

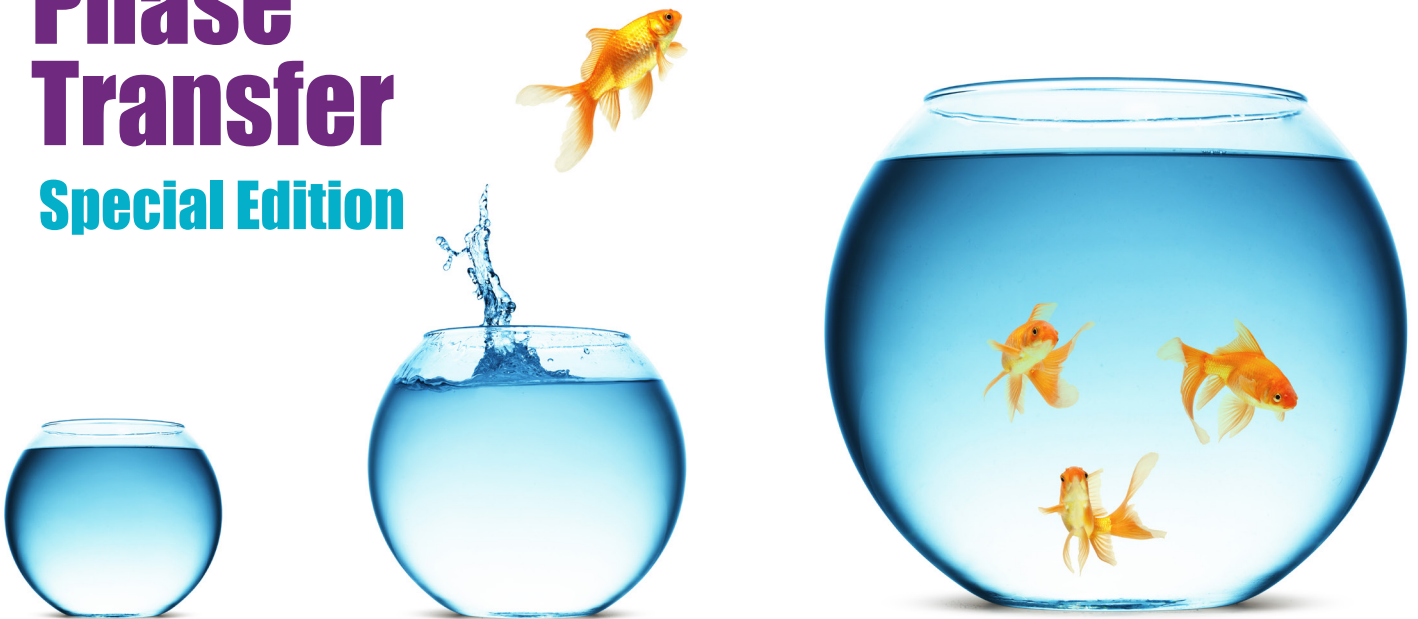
# SENlegal

NEWSLETTER

Phase Transfer - Special Edition



## Phase Transfer Special Edition



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# All things Phase Transfer, an introduction and timeline of events.

By Bethan Hone, Paralegal



It's that time of year again! In the Spring of each year, Local Authorities across the country have a statutory deadline to produce a finalised EHC Plan for every child and young person moving between a 'phase' of education, i.e. from Primary to Secondary School. The deadline is set for **31 March** for transfers from secondary to post-16, and **15 February** for any other phase transfer, i.e. primary to secondary.

The idea behind this is that families can have ample time to prepare their young person for transition into a new placement. This also should leave plenty of time for Appeals to be brought, heard and concluded in the SEND Tribunal in time for the new school year, so that children spend as little time out of education as possible. However, this is only possible if Local Authorities meet their phase transfer deadlines, and with the Tribunal working at absolute capacity this year, it is more important than ever to ensure that this deadline is being met.

As there are many different factors to consider with Phase Transfer and often a lot of horror stories in how Local Authorities deal with Phase Transfer, we have dedicated our whole newsletter to all things Phase Transfer.

## Early Years to Primary, Primary to Secondary Phase Transfer and everything before and in between!

Phase transfer applies to any child or young person who is moving between a phase of education and therefore requires a change of placement.

