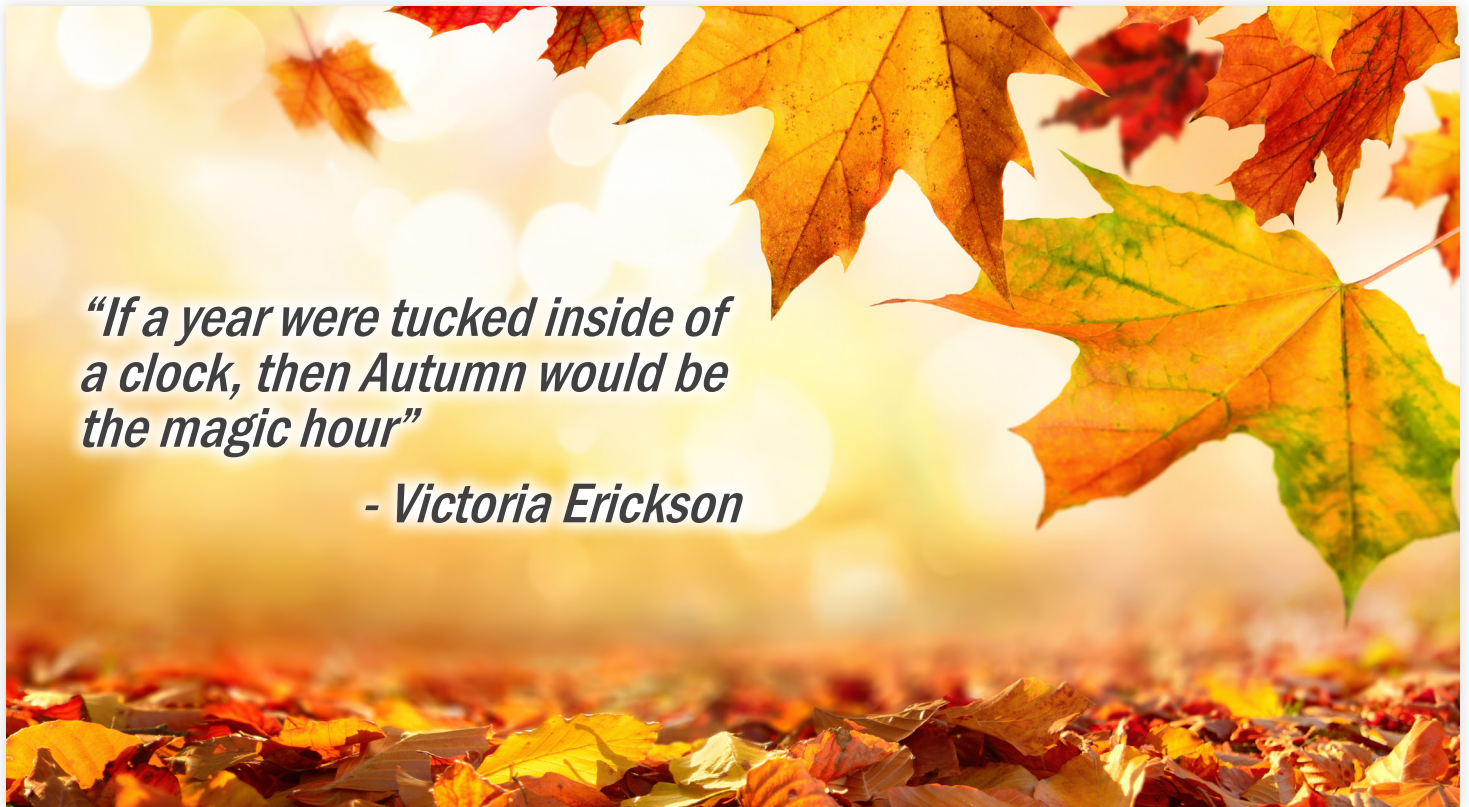


# SENlegal

NEWSLETTER



Parent's Newsletter Edition 9



*“If a year were tucked inside of a clock, then Autumn would be the magic hour”*

*- Victoria Erickson*

## In this Newsletter:

---

Achieving your school –  
Improving the prospect(us)

---

FYI - For Your Information

---

SEND system - The verdict is in

---

EOTAS - If the shoe doesn't fit,  
get a different pair!

