific, i.e., Band 1 maybe provide for 1-5 hours per week and Band 2 provides for 6-10 hours per week or Band 1 = £5,000 a year and Band 2 = £6,000 a year.

If funding bands like these are included within an EHC Plan it leads to uncertainty as to the specific amount of provision that is being funded and is therefore unlawful. Funding bands can be included in an EHC Plan, but not as an alternative to specifying/quantifying provision, nor so as to override or limit the specified/quantified provision (**R v Cumbria County Council Ex Parte P ELR (1994) 337**).

Bandings are also subject to changes as they are only in a policy. This means that they can be reduced at any point and this could reduce the quantity of provision provided by that band. There is no Right of Appeal against this.

What is key to remember is that if provision is not being delivered, this is enforceable directly against the Local Authority. There is no 'if we can afford it clause' the Local Authority can rely on. A Pre-Action Protocol Letter should be issued to ensure the missing provision is put in place. For specific advice on this, please do get in contact.

A common misconception held by many parents is that schools, colleges or other educational institutions are responsible for securing and funding a child or young person's EHC Plan.

This is not true; the body responsible for securing and funding the provision in a child or young person's EHC Plan is the Local Authority.

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Moving Local Authorities



By Rebecca de Winter, Trainee Solicitor

Many parents fail to consider the effect of moving house on their child's EHC Plan. Moving to a new Local Authority area can have significant consequences on the funding of the plan.

When an opportunity presents itself to the Local Authority to potentially to reduce funding, there is every chance they will try and take this.

Of course, if the move is simply within the boundaries of the Local Authority they are currently residing in, then no issue arises. However, if parents are moving to a different Local Authority there are several factors to consider, as the EHC plan will need to be legally transferred to the new Local Authority as they will become responsible for funding.

The most important factor to consider is that when moving Local Authority, the transfer of an EHC Plan gives the new Local Authority the legal right to review the EHC Plan.

Following this review, it may decide it wishes to amend the EHC Plan which can lead to loss of provision and funding of the placement named in Section I.

Regulation 15 of the Special Educational Needs and Disability Regulations 2014 sets out the procedure for transferring an EHC Plan to a new Local Authority. It can be summarised as follows:

1) *The old authority shall transfer the EHC plan to the new authority on the day of the move or, where it has not become aware of the move at least **15 working days** prior to that move, within **15 working days** beginning with the day on which it did become aware - This means that it is important to put the new Local Authority on notice of the move into the area as far in advance as possible, to try and prevent any issues with funding.*

2) *From the date of the transfer, the EHC Plan is to be treated as if it had been made by the new authority on the date on which it was made by the old authority and must be maintained by the new authority - This is when the new Local Authority becomes responsible for funding the EHC Plan and securing the provision within it.*

3) *The new Local Authority has **six weeks** to notify the parent or young person that the EHC plan has been transferred and to let them know when it is going to **review the EHC plan or not** – If the Local Authority decides to amend the plan, they can remove the provision or name a different setting in Section I, even if the old Local Authority had agreed to fund it.*

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4) *The new Local Authority must review the EHC plan within either **12 months** from the EHC plan being made or last reviewed, or **3 months** from the date of the transfer, whichever is later* – The Local Authority can legally review the plan before these dates.

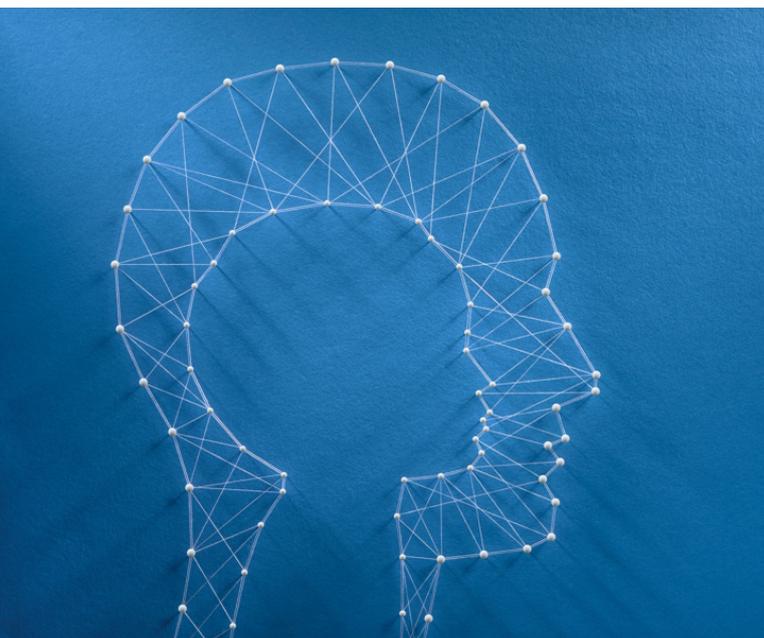
It is therefore essential to fully consider the risk arising from the Local Authority reviewing the EHC Plan before deciding to move to a new Local Authority.

