

# SENlegal

NEWSLETTER

Issue 3 - January 2018

# 2018

For Professionals & Schools  
working in the SEND Sector.

HAPPY NEW YEAR  
from all of us at  
**SENlegal**

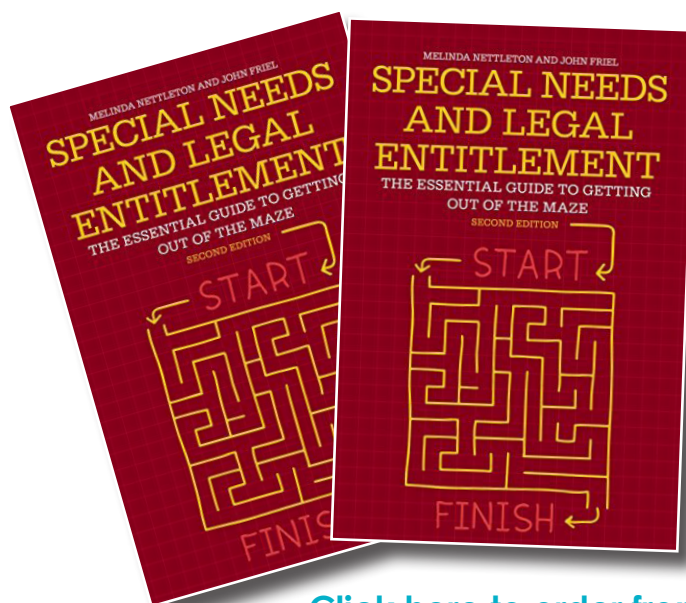
## In this Newsletter:

The Funding Fudge

Direct Payments. What are they  
and do I really want one?

Dates for your diary - HACs  
workshops & Annual Conference

Annual reviews and avoiding the  
pitfalls.



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**amazon.co.uk**



*By Melinda Nettleton - Principal Solicitor, SEN Legal.*

**The 2017 School Survey by The Key, found that SEN funding was inadequate and Local Authority referral systems for top up funding are too difficult.**

Parents and Schools are not powerless where there is an EHC Plan, because the Local Authority (not school) has ultimate responsibility for funding all of the Special Educational Provision in Sections F and I of an EHC Plan. This is due to Section 42 of the Children and Families Act 2014 which requires the Local Authority to secure the Special Educational Provision specified in the Plan.

**There is no get out clause.** The Court of Appeal has held that:

**"there is no best endeavours defence in the legislation".**

*See R v North Tyneside Borough Council [2010] EWCA Civ 135, [2010] ELR 312.*

Whilst an EHC Plan can make reference to arrangements for funding the provision (e.g. banding) such arrangements have no legal effect and the Local Authority remain ultimately responsible for making the provision in full if the school or NHS fail to do so, *R v Cumbria County Council ex parte P* [1995] ELR 377 & *R v Oxfordshire ex parte C* [1996] ELR 135 & *R v Hillingdon ex parte Queensmead School* [1997] ELR 331.

The Education Funding Agency (EFA) is only an executive agency of the Department for Education. An executive agency is part of a government department, but is treated as managerially and budgetarily separate. This means that the Education Funding Agency can legally have no greater power than the Department for Education. Legally the Department for Education and EFA cannot override Section 42 of the Children and Families Act 2014 and decisions of the courts on this issue.

This means no school is bound by the notional SEN budget (i.e. the £6,000) and the Local Authority's top-up funding arrangements. Interestingly, implicit acknowledgement of this point appears in the DFE newsletter to all Local Authorities October 2014 which concludes "£6K is not a threshold for access to EHC needs assessments or to EHC plans".

In summary, the cost of provision in Sections F and I is legally recoverable.

**Legal action is successfully being taken if monies are unlawfully withheld or delayed due to labyrinthine Local Authority process by courageous parents and schools.**

**Need advice or more information?**

Call our friendly team on **01284 723952** to speak with one of our specialist Solicitors.

# SEN Legal/ 3PB Barristers Annual Conference 2018

Hosted this year at the iconic London location,

*The Tower of London.*

More details will be sent via email shortly, but please save the date for now as we'd love to see you there!