---



# Achieving your School – Improving the prospect(us)

By Nicole Lee, Specialist Solicitor



A question that we routinely come across at events all over the country is, “We want a place at XYZ school as it is the only school that can meet our son’s needs. How do we do it?” That is too big a question to answer in a short article, so instead, I am going to focus on the evidence that the Tribunal need to see from a chosen school.

All too often we see that the only evidence submitted to the SEND Tribunal about a school is a Prospectus, Inspection Report, and a letter confirming a place has been offered. In order for a Tribunal Panel to Order that a School should be named in Section I, the Tribunal cannot rely on evidence that the School is a “good” school. A good Ofsted report can set nothing more than a baseline for the case to build on.

The Tribunal needs to see detailed evidence specific to the child. What they need to know is can this school meet the child’s individual needs, how are they going to meet those needs, and how much is it going to cost. School reports or offer letters which effectively say, “The child came to our school, we saw him, we are offering a place,” are not appropriate. Similarly, it is completely irrelevant whether or not your Local Authority, or a different Local Authority, place children at the school. That gives no indication of the School’s ability to meet the needs of the child whose EHC Plan is the subject of the Appeal. In the case of **London Borough of Southwark v Animashaun [2005] EWHC 1123 (Admin), [2006] ELR 208** it was further stated “*a Tribunal may draw reassurance or comfort from those facts, but no more*”.

It may be helpful to provide your chosen school with a list of questions, which they can then answer when producing their report. Before drafting, the school should have read all of the background information relating to your child, and then consider;

- (i) What the child’s or young person’s needs are.
- (ii) What provision is required for the child’s special educational needs including teaching staff with additional training and experience or post graduate qualifications/ therapies/ behavioural management/ waking day curriculum and life skills where appropriate.
- (iii) Are the school able to provide this provision?
- (iv) How does this individual student fit into the profile of students that we have at the school/FE college?
- (v) How much will this provision cost?

It is very important that this information is as specific and detailed as possible, with all provision quantified, and an explanation provided as to how this provision is adequate to meet the child’s needs.

They should then outline;

- (i) The type of setting they would provide.
- (ii) The number of students at the school
- (iii) The size of the class group the Child or Young Person would be in.
- (iv) The gender mix of the school
- (v) The primary needs of existing students.
- (vi) The qualifications/skill mix of those teaching and caring for the students.
- (vii) The peer group the student would be in.
- (viii) The primary needs of the students with whom he or she would be placed.

When drafting a report, schools should cover their current Ofsted status and, if there are any outstanding issues relating to Ofsted, demonstrate what they are doing to address Ofsted's criticisms and concerns and ensure the provision that they are proposing can adequately meet the child's need.

The school should always bear in mind whether it is an appropriate setting and whether it can provide all the provision necessary to meet the student's Special Educational Needs. With that in mind, a school should ensure they have viewed the working document to ensure the provision suggested can be provided at the school, and that the costings are correct.

The key point to remember when Appealing for a particular school, is that you are not trying to show the Tribunal that it is a good school for any child. You are evidencing that it is the right school for YOUR child.

A good quality school report will provide you with one of the pieces that make up the bigger picture of a successful Appeal. If you need guidance on slotting them together, we can help!



## We welcome three new members to the SEN Legal team...



**Kyra Harvey**  
Customer Service

*"I joined SEN Legal in September 2019. I am the newest member of the Customer Service Team providing support to the Legal Team and undertaking a range of general office duties including telephone reception, data entry and record management."*

*"I'm likely to be one of the first people you speak to when you call the office and I will do my best to assist you."*

**SENlegal**  
meet our team



**Allys Kelsey**  
Paralegal

*"I joined SEN Legal in September 2019 as a paralegal. My work includes liaising with clients, drafting documents and supporting the solicitors on cases."*

*"I have 5 years secretarial experience in various areas of law, my last 2 years were predominantly with real estate law. When deciding to take the next step in my legal career I wanted to branch into an area of law that makes an impact on people's lives, helping children and young adults achieve what they want from school and life seemed to be the perfect fit. I hope to start my studies to become a qualified lawyer in the future."*



**Rebecca de Winter**  
Paralegal

*"My name is Rebecca de Winter and I joined SEN Legal in September 2019 as a Paralegal. In 2018, I obtained a Distinction in my Graduate Diploma in Law (GDL) from University of East Anglia."*

