

**Welcome to Landmark Chambers, Rook Irwin Sweeney and Support
SEND Kids' 'Education Otherwise Than At School;
a law and practice update' webinar**

The recording can be accessed [here](#).

Your speakers today are...



Leon Glenister

Barrister, Landmark Chambers



James Betts

Senior Solicitor, Rook Irwin Sweeney

Overview

- What is EOTAS?
 - Difference between EOTAS and elective home education
 - Interaction with s19 Education Act 1996
- How is s61 applied? Case law review
- Procedure if it is felt EOTAS may be required for a child
- How EOTAS should be dealt with in an EHC plan
- Evidence if requesting EOTAS
- Dispute resolution if EOTAS is not agreed
- Q and A

Overview

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- What it says on the tin –education outside of a formal school or college setting
- Provided through s61 of the Children and Families Act 2014
- (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.
- LA funded
- Can be full time but can also include split placements
- Can be at home or another external educational setting

Not to be confused with...

- Elective Home Education
 - - EHC plan names a school and does not contain EOTAS provision
 - - Decision made by parent to educate at home/de-register from school etc
 - - LA may consider parent has made 'suitable alternative arrangements' (s42(5) of the CFA)
 - - If dispute between parents and LA may need to be resolved through Tribunal
- LA duty to provide suitable education for those out of school
- s19 Education Act 1996
- Usually a temporary arrangement. For example, a child has an EHC plan naming a school but is too ill to attend
- Duty quite broad – education generally has to be what the LA consider is suitable
- If will be long term arrangement, will want EOTAS to be set out in an EHC plan.



Leon Glenister

Barrister, Landmark Chambers

Introduction

- Key provision: s61 of the Children and Families Act 2014
- Key case: *NN v Cheshire East Council* [2021] UKUT 220
- Questions:
 - What SEP is necessary?
 - Inappropriateness?
 - Has there been consultation?
 - Discretion or duty
 - Where does EOTAS provision go in the EHC Plan?
 - What goes in Section I

Children and Families Act 2014

Special educational provision otherwise than in schools, post-16 institutions etc

- (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.

Q1: what SEP is necessary?

- Applies to SEP that it has decided is necessary for a child or young person
- Therefore, EOTAS question arises AFTER the question of what SEP is necessary to meet the child or young person's SEN: *S v Bracknell Forest* [1999] ELR 51

Q2: inappropriateness: “a school” or “any school”

- Means “any” school or post 16 institution, not just that it is inappropriate for the LA proposed placement to make the provision: *Derbyshire CC v EM and DM* [2019] UKUT 240 (AAC).
- This means factors will usually centre on the child or young person (e.g. anxiety) or the nature of the special educational provision (e.g. specific equipment).

Q2: inappropriateness: meaning of “inappropriate”

- LA / Tribunal is not just asking if school “can” make SEP, but whether it “would not be suitable” or “would not be proper”: *TM v Hounslow* [2009] EWCA Civ 859 paragraph 26, *NN* paragraph 32
- This includes evaluation of circumstances of case including: the child’s background and medical history, the particular educational needs of the child, facilities that can be provided by a school and otherwise than at a school, the comparative costs of alternative provisions, the child’s reaction to the provisions, the parents’ wishes and any other particular circumstances that might apply.
- Parental wishes also relevant by section 9 EA 1996, but not determinative.

Q2: inappropriateness: meaning of “inappropriate”

- Examples:
 - A child’s “school related anxiety“ may lead for it to be “inappropriate” for provision to be made at a school: *M v Hertfordshire CC* [2019] UKUT 37
 - A child’s “firm views”, in the context of “extreme controlling behaviour” should have been taken into account: *NN*.
- Overall, wide discretion for LA / Tribunal

Q2: inappropriateness: part of SEP being EOTAS

- It is possible for a specific part of SEP to be provided out of school, e.g. a particular therapy: *NN* paragraph 30

Q3: has there been consultation

- The LA must consult with child's parent or young person on EOTAS.
- Principles of consultation will apply:
 - Decision must be at a formative stage
 - Parents or young person must be given sufficient information
 - Adequate time to respond
 - Response to consultation must be given conscientious consideration
- Decision ultimately that for judgment of LA or Tribunal.