**Regulation 18(1)(b) of the Special Educational Needs and Disability Regulations 2014** provides you should receive a finalised Phase Transfer EHC Plan by **15 February** if your child is moving from:

- Early years education to primary/first school
- Infant School to Junior School
- First / Primary School to Middle School
- Primary School to Secondary School
- Middle School to Secondary School

For young persons moving from secondary to a post-16 and onwards, please see Nicole Lee's article on page 4.

In order for the **15th February** deadline to have been met, your transfer review meeting should have taken place no later than **23rd November 2022**, as the annual review process can take a maximum of 12 weeks from start to finish.

For some parents, we have seen that the transfer review meeting has not even taken place yet or they took place earlier in 2023 and are therefore still left without a decision. It is in your interests to ensure these transfer review meetings are taking place and request confirmation from schools/local authorities for dates.

If you still do not yet have your amended final EHC Plan from your Local Authority, you should chase this as soon as possible. You should also consider a Pre-Action Protocol Letter to obtain this, which is explained further in this newsletter.

# Phase Transfer timeline

## 6<sup>th</sup> JANUARY

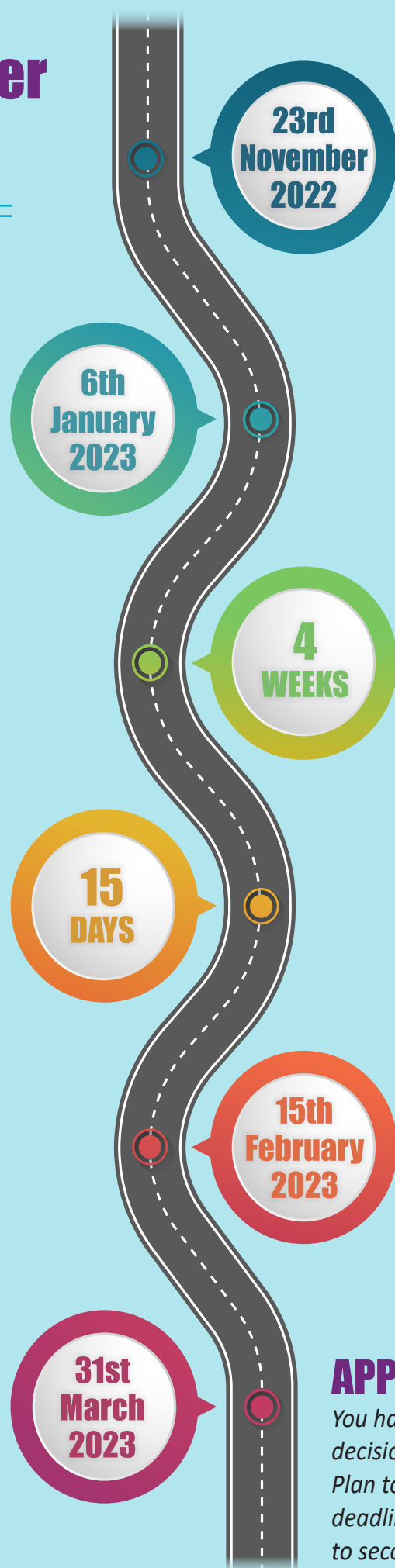
This is the last date in which the Annual Review of Phase Transfer review for young people transferring from Secondary to Post 16 and from Post-16 onwards should take place to meet the final deadline.

## 15 DAYS...

Parents have 15 days to make comments on the EHC Plan, it is important parents ensure they have their say on the draft. The draft will be used to consult with potential placements.

## 31<sup>st</sup> MARCH

For all EHC Plans transferring from secondary to post-16, the Local Authority must send the finalised amended plan by this date.



## 23<sup>rd</sup> NOVEMBER

This is the last date in which the Annual Review or Phase Transfer Review for children transferring from Early Years to Primary, Primary to Secondary (and everything in between and before) can take place to meet the final deadline.

## 4 WEEKS...

Following your Transfer Review meeting, the Local Authority have 4 weeks to confirm that they will amend the child/young persons' EHC Plan.

This decision should be accompanied by an amendment notice with a draft amended EHC Plan. Section I of this EHC Plan will be left blank until the plan is finalised.

## 15<sup>th</sup> FEBRUARY

For all EHC Plans for Early Years to Primary, Primary to Secondary (and everything in between and before) the Local Authority must finalise and send the plan by this date.