*"I am currently undertaking the Legal Practice Course at BPP University in Cambridge. Prior to pursuing a career in law, I was a qualified scientist working in the Biotechnology Industry. I have chosen to work within the field of SEN law as I am passionate about children and young people being able to access their educational needs, whilst supporting parents and schools to achieve this."*



# HACS

Hillingdon Autistic Care & Support  
Registered Charity Number 1066859

## Legal Advice Workshop

### “Getting the most out of your Annual Review”

#### Does your child have an EHC Plan?

If so, there is a legal requirement for that plan to be reviewed at least once a year. The annual review is more than just a review; it is a vitally important legal process. It is your opportunity as a parent/carer to ensure the EHC is up to date, continues to reflect your child's needs and that all legally enforceable provision is being delivered. Often schools are overly positive at annual reviews which results in provision that your child needs, being taken away. Many parents underestimate the importance of this meeting and become frustrated when it is too late and they have missed their opportunity to make changes to their child's educational provision.

#### The workshop will cover:

- > What Your Legal Rights Are
- > The Annual Review Process and how to prepare
- > Checklist for attending your Annual Review
- > Key differences with Transfer Reviews (moving between phases of education)
- > What to do if you object to amendments/if provision isn't being delivered.

*(Light refreshments  
will also be provided)*

**Guest Speaker: James Brown, Specialist Solicitor, SEN Legal**

**Time and Date: Tuesday 26th November 2019, 11am - 2pm**

#### \*Cost

£20pp for HACS members or  
£40pp for non-members.

#### Location

HACS Resource Centre, Dudley Place,  
Hayes, UB3 1PB

*\*All money raised through ticket  
sales goes to supporting HACS*

**Book today at: [www.hacs.org.uk](http://www.hacs.org.uk)**



## FOR YOUR INFORMATION

*By Richard Nettleton Trainee Solicitor*

GDPR and DPA are the current 'buzz words' which plague your e-mail inboxes and feature in news articles, highlighting breaches where personal data may have been obtained by hackers. However, what does GDPR/DPA mean and how can it be useful if you have an appeal running with the SEND Tribunal?

GDPR stands for the General Data Protection Regulation (EU) 2016/679 and is a regulation in EU law which sets out the key principles, rights and obligations for organisations processing personal data.

DPA stands for the Data Protection Act 2018 which sets out the framework for data protection law in the UK. The DPA sits alongside the GDPR, and tailors how the GDPR applies in the UK.

However, what both pieces of legislation do, other than governing how organisations process personal data, is also allow individuals to make requests, sometimes referred to as 'subject access requests' to these organisations for a complete copy of the information that has been collected regarding them.

While engaged in an SEND Tribunal appeal, a parent might make a request to their Local Authority for all the information that is held on their child. This can often provide them a copy of correspondence which was never meant for the parents to see.

In our experience this correspondence can sometimes show:

1.) The lack of understanding that the Local Authority's solicitor/SEN worker/Tribunal team member has about your child's needs and the provision which is required to meet these.

2.) In the most extreme examples, show vexatious actions designed to frustrate the Tribunal process.

However, what is often overlooked is sending a DPA/GDPR request to the school that the Local Authority have named in their written response or who you may have advanced knowledge they have consulted to seek their view regarding the school's ability to meet your child's needs.

Often, a school which the Local Authority claim can meet all your child's needs may have in reality said, 'we cannot meet jo/e's needs' or 'we can meet jo/e's needs if we are provided a significant amount of additional funding'. Often these responses are omitted from Tribunal proceedings because the Local Authority have told the school they will be accepting this child despite their response and they will not negotiate on the matter.

Continued next page...



As the SEND Tribunal is an evidence-based system, this correspondence between a Local Authority and their chosen school can be helpful to your case if they contain the type of example above and this is information that the Tribunal panel will want to see when hearing evidence at your hearing when your appeal contains Section I (placement). Correspondence such as these speak to the heart of the issue that the Local Authority do not understand your child's needs and are attempting to place him/her in a placement which cannot meet them or deliver the required provision.

The DPA/GDPR mandates that the organisation to which you send the request to has one month to comply with your request and provide you a copy of all the information requested.