APRIL

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**HACS**  
Hillingdon Autistic Care & Support

Upcoming 2018 workshops for parents, carers and professionals

**3rd  
February**

**'Secondary and  
post-16 Transfer'**  
10am - 1pm

**17th  
March**

**'Transferring  
to an EHCP'**  
10am - 1pm

**21st  
April**

**'Obtaining an  
EHCP'**  
10am - 1pm

**12th  
May**

**'Exclusions'**  
10am - 1pm

**Speaker: Melinda Nettleton, Principal Solicitor at SEN Legal**

All sessions will be held at HACS Resource Centre, Dudley Place, Hayes UB3 1PB.  
For more information or to book, contact [catherine@hacs.org.uk](mailto:catherine@hacs.org.uk)

# Direct Payments.

What are they, and what do they mean for our School?



*By Nicole Lee - Specialist Solicitor, SEN Legal. (pictured right)*

**Under Section 49 of the Children and Families Act 2014, parents or young people can now ask for a personal budget, which can be put into place in three ways. The most frequently requested way, is through direct payments.**



## What are Direct Payments?

Direct payments are funds paid from the Local Authority, to the parent or young person, in order for them to contract and manage provision themselves. For example, choosing and paying for their own Speech and Language therapy provision.

The Special Educational Needs (Personal Budgets) Regulations 2014, are the specific regulations which deal with direct payments for education. Regulation 9 states that a Local Authority may not make direct payments to fund provision which will be delivered within an early years, school or post-16 placement, without first obtaining the written consent of the head teacher (or equivalent).

**This leads the question, what does a direct payment arrangement practically mean for an educational setting?...**

**1.** If you provide consent for provision to be delivered by way of a personal budget, then practically, this means that an outside agent, such as a Speech and Language or Occupational Therapist, will need to visit the school in the frequency set out in the child's EHC Plan (weekly, fortnightly etc.), to deliver the provision.

**2.** Much like any visitor to your school premises, any outside agent should not be permitted to be left alone whilst on the school premises. However, this is no different than if therapy were to be delivered by an NHS therapist, rather than by an independent therapist funded through direct payments. It is widespread practice for independent therapists or other experts who work in schools to maintain an enhanced DBS Certificate, and will be happy to provide a copy to you for your records.

**3.** In many cases, it will be necessary to provide a quiet and empty room, for the provision to be delivered, particularly in the case of 1:1 direct therapy. Again, this is no different than if therapy were to be delivered by an NHS therapist, rather than by an independent therapist funded through direct payments. This should also be written into the child's EHC Plan.

Ultimately, where a child has an EHC Plan, the Local Authority are under an absolute duty to ensure that the provision set out in Section F of the EHC Plan is provided. Therefore, if an EHC Plan contains provision for a therapist or other professional to visit a child at school in order to meet the child's needs, then that person will need to attend, regardless of whether that person is in the employment of the Local Authority or NHS, an independent practitioner paid directly by the Local Authority, or an independent practitioner paid by the child's parent by way of direct payments.

The purpose of the direct payment scheme, is to allow parents to take some control about the provision their child receives. This in turn allows them to feel that they have a positive and tangible role to play in the provision which is made for their child. Working collaboratively is likely to foster a positive 'working together' mentality, which will hopefully result in a better learning experience and learning outcomes for the child.

Ultimately, provision written into an EHC Plan must be delivered. Therefore, refusing a personal budget will not prevent the provision being implemented. It will simply influence the way in which the provision is funded. However, it will have the practical effect of removing the parents decision making abilities.

If you have received a request for your consent to a personal budget, and you have any specific questions about how your response may affect your educational placement, please do let us know. We are more than happy to help.



### Links you might find useful...

- 1) [Section 49 of CFA2014](#)
- 2) [The Special Educational Needs \(Personal Budgets\) Regulations 2014](#)

# Annual Reviews - and how to prepare.



*By Hayley Mason - Senior Solicitor, SEN Legal.*

**As you will know, where a child/young person is in receipt of an EHC Plan, it must be reviewed annually by the Local Authority. The first review must be held within 12 months of the plan being finalised and subsequent reviews within 12 months of the previous review.**

Emergency Annual Reviews can be carried out sooner (where a substantial change in circumstances require).

## **In preparation for an Annual Review:**

1. The relevant Local Authority **must** consult with the child/young person's parent(s) (or young person directly) and the school/institution attended, about the EHC Plan;
2. Information **must** be gathered from the young person, parent(s) and relevant professionals and circulated (ordinarily by the school) two weeks before the Annual Review meeting; and
3. An Annual Review meeting **must** take place to discuss the EHC Plan.