## APPEALS - 2 MONTHS...

*You have 2 months from the date of the decision letter enclosing the amended EHC Plan to Appeal to the SEND Tribunal. The deadline is the same whether that is primary to secondary, or secondary to post-16.*

# Secondary to post-16 Phase Transfer

*By Nicole Lee, Solicitor*



**When a young person is in the year of secondary to post-16 phase transfer, a different deadline applies than applied for all the phase-transfers a child has gone through before.**

**Regulation 18(1)(a) of The Special Educational Needs and Disability Regulations 2014** states that when a young person is moving from secondary school, to a post-16 institution, the Local Authority must review and where necessary amend the EHC Plan, so that it names the placement the young person will attend, by the **31st March**.

It's really important to note that a phase-transfer still happens, even when the child doesn't need to change placements. Many settings have both a secondary and post-16 provision as part of the same Department for Education registration, and on the same site. We have seen incidents of Local Authorities and/or educational settings advising parents that there is no need for a transfer review where the child does not need to change setting. **This is incorrect.**

In order for this deadline to be met, the transfer review should take place no later than the **6th January**. This is because the Local Authority is allowed a maximum of 12 weeks from the date of the Transfer review to make a decision, and issue the final EHC Plan.

In practice, Local Authorities are poor at meeting deadlines, so a review before Christmas would allow you some additional time, if the deadline is missed.

It's important to note that phase transfers are linked to phase, not age. If a child has been educated outside of chronological year group, they will need to have their phase-transfer review when they are in the phase-transfer year, and not based on their age.

## **Transfers between post-16 settings:**

It is possible for EHC Plans to be maintained up to the end of the academic year in which a young person turns 25. In such cases, it is highly likely that there will, at some point, be a transfer from one post-16 setting to another.

These transfers are covered by **Regulation 18(2) of the SEND Regulations 2014**. This says that where it is proposed that a young person will change post-16 placement, that the EHC Plan must be reviewed, and if necessary amended, at least five months before the transfer should take place. In practice therefore, the transfer review should happen at least eight months before the transfer takes place. This is because the Local Authority are allowed 12 weeks to issue their decision after the review, and if amending the Plan, amend and finalise it.

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There is no fixed deadline on when the five month period will be, as this is calculated based on the end date of the placement. For example, if the placement will end on the last day of summer term (21st July), the EHC Plan must be reviewed and amended by 21st February. If however the placement continues until the beginning of the Autumn term (4th September), then the EHC Plan must be finalised by the 4th April.



The educational setting and/or Local Authority should be clear exactly when the placement is proposed to end, so that you can calculate the deadline correctly. It will vary from case-to-case.

If you have a child in post-16 placement, and the LA are trying to use a review process to change the placement against your wishes, it's really important to know that **Regulation 18** requires at least 5 months' notice. Very often, parents receive far less notice than this, with the LA announcing as a foregone conclusion that the placement will be changing in the near future. The Regulations do not allow this.

Many post-16 placements are registered to educate young people until the age of 19, and so their placement will come to a natural end in the academic year that the young person has their 19th birthday. In such cases, you will want to make sure that a transfer review is being held in your child's final year, at least eight months before the proposed transfer. It must not be assumed that your child leaving a post-16 placement means that the EHC Plan should be ceased, and that another placement doesn't need to be found.

For information on Ceasing to Maintain an EHC Plan, please visit our **SEN Legal YouTube** page for a completely free-to-access Webinar.

Hayley  
Mason



Friday  
12pm

Navigating the SEN maze: entitlement,  
provision and Appeals

**D**yslexia  
SHOW2023

**P**ARENTS

# The power of a simple Pre-action Protocol letter.

*By Hayley Mason, Senior Solicitor & Director*

**As you will have read multiple times in this newsletter, timescales are absolutely key when it comes to ensuring a successful phase transfer for your child/young person.**