While you can never determine what the information you request will say, what do you have to lose by requesting a copy of it?



## Top Tips & Watch outs...

- ✓ A GDPR/DPA request can be extended by two further months if it is a complex request. If this happens, which is primarily used by Local Authorities, narrow the request for information down to the last year/six months as any information beyond that point is likely to be stale from an evidential perspective.
- ✓ If the Local Authorities proposed placement that your child has never attended decides to use the extension, bearing in mind they were only provided limited information on your child, a complaint can be lodged with the ICO (Information Commissioner's Office) as this is likely to be an abuse of the extension provision in the legislation.
- ✓ Always have a means of proving delivery i.e. send the request by Recorded Delivery.
- ✓ When making a request on behalf of your child, sending a copy of your child's birth certificate or a copy of his/her EHCP and a copy of a household utility bill can often stop a delay in the request being acknowledged.
- ✓ If your child is over a certain age (around 12) often a Local Authority will want your child to sign the GDPR/DPA request. If this happens and if it is appropriate for your child to sign your letter (you will know whether your child's SEN needs mean they understand what they are signing) then we suggest they sign the document. If it is not appropriate, state with the application why it is not appropriate they sign the request.
- ✓ The GDPR/DPA legislation does not mandate a specific form being filled out. You can make the request in a letter (ensuring you sign the letter) and provide the necessary identification documents to accompany this.
- ✓ A GDPR/DPA request should not be confused with an FOI (Freedom of Information) request which allows public access to information held by public authorities i.e. you can ask the Local Authority how many EHCP plans it issued in the last calendar year etc.
- ✓ If the Local Authority's proposed school replies to your request that they have deleted all the information related to your child, you can report them to the ICO as this was not their information to delete. We would always advise that the school is given the chance to recover the data but if they are unwilling or unable, a complaint should be lodged with the ICO to investigate.

# EOTAS. If the shoe doesn't fit, get a different pair.

By Nicole Lee, Specialist Solicitor



It seems that not a day goes by without the publishing of an Ofsted Report, Government Enquiry or new article highlighting ongoing systemic failings by Local Authorities to provide children and young people with Special Educational provision in a timely manner, if at all.

It will therefore come as no surprise that for some children and young people, the arrival of their EHC Plan equates to closing the stable door after the horse has already bolted. As a result of exacerbation of their underlying needs or needs which have developed as a result of inadequate special educational provision, any educational placement, be it mainstream, specialist or independent, would not be appropriate for that child or young person.

This was a fact recognised by Parliament when the Children and Families Act 2014 (CFA) was drafted, and **Section 61** of the CFA making specific legal provision for the education of children and young people, for whom education in a school or post-16 institution would be inappropriate.

In basic terms, Section 61 means that the Local Authority must decide if it is "necessary" to educate a child or young person in some other place than a nursery, school or Further Education placement. When deciding whether or not it is "necessary", the decision must be made considering whether it would be inappropriate for provision to be made for that particular child or young person, outside of a nursery, school, or further education placement. This is called, "Education Otherwise Than at School" (EOTAS).

Case Law was required to 'put the bones' of what EOTAS would look like, and case law on that point is starting to come through. For example, the case of **M v Hertfordshire CC [2019] UKUT 37 (AAC)** determined that a child's anxiety may mean that it is "inappropriate for provision to be made at a school."

The most obvious example of EOTAS is home education, where a child's needs mean it would be inappropriate for them to attend a school placement, and so is educated, in accordance with their EHC Plan, at home instead.

However, this begs the question, what do we do with Section I – Placement? **Section 12 of the Special Educational Needs and Disability Regulations 2014** makes clear that Section I of an EHC Plan should set out *"the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I);"*

## CFA 2014 - Section 61:

(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.

(3) Before doing so, the authority must consult the child's parent or the young person.

Case law has again been used to answer this question. The most recent piece of case law is **Derbyshire CC –v- EM and DM (SEN) [2019] UKUT 240 (AAC)** which looked at how EOTAS should look within an EHC Plan.

Previous case law had determined that EOTAS should be named in Section F of an EHC Plan, as it is not a placement or type of placement as defined under Section 12 of the Special Educational Needs and Disability Regulations 2014. A child cannot “attend” their own home, and nor is their home an “institution.” However, it had been decided that it is a statutory requirement to have a placement or type of placement named in Section I of the EHC Plan, and suggested that a placement or type of placement that the child or young person aspires to attend once it is appropriate to do so, should be named in Section I.