Q4: discretion or duty?

- Section 61: the LA “may arrange” for any SEP to be provided otherwise than at school/institution/placement
- But:
 - Framed as discretion, but effectively a duty with reference to section 42 CFA 2014
 - Discretion already exercised as to whether “inappropriate” or not

Q5: Where does EOTAS provision go in the EHC Plan?

- Provision goes in Section F: *NN* para 47(i).
- Does EOTAS affect specificity in Section F?

DM v Cornwall CC [2022] UKUT 230 (AAC): the specificity required will depend on a specific case, but “in some very general sense...education which is bounded by a school building and the provision and rules that may apply to all pupils in that school may to an extent be assumed and not need to be stated whereas that provision *may* need to appear more explicitly in a case where the EHCP concerns a child being educated at home and otherwise than in school.”

Q6: what goes in Section I?

- The FTT should consider whether a school or type of school will be “attended by” the child, i.e. “be present at”: *NN* paragraph 43. This includes part time attendance.
- If the child does not attend a school, section I should be left blank (this is logical as the LA has decided no school/institution is “appropriate”): *Derbyshire CC v EM and DM* [2019] UKUT 240 (AAC).
- What is specified must be strictly limited to the name and type of school, and home tuition is not included in Section I: *East Sussex v TW* [2016] UKUT 528 (AAC) paragraph 33.

Q6: what goes in Section I?

- A “school” is an educational institution outside FE and HE sector that provides primary and/or secondary education: s4 EA 1996.
- Whether something is a school is a question of fact for the Tribunal: *TB v Essex CC (SEN)* [2013] UKUT 0534.
- A “post 16 institution” is an institution which provides education or training for those over compulsory school age but is not a school or HE institution: CFA 2014 s83(2).



James Betts

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Procedure if EOTAS might be needed

EHC assessment for those that do not have an EHC plan already...

- the test to obtain an EHC needs assessment is whether the child has or may have SEN, and it may be necessary for provision to be made under an EHCP (s.36). Parent or school can request (or young person if 16 or over).. If considered EOTAS may be needed threshold for assessment will likely be met
- The test for an EHCP to then be issued is whether it is necessary for provision to be made under an EHCP (s.37).
- An EHC assessment includes gathering information from health, social care, educational psychologist, school, and any other person reasonably requested.
- 20 weeks from start to finish

If have an EHC plan already...

- Annual Review
- Re-assessment must be done if requested by parent, young person or placement (rare in practice – can take longer than Annual Review)

Evidence

- Expert reports (from school, EPs, therapists, CAMHS etc and any other relevant professionals) to explain
 - What are the needs that mean it is inappropriate for provision to be delivered at school/college
 - Specific and quantified recommendations as to the provision that is needed
- A proposed timetable/provision plan including:
 - What the week will look like;
 - Who will do what, where and when;
 - How many hours will each person be involved for;
 - Where is it proposed the provision will be delivered;
 - What programmes/qualifications will be undertaken;
 - Who will be involved in delivering the programme together with details of their qualifications (CV etc);
 - Will any particular equipment be needed;
 - If therapies will be needed set out;
 - Short and long term outcomes;
 - The costs of the provision (important to avoid arguments later)
- Views of the child/YP

EHC Plans

- The EHC plan is set out into sections:
 - Section B – special educational needs; Section F – special educational provision
 - Section E – proposed outcomes
 - Section C – healthcare needs; Section G – healthcare provision
 - Section D – social care needs; Section H – social care provision
 - Section I – school placement.
- Important legal rights under section 42 of the Children and Families Act 2014 – a local authority must provide the provision set out in Section F of an EHC plan, and a CCG must provide the healthcare provision set out in Section G of an EHC plan
- Can continue up to the age of 25 if there is an educational need for one. No lower age limit