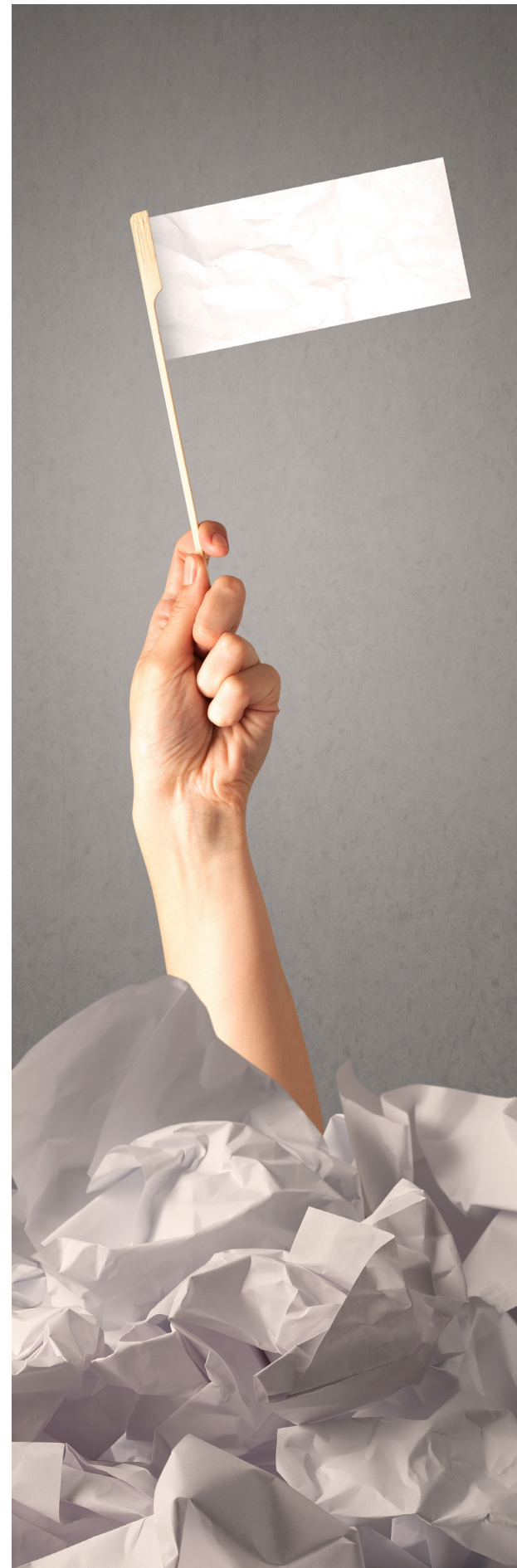
Worryingly this year, however, when we started to post on social media about the legal deadlines that must be adhered to, we were met with alarming comments from parents about how they had already been informed that their Local Authority would not be able to meet the legal deadline. Unfortunately for Local Authorities, the deadlines of **15th February** and **31st March** are legal deadlines that cannot be ignored; to do so is unlawful.

If you have not received your final EHC Plan by the deadline – regardless whether you have been informed by your Local Authority that they will not be able to meet the date, a simple Pre-Action Protocol letter can ensure you receive your final EHCP without delay, so that your ability to bring an Appeal before the new academic year is not compromised.

A “Pre-Action Protocol Letter” is a legal letter sent to the Head of Legal Services, and the Head of the Relevant Department (usually education). This letter must follow the Pre-Action Protocol, which sets out the form of a Pre-Action letter, and the information that it should contain.

While it is possible to proceed to a Judicial Review in the Administrative Court if the matter is not resolved at the Pre-Action stage; a **well drafted and legally sound Pre-Action protocol letter will often ensure you receive a final EHCP and resolves the issue in the vast majority of cases**, without the matter ever needing to be referred to the Administrative Court. At SEN Legal, Pre-Action letters have around a **99% success rate**.

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### Other instances where a Pre-Action Protocol letter would be useful to force the Local Authority into complying with their legal duties in phase transfer cases may be:

- ✓ The Local Authority not giving you a decision within 4 weeks of an Annual Review.
- ✓ The Local Authority not providing your child with appropriate or full-time education.
- ✓ The Local Authority unlawfully refusing to provide, or fund home-school transport.

If a Pre-Action Protocol Letter setting out the unlawful behaviour and the action we expect the public body to take does not resolve matters, then it may be necessary to submit a Judicial Review claim to the Administrative Court. This is very unusual, but unfortunately not impossible.

In a Judicial Review matter, it may be possible to obtain 'legal aid funding' in the child/young person's name to bring the claim but you must also be aware that should you lose the claim you may also be liable for the legal costs of the winning party, so it is important to take legal advice as to the likely success of your claim before proceeding to a Judicial Review.

**This works both ways, as in the event of a successful claim you may also be able to recover a proportion of your costs from the public body (possibly around 70-80%).** As in matters such as this the issue is so clear cut, where there is a deadline set out in law, that the Local Authority have not complied with, for this reason, public bodies are almost always open to resolving the matter within 14 days and outside of the Administrative Court.