If your child can continue to attend the school named in Section I of the plan the new Local Authority should continue to maintain the plan and funding for this if applicable. Therefore, the Local Authority may keep the placement the same if attendance remains practicable. However, the new Local Authority has the opportunity to review this EHC Plan. When an opportunity presents itself to the Local Authority to potentially to reduce funding, there is every chance they will try and take this.

If you have recently been through an Appeal to the Special Educational Needs Tribunal, it is key to note that this does not protect the EHC Plan from being reviewed and amended by the new Local Authority. Therefore, if you are considering moving Local Authorities it is (in most cases) wise to do this before you undertake an Appeal to the Special Educational Needs Tribunal in relation to the content of an EHC Plan to ensure the provision or indeed the placement named are not amended shortly after. A move whilst an Appeal is ongoing is also possible.



On Sunday 6th March 2022, James Brown and Allys Kelsey will be taking on the Cambridge Half Marathon in order to raise money for the Papworth Trust! To find out more or to donate, visit... **JustGiving**



Deputyship

- why is it important?

Many parents of young people with SEN have evidence or suspect that their child lacks capacity to make their own decisions. However, when a young person turns 18 years old, if a Deputyship Order is not in place this can lead to difficulties, due to the fact that Parental Responsibility ceases.

The difficulties encountered can be anything from not being able to access bank accounts in the young person's sole name, to finding they are prevented from having input into decisions about any care or medical treatment the young person is provided. Parents are faced with the frightening prospect of ever-changing Local Authority staff making "best interests" decisions despite not knowing the young person well or understanding their wishes.

Many parents have found themselves locked out of (the day-to-day and substantial) decision making by Local Authorities Post-18, by stating they do not have to deal with parents only the young person. Furthermore, if you are attempting to run an Appeal in the Special Educational Needs Tribunal or make a complaint on behalf of a young person who lacks capacity (but is over 18), you are likely to encounter huge difficulties in obtaining information about the young person.

Where the young person does lack capacity, a Deputyship can assist young persons and parents/guardians in this situation. A Deputyship will effectively ensure you retain parental responsibility, as you did prior to the young person turning 18.

The circumstances and criteria for obtaining a deputyship are very limited, but by no means impossible.

Due to the assumption within the **Mental Capacity Act 2005** that at the age of 18 everyone has the full capacity to run their own affairs and can make their own decisions, any application must be able to evidence the young person lacks capacity. A report setting out whether the young person has capacity can be provided by one of the following professionals completing a COP3 form to be included in the application:

- Medical Practitioner e.g. GP
- Psychiatrist
- Psychologist
- An Approved Mental Health Professional/ Capacity Assessor
- Social Worker
- Nurse
- Occupational Therapist

For the Court to grant deputyship there must also be the need for ongoing linked decision-making on the young person's behalf, not simply a one-off decision. In situations where this is the case, parents or trusted persons (such as siblings or step-parents) are able to seek a Deputyship Order.

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Types of Application

There are two separate applications that can be made to the Court of Protection for Deputyship, these are:

1) Health & Welfare - *This would be ordered when a young person lacks capacity to be able to make decisions about their residence, what care they receive, where they should be educated, medical treatment they receive and their personal care - such as what to wear and eat.*

2) Property & Affairs - *This would be ordered when a young person lacks capacity to make decisions about what to spend their money on, entering into tenancy agreements and managing their finances generally. We normally advise for this application the young person must have sufficient assets to manage, such as a bank account holding over £1,000.*

As you would expect given the personal and potentially life-changing nature of the powers it provides a deputyship for Health & Welfare is much more difficult to obtain and requires permission from the court to make the application. An application would need to demonstrate ongoing decisions were required, such as continuing complex medical investigations.

If Deputyship is granted

Deputyship effectively gives parents the same rights to manage their affairs post-18 as they had before the young person became 18. It would allow decisions that the young person would generally have made themselves, if they had capacity, to be made by the deputy on their behalf. The deputy will make best interests decisions for the young person, not the school, college or local authority. Therefore, it can be an invaluable tool to ensure you as parents/guardians, remain the lead person in making those very important decisions.

When should you be applying?

The ideal time to apply is when the young person turns 17 years of age, so that the deputyship is in place for their 18th birthday.

Applications usually take several months due to the Court of Protection processing times and the amount of evidence required to make the application as strong as possible, therefore it is not a quick process. If a young person has already turned 18, you can still make an application.

If you have any queries in relation to Deputyship applications, please do get in contact. We can help.