This led to the bizarre position that even when it had been established that an educational institution was inappropriate for a young person, a school or type of school would need to be named in Section I of their EHC Plan, for no reason other than to tick a legal box.

**Derbyshire CC –v- EM and DM** re looked at this position, and has helpfully clarified that in the case of EOTAS, the arrangements should be set out in Section F of the EHC Plan as special educational provision, but that there is no need to specify a named placement or type of placement in Section I of the EHC Plan. Where a child is to receive all of their education as EOTAS as attending an educational institution would be inappropriate for them, there is no requirement to name a school in Section I of an EHC Plan.

## So why does this matter?

Many parents find themselves in a situation where, for whatever reason, they simply cannot get their child to school, as their needs prohibit it. Often, these children are at a point of emotional crisis, and to force them to attend school would release in a significant and dangerous decline in their mental health.

Faced with this position, an overwhelming number of parents decide to electively home educate or are “persuaded” by either their child’s school or the Local Authority to “electively” home educate. This has huge legal repercussions, as Section 42(5) of the CFA provides that the Local Authority is no longer under a duty to secure the special educational provision contained in an EHC Plan, as the parents are deemed to have electively made their own suitable alternative arrangements.

In such a situation, the parent and the child, often fall through the cracks of a system which is already systematically failing children who are attending an educational institution every day, leaving parents to carry the load.

If a child or young person cannot attend a school, then it is possible to have home education, or an alternative therapeutic based provision which is not a registered educational institution to be named in Section F of their EHC Plan. This means that the Local Authority will remain under an absolute legal obligation to provide the provision contained in the EHC Plan, and also will secure that an appropriate educational package is provided.

If the shoe doesn’t fit, get a different pair. Don’t walk barefoot over the shards of a broken system. EOTAS may be just the right fit for your child.



## House of Commons Education Committee

*Special educational  
needs and disabilities  
First Report of Session 2019*

# The Verdict is in...

*By James Brown, Specialist Solicitor*



Whilst every MP in the country is seemingly busy debating Brexit and not doing much else, it appears that a select committee of MP's have been doing something of use and have produced an insightful report into the failings of the current SEND system - House of Commons Education Committee, Special Educational Needs and Disabilities, First report of Session 2019-20.

*"The significant shortfall in funding is a serious contributory factor to the failure on the part of schools and local authorities to meet the needs of children and young people with SEND".*

## What actually is this report?

The report itself is an inquiry into the SEND system following the 2014 reforms led by 11 MP's, consisting of Conservative, Labour and SNP MP's. The report looks at what the current state of play for the SEND system is and specifically at the 2014 reforms (Statements to EHCP's), i.e. have they been successful? Have they achieved their purpose? The report is unequivocal in its conclusion that the SEND system is currently failing, and the reforms have not worked.

*"We heard that in some cases staff in schools and local authorities do not know the law, give misleading or unlawful advice, and in some cases, publish erroneous information on their website"*

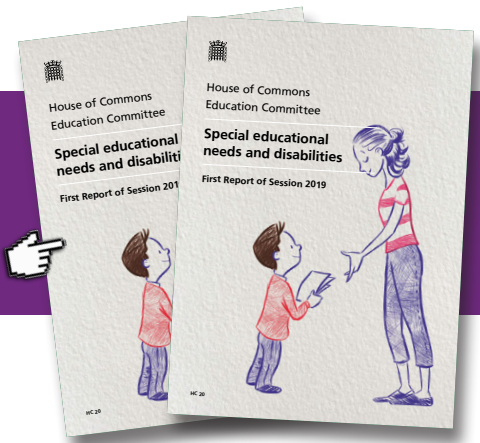
## The report concludes at paragraph 232:

*"...the weight of the evidence, gathered through our inquiry and by others in their own work, review and experiences, is clear. The system is not working – yet... Families are in crisis, local authorities are under pressure, schools are struggling. And they cannot wait for the outcome of another review: they have waited patiently for long enough. The Government must act decisively and soon. It must implement our recommendations with immediate effect and move swiftly to address the many other problems that we identify in our report. A generation of children depends on it."*

The findings of the committee's report will sound all too familiar to you as parents trying to navigate your way through the maze that is the SEND system and the constant fight for adequate provision for your children. This is highlighted by the committee at Paragraph 80 and the evidence of various parents and children's own accounts within the report. A whole paper could be dedicated on what the report says, but for the purposes of this newsletter the focus will be on a few very select practical points (a link is attached for you to be able to read the full report if you wish to do so).