Challenging a public body can seem a daunting task, but many of our clients are surprised to find that the law is in fact in their favour and that forcing their Local Authority to act lawfully is achieved quickly and easily.

If your phase-transfer isn't running smoothly, or isn't running at all because you are not yet in receipt of your child/young person's final EHCP and your Local Authority has veered off course, contact us on 01284 723952, and we can talk through getting things back on track.



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**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](#).



# Hearing dates at the SEND Tribunal

*By Idhren Drew, Solicitor*

## Appeal Timelines & Hearings

Regulation 18 of The Special Educational Needs and Disability Regulations 2014 sets out the deadlines for when Local Authorities must review (and if necessary amend) a child or young person's EHC Plan to name placement, where that child or young person is in a 'phase transfer' year (i.e. due to enter Reception, Year 7 or Year 12 in September 2023). These deadlines are **15 February** for Reception and Year 7, and **31 March** for Year 12.

Although you might think that this allows plenty of time for an Appeal to be concluded before September 2023, in reality, timing is already extremely tight. Using a recently submitted 'phase-transfer' appeal as a guide, which received a Hearing in May 2023, one can see that it won't be long before Hearings reach June and then July, particularly given that many Appeals will still not have been registered. Although the Tribunal does sit during August, it is our experience that where a Hearing date is not supported by the Local Authority in the case (due to summer holidays etc), it will often be adjourned until September or even later.

Note also that even after the Tribunal issues its decision, the Local Authority is afforded a period of time under the 2014 Regulations in which to issue a new final EHC Plan (5 weeks for Sections B, F and I Appeals, which we recommend, 2 weeks for Section I only Appeals). This means that you really need a Hearing date before August, if you are to receive a new final (legally binding) EHC Plan before September.

Of course, the Tribunal is well aware of the difficulties, and issued guidance last year that it would be 'protecting' time in its listings, between March and July, specifically to try and ensure that 'phase transfer' Appeals are dealt with as early as possible. However, this should be read with caution – last year, employing a similar approach, some phase transfer Appeals were still being heard in October 2022, meaning that for the intervening period, that child / young person was left without any placement at all. To put this into context, for those Appeals which do NOT qualify as 'urgent', Hearings are currently being listed at the end of January 2024.