What the EHC plan should look like

Section B – should set out the needs that mean EOTAS package needed. For example, if child or young person is unable to attend school this should be set out here

Section F – Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise....provision must be specified for each and every need specified in section B

- If the placement will be a split placement, clearly set out what aspects of the plan are to be EOTAS
- Who will oversee the programmes and who will deliver
- Where will the EOTAS provision be delivered
- Do those delivering the package require any particular level of training and experience?
- Any external group/social activities
- Is any therapeutic input needed? SLT/OT/Physio – if so, how many hours, how often
- Any other professional input needed (Psychologist, Counsellor, Specialist Teachers, Dyslexia specialist))
- Is any particular level of equipment needed? (laptop, communication devices, sensory equipment etc)

Section I – should be blank if no school to be attended

Annual Reviews

A meeting takes place between school/parents. LA and relevant professionals should be asked to provide evidence and be invited.

From Year 9 onwards must include a focus on preparing for adulthood, including employment, independent living and participation in society and options and choices for the next phase of education

LA to make decision following the meeting as to whether to amend the EHC plan.

Legal timescales – 4 weeks to confirm if any changes then a final plan within 8 weeks.

Personal Budgets and Direct Payments

- Personal budget: an amount of money identified by the LA to deliver the provision in a plan
- Direct payment: where that money is paid to parents to arrange
- An LA that maintains an EHC plan, or is securing the preparation of an EHC plan, for a child or YP must prepare a personal budget if asked to do so by the child's parent or the young person
- Where a request for direct payments has been made, a local authority must consider that request
- LA must make arrangements for provision of information, advice and support including organisations that can provide assistance on direct payments

Direct Payments

When will direct payments be made?

- recipient will use them to secure the agreed provision in an appropriate way
- parent or a nominee will act in the best interests of the child or the young person when securing the proposed agreed provision
- the direct payments will not have an adverse impact on other services
- securing the proposed agreed provision by direct payments is an efficient use of the authority's resources

Advantage – choice and flexibility

Disadvantage – responsibilities of becoming employer - tax, insurance etc

Dispute Resolution

- Tribunal
- Mediation
- Judicial Review

Tribunal appeals

Various decisions can be appealed to the First Tier Tribunal for SEND:

- Refusal to carry out EHC needs assessment or to issue EHCP;
- Disagreement with contents of EHCP;
- Disagreement with the decision not to amend/to amend EHCP following annual review
- Disagreement with a decision to cease EHCP

Limitation: 2 months from the date of the decision (i.e. the decision letter sent with the new EHCP)

Can also ask the Tribunal to make recommendations about health and social care sections

Note that Tribunal is currently operating with very long timescales for appeal – the sooner appeals can be issued the better

Mediation

Before an appeal can be brought, consideration must be given as to whether or not to mediate

Not necessary to have a mediation but the person bringing the appeal needs to show they have thought about it.

Parents contact the mediator - will then either arrange a mediation or issue a certificate confirming the person has received advice about mediation. Will then have another month from the date of the certificate.

Judicial Review

Judicial review is a potential remedy for enforcing any rights that cannot be resolved through a Tribunal. Such as:

- A failure to deliver provision in an EHC Plan (if for example a child/YP has an EOTAS package in their EHC plan already but aspects of it are not being provided)
- A child out of school not receiving any education
- A failure to make a decision within legal timescales (such as delays making a decision following an Annual Review)
- Refusal to make provision by way of a direct payment/personal budget

Legal Aid

Legal aid is still available for SEN appeals and judicial reviews

For Tribunal appeals eligibility based on parental means unless child is over 16

For JR – based on child’s means

To check if eligible and access legal advice [Civil Legal Advice \(CLA\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/civil-legal-advice)

Where to go for help

SEND Support Kids: a platform that provides legal information in a user friendly, Q&A format, which is accessible to SEND families and advocates. Once registered on the website - can post questions that will then be answered by legal professionals. <https://supportsendkids.org>

Noddy Guide – also now in a Q and A format. PDF can be accessed [here](#).



Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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