## Want to read the full report?

Search Google for '*Special educational needs and disabilities First Report of Session 2019*' or click here >>



## 1) Misinformation & Unlawful policies:

*"We were told of examples of poor, misleading and unlawful advice being given to schools and parents. We heard that in some cases staff in schools and local authorities do not know the law, give misleading or unlawful advice, and in some cases, publish erroneous information on their website.....The Local Government and Social Care Ombudsman told us that some local authorities were gatekeeping and able to do this because of a lack of specific guidance in the Code of Practice, particularly around the local authority duty to carry out a need's assessment. He said that local authorities were putting hurdles and systems in place that were not based on the legislation."*

Gatekeeping from the Local Authority is something we have seen time and time again. Local Authorities across the board have put in place imaginative and unlawful policies to prevent carrying out EHC Needs Assessment of children and young people, which are contrary to the legislation. Section 36(8) of the Children and Families Act 2014 provides the legal test the Local Authority must follow when making decisions on request for EHC Needs Assessment, not their own unlawful policies.

If the Local Authority have done similar to you, you have a right of Appeal against this decision to the SEND Tribunal.

## 2) Lack of provision:

*"The lack of therapists is causing problems for local authorities in their assessment and review processes, schools for their ability to provide support for teachers and pupils, for the therapists themselves, and ultimately the children and young people who need their support. They are unable to spend appropriate time with children and young people, provide the expert advice that is related for needs assessments and for pupils who receive lower level support, and attend annual reviews. In some cases, they are unable to provide the specified interventions because there is insufficient staff."*

There is a considerable lack of specialist provision being offered to children and young people by Local Authorities. There is of course a complete lack of funding provided for this provision. However, parents need to be aware, once special educational provision is specified within an EHC Plan, the Local Authority have to provide it. Section 42(2) of the Children and Families Act 2014 is clear on this point. There is no "if we can afford it" clause within the legislation. Therefore, if your Local Authority is not providing the provision within your child's EHC Plan you can challenge this. The easiest way to do so is through a 'Pre-Action Protocol Letter'. For more information about what a Pre-Action Protocol Letter is and whether you need to send one out, please do contact us for further information.

### 3) Shortfall in Funding:

*"The significant shortfall in funding is a serious contributory factor to the failure on the part of schools and local authorities to meet the needs of children and young people with SEND. However, unless there is a systemic cultural shift on all parties involved, additional funding will make little difference to the outcomes and experiences of children and young people with SEND."*

Whilst budgets can be announced over night, cultural shifts in a system already 5 years old will take time and it would be foolish to think an accurate time frame can be placed on this. Therefore, to expect this system to change any time soon is wishful thinking and unfortunately the position is likely to remain the same. The Government needs to provide a response to this report, at a time when we are entering into a further general election and the focus on Brexit remains, it could be some time before a response is provided, or the report is even considered by the Government.

What you can and should do in the interim, is know your legal rights and how you can successfully challenge the failures of the system you find yourselves in. Whilst the Government will need to respond to the report, children and young people's right to provision remains the same, as do the Local Authorities legal duties.



Finally, we just wanted to say...

# Thank you



to all our clients and colleagues for these fantastic testimonials reported in The Legal 500. We are so grateful to have such a wonderful team supporting us here at SEN Legal and really making a difference for children with special educational needs.

“

*Melinda Nettleton could well be called the Godmother of education law. Her knowledge of this area is exceptional. She is a fierce advocate for those with special educational needs and fights her clients' cases fearlessly.*

”

“

*Hayley Mason is a rising star. At a very young age she made partner as a result of her considerable hard work, strong knowledge base and good client care skills. Her attention to detail is remarkable.*

”

“

*They know exactly what evidence is needed from where and are able to call on a range of relevant experts who are experienced in giving evidence to the First Tier Tribunals.*

”

Connect with SEN Legal on social media and follow our news, events and updates