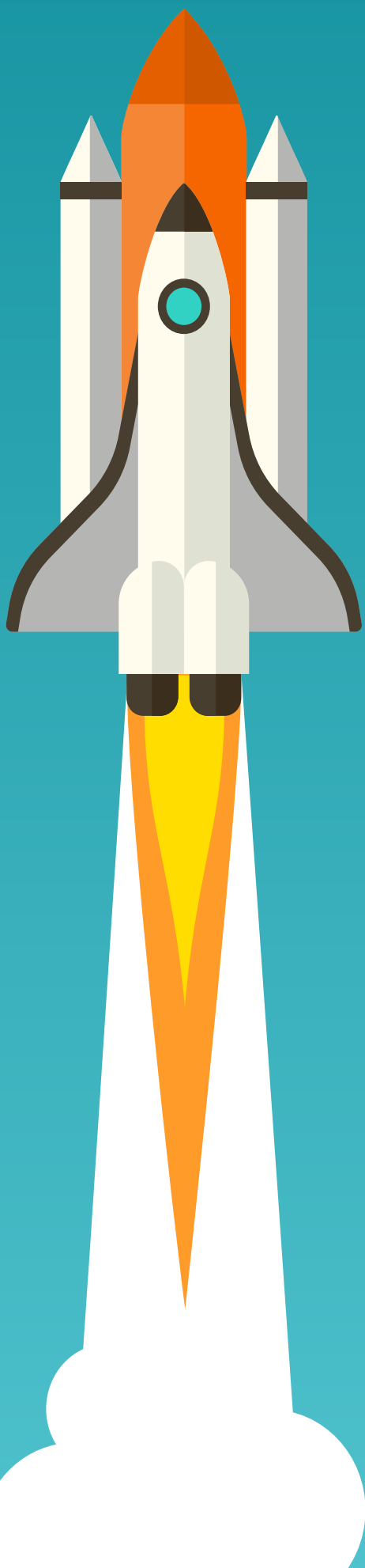




## Maximising the chances of your appeal being completed prior to September...

- 1.** Try to ensure that your Local Authority issues the EHC Plan (with the updated placement) promptly. Delay simply denies you your right of appeal (should you need it), so try to hold them to the deadline or if they are late, chase them until you receive the updated EHC Plan.
- 2.** With timings so tight, it is really important that you are well prepared and submit your Appeal as soon as possible – fill out the application form (SEND35), obtain your Mediation Certificate ASAP (they must provide it within 3 working days of your request) and if at all possible, be in a position to name the school you are seeking.
- 3.** As the Tribunal is entirely ‘evidence driven’, to really give yourself the best chance of success, have reports done from independent ‘experts’ (e.g. educational psychologists) to confirm what should be in the EHC Plan, as the child’s or young person’s needs (Section B) and provision required (Section F) will support the placement that is ultimately awarded.
- 4.** On registration of your Appeal, you may find that despite it being a ‘phase-transfer’ Appeal, it has been registered without an expedited timetable and you have been given a Hearing for next year. We have had experience of this recently, even where the Appeal submission has been clearly flagged as high priority ‘phase transfer’. If this happens to you, write back to the Tribunal immediately, challenging the timetable and requesting a Hearing date before September.
- 5.** Police the Appeal deadlines. If the Local Authority misses a deadline, such as serving it’s formal response to the Appeal (where it must set out whether it’s opposing the Appeal and crucially, the reasons for its opposition), write to the Tribunal immediately, chasing it. Do not let timings slip as it will greatly increase the chances of a Hearing adjournment down the line. We often experience Local Authorities not effectively preparing their cases and then successfully seeking a later evidence deadline and Hearing date as a consequence.
- 6.** And finally, even once the Appeal is over, keep chasing the Local Authority until you receive the new Final EHC Plan! Then check the wording carefully to ensure that it is an accurate version of what was agreed / ordered.

And if all this sounds too much and you’d rather have someone else navigate the maze on your behalf, we are here to help.





# Don't believe the misinformation...

you **CAN** get an EHC plan for Dyslexia!

We've helped hundreds of families to secure the right support for their child's education. If you need our help, contact the team at **SENlegal** today.

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### Will the Government's "Improvement Plan fix SEND?



*Hayley Mason*      *Steve Broach*      *Renata Blower*      *Tania Tirraoro*      *Matt Keer*      *Sharon Smith*

# **RECORDING**

# Parent's options if your preferred school is not named.

Whilst appealing the decision and if the Tribunal will not take place until after September, parents have basically two options. They are:



By Melina Nettleton, Principal Solicitor

## 1) Send the child or young person to the placement named by the LA:

There are pros and cons of this approach:

The placement named by the Local Authority may fail. Evidentially this would be useful and prove a point.

There may be a difference of opinion, the Local Authority placement may say that it is working beautifully and that they are meeting needs. This gives an evidential advantage to the Local Authority. The parental opinion may differ. It is possible to challenge such claims by sending the parental Educational Psychologist into the Local Authority placement to investigate the provision that is being made for the child/young person. The Tribunal does have power to force schools to admit investigating experts.

What about the effect on the child? Is there a risk that an inappropriate Local Authority placement may cause the child/young person unnecessary harm.

## 2) Home Education:

The legal obligation is to educate. It is not to send a child to school. However, if challenged, it would be necessary to establish that some kind of an education is being provided. It is not necessary to follow the national curriculum. If the young person is of an age where compulsory education applies, then the young person should be removed from the school roll under Paragraph 8 (1) (d) of The Education (Pupil Registration) (England) Regulations 2006. This avoids any unpleasantness with action to enforce school attendance, such as fines (up to £2,500), Parenting Orders, Education Supervision Orders etc.

**Paragraph 8 (1) (d)** of the Regulations is headed "Deletions from the Admissions Register" and states:

*"In a case not falling within Subparagraph a of this paragraph, that he has ceased to attend the school, and the proprietor has received written notification from the parent that the pupil is receiving Education Otherwise Than At School."*

Under this regulation, the proprietor is the Headteacher or Principal. **Regulation 8 (a)** relates to the existence of a School Attendance Order. There is no problem if no Order exists.

The only other issue is whether the Education Otherwise is relating to a special school. In the case of a special school, application must be made to the Local Authority and, if refused, then to the Secretary of State for Education. Fortunately, before the Secretary of State gets around to deciding it, (administratively they are very slow), you should have had your Tribunal hearing.