What always surprises me however, is how many schools (particularly specialist schools) prepare the Annual Review paperwork with great enthusiasm and intent but at a detrimental cost to the parent(s) of the child/young person in receipt of an EHC Plan, or the young person themselves.

## **There are two common errors:**

1. The annual review papers are overly positive. For example, "Johnny has really progressed in his speech and language and has achieved all of his outcomes" and/or;
2. The annual review papers **clearly** document progress but **fail** to explain what provision is actually being put in place to achieve such progress. Further, the papers are silent on what progress the child/young person can go on to achieve.

Point 2 is particularly pertinent for specialist schools. These specialist settings (often because they are exactly that – 'specialist') where it is standard practice for teachers to be trained and experienced in autism/dyslexia, or to have on-site speech and language/occupational therapy, or a multi-disciplinary team, fail to adequately set out the provision they provide.

Taking the above sentence as an example, if one of my client's had given me 'Johnny's' paperwork to review' I would expect the above sentence to accurately read:

*"As a result of one hour of direct speech and language therapy delivered once per week by the on-site speech and language therapist, Johnny has really progressed in his speech and language. He has been attending social communication skills groups, with a maximum of 4 pupils on a twice weekly basis in order to achieve his current social communication and interaction outcomes. As a result of this continued work, next term Johnny will work towards.... [insert relevant outcome here]."*

## So why is it so important to get the information correct?

After the annual review meeting, the Local Authority will review the EHC Plan (and all of the evidence) and **must** notify the parent(s) of the child/young person **within four weeks** of the meeting:

1. Whether they will be leaving the EHC Plan as it is;
2. Whether they will be amending the EHC Plan; or
3. That they are ceasing to maintain the EHC Plan.

A Local Authority can only 'cease to maintain' an EHC Plan where it is no longer necessary for it to be in place. This should be happening in very few cases and only where there has been a substantial change in the child/young person's special educational needs

Whichever decision the Local Authority makes, either 1, 2, or 3 above, this decision will provide the child/young person's parent(s)/young person with a Right of Appeal to the SEND Tribunal.

If the level of detail (described above) is missing from the Annual Review papers however, we are seeing a sharp rise in the number of Local Authorities coming to the (in fact sensible) conclusion *"why should we continue to fund this EHC Plan? Johnny has progressed, he has met all of his outcomes and he does not have any further outcomes to achieve?"* Inevitably leading to either a reduction in provision or withdrawal of provision entirely.

The Local Authority may decide that if all progress has been made, a specialist setting is no longer necessary and 'Johnny's' needs can instead be met in a mainstream setting. This is often the complete opposite of the child/young person's parent(s) or the young person themselves wishes - often to remain at the same setting with the level of provision specified in Section F of their EHC Plan.

We do recognise that due to time and budget constraints also often a lack of co-operation, putting these papers together can be cumbersome for a school/institution. If the child/young person's parent(s) have legal representation, ask them to look through the paperwork for you, before they are circulated. A Legal Representative experienced in this field will often know the school's provision well and will be able to pick up on missing information.

For example a typical discussion might go:

**Legal Rep:** *"How did Johnny progress so well with his speech and language?"...*

*"Through one hour of direct speech and language therapy delivered once per week by the on-site speech and language therapist, and attending social communication skills groups, with a maximum of 4 pupils on a twice weekly basis"..."*

**Legal Rep:** *"ok, so why doesn't the papers say that? – put it in"*

**Don't let a lack of preparation cost you a place and the parent/young person an Appeal. With correct preparation, annual reviews can often run smoothly without requiring parents to Appeal to the SEND Tribunal to secure their current provision/placement.**

# Visit the SENlegal team at these events...

the autism show  
The National Event for Autism

Manchester  
29 - 30th June

SNAP PARENT CARER FORUM  
CENTRAL BEDFORDSHIRE

Bedfordshire  
21st March



SEN Show

Central London  
5 - 6th October



Farnborough  
17th May



BDA International Conference  
and EXPO 2018

Telford  
12 - 14th April

pinpoint

for parents by parents

St Ives, Cambs  
1st February

the autism show  
The National Event for Autism

Central London  
15 - 16th June



Is there a topic you'd like us to cover in the next issue of our SEN Legal Newsletter?



Click on the box to  
register your suggestions

We value all feedback and will aim to cover as many topics as possible. Thank you.