

Children's additional needs in private law and financial remedy proceedings

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The welfare of a child is the court's paramount or first consideration but how should the court take account of a child's additional needs? If a party raises an argument that a child's additional needs may be relevant to the court's decision-making, knowing where to look for evidence and what to look for is essential.

What are Special Educational Needs?

Section 20 of the Children and Families Act 2014 ('the Act') sets out when a child or young person has special educational needs ('SEN'). The criteria can be summarised as follows:

- A learning difficulty or disability which calls for special educational provision to be made.
- A significantly greater difficulty with learning than others of the same age.
- Difficulty or prevention in making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

Section 36(8) of the 2014 Act places a duty on local authorities to assess children who may have SEN. The legislation provides as follows:

'The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that –

- (a) the child or young person has or may have special educational needs; and
- (b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.'

Although a local authority may refuse to assess, the threshold for assessment is low. Not every assessment will result in an Education Health and Care Plan ('EHC Plan'). Section 37(1) of the Act goes on to set out when a local authority must issue an EHC Plan.

According to s 37(2) and (3) an EHC Plan should specify the following:

- '(2) ...
- (a) the child's or young person's special educational needs;
 - (b) the outcomes sought for him or her;
 - (c) the special educational provision required by him or her;
 - (d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
 - (e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the

- Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);
- (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).
- (3) An EHC plan may also specify other health care and social care provision reasonably required by the child or young person⁷

In short, an EHC Plan will describe the child's needs, the provision that will be made to meet those needs as well as the school place/provider. It will also set out the arrangements if a child is to be educated otherwise than at school, for example, in the home. In terms of educational provision, the EHC Plan is legally binding on the local authority and what is set out in sections F and I of the Plan must be provided as a matter of law.

An EHC Plan can last until the age of 25 unless the criteria set out in section 45 of the Act are met. AN EHC Plan will cease to be maintained when the local authority is no longer responsible for the child. If the child moves to another local authority's area, the new local authority is extremely likely to become responsible for maintaining the EHC Plan. An EHC Plan may come to a more natural end if a child's outcomes have been achieved or special educational provision is no longer necessary.

Why does this Matter?

SEN is a definition which embraces a large variety of diagnoses but let's take Autism Spectrum Disorder ('ASD') as an example. Put in the context of a simple scenario, one party may argue that: (i) the child could not cope with transitioning between two houses; (ii) may struggle with change; or (iii) that the other party's living arrangements may not be conducive to meeting the child's sensory or physical needs.

Where can the court find reliable and persuasive evidence as to the child's day to day needs? An EHC Plan can have significant evidential value and should not be overlooked. The description of the child's needs is often lengthy and set out in great detail. It usually covers issues such as the child's cognition and learning needs, physical needs as well social, emotional and mental health needs. EHC Plans usually contain a number of bespoke expert reports as appendices. One frequently sees reports from educational psychologists, child psychologists, psychiatrists, speech and language therapists, occupational therapists, physiotherapists, as well as teaching staff or nursery staff.

These reports may contain valuable information which can assist the court in better understanding the child's diagnosis and resulting needs. It may be open to a party to argue that if the school reports a child struggling with changing classrooms, an average class size or unstructured times during the school day this ought not to be overlooked. The reports may also identify a child's sensory difficulties or challenges in the physical environment. Information about a child's social skills and peer relationships may also be relevant, particularly if there are other children residing in or visiting the home. An EHC Plan could also have real evidential value if a party is seeking to persuade the court that a particular diagnosis is of no importance in the court's decision-making process. The EHC Plan may reveal that the child's needs are not significant and therefore ought not to impinge on a party's proposed child arrangements.

What if the child does not have an EHC Plan? If the local authority has not issued an EHC Plan, ask what other records are held by the school. Often the outcome of the assessment and other documents will be available to the parties even if the assessment did not result in an EHC Plan.

The First Tier Tribunal

It is important to note that if either party disagrees with a local authority's choice of

school as provided for in the EHC Plan, there is a specific route of appeal available through the First Tier Tribunal (Special Educational Needs and Disability). The First Tier Tribunal determines a range of disputes including:

- the refusal to assess a child or young person;
- the refusal to issue an EHC Plan;
- disagreement over the content of the EHC Plan.

JW v Kent County Council [2017] UKUT 281 (AAC) confirms that both parents can be joined as separate parties if they hold different views.

Financial remedy proceedings

A child's additional needs may affect the outcome of financial remedy proceedings. A detailed discussion of the multitude of financial implications is beyond the scope of this article and is particularly fact specific but some general points can be made. It may be argued that one party cannot work due to the additional time spent in caring for a child or the distance involved in taking a child to or from a specialist educational setting. It is important to look at the local authority's home to school transport policy for children with SEN to understand whether a transport duty is triggered and what the parties may be entitled to, including whether or not it would cover both parents' homes.

If one party's earning capacity is affected by the child attending school for only part of the school day or because of frequent requests to collect the child early, the parties may wish to consider whether the school is actually meeting the child's needs. If a party is unable to work because a child is not attending school at all, s 19(1) of the Education Act 1996 may be applicable. It imposes a duty on local authorities to 'make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education

unless such arrangements are made for them'. Successful reliance on this provision in appropriate circumstances may assist a party who would like to be able to work but is unable because the child is not in education.

It may also help to consider what additional help is available through a local authority's Local Offer as set out in s 30 of the 2014 Act. The Local Offer should be a user-friendly guide as to the services which are available for children, young people and families.

The cut off point for child maintenance or other child-related benefits may not tie in with young person achieving independence. Section 29(3)(b) of the Matrimonial Causes Act 1973 allows for financial provision for children to be extended beyond the child's 18th birthday if there are special circumstances. Further, pursuant to para 3(2)(b) of Sch 1 of the Children Act 1989, where there are special circumstances an order can also extend beyond the child's 18th birthday.

Selling or retaining the family home can also be an extremely important decision for parties who have a child with additional needs. An EHC Plan can be transferred to a new local authority where appropriate but a child may attend a very specialised school in proximity to the home which makes selling undesirable. Careful consideration needs to be given to whether or not deferring the sale of the home may be appropriate with more bespoke triggers for sale, for example, dependent on when it is anticipated the child or young person will reach independence, transition to adult services or enter residential school or supported living.

There may be arguments about housing needs and adaptations. When it comes to housing needs, it is worth checking the availability of Disability Facilities Grants or other financial support. Some schemes may have a pay-back clause and therefore a decision would need to be made about the optimum time to sell the family home if the parties have already received a grant and carried out works.

Conclusion

The law relating to special educational needs and the associated entitlements may be unfamiliar territory for the court. If a child's additional needs are relevant to the outcome of proceedings, it is crucial that the issues are identified at an early stage and the court is provided with proper evidence in support.

Please also see the article in March's *Family Law*, 'Special educational needs for the care issues lawyer: why is it relevant?' by Baljinder Bath and Sarah Palmer ([2020] Fam Law 341).