

Guest Article

How can parents minimise the impact of separation on children with SEND?

What additional considerations should parents to children with SEND be mindful of within family litigation?

Anthony Collins Solicitors' associate solicitor Kadie Bennett and 3PB's specialist family and education law barrister Aimee Fox look at Children Act proceedings and the considerations that parents of a child with SEND may find helpful.

Having a child with special educational needs or disabilities (SEND) can bring with it some of life's greatest highs and lows. Children with additional needs rely on adults to be their voice and champion them to ensure they get everything they need to reach their potential and achieve as much independence as they can.

According to the latest figures from Statista, 2020 saw 103,592 divorces granted in England and Wales. Separation for parents of children with SEND can present additional complications and worries. The stresses and strains of relationship breakdown are sometimes amplified by concern about the impact on the child.

Like all separated families, parents are encouraged and expected to explore alternative routes of dispute resolution with the aim of being able to parent cooperatively in the future. Parents are encouraged to try and resolve any disputes through mediation. This involves the parents discussing their issues with an independent trained mediator in an effort to reach an agreement without the intervention of the court. The benefits of mediation are wide-ranging and should not be overlooked. Mediation allows parents to focus specifically on their child(ren) and what they need; this can allow for bespoke arrangements to be reached that are suitable for both the child and the parent rather than arrangements being foisted upon the parties by the court and a judge who has never met them nor their child.

Mediation also allows greater control over the arrangements. If both parties feel that they have compromised and have been 'in charge' of the agreement reached it is more likely to work. Mediation allows for more positive communication between co-parents which can lay solid foundations for the future co-parenting relationship and ultimately benefit the child.

If an agreement cannot be reached and an application to the court is necessary, the starting point for the court in Children Act proceedings is what is otherwise known as the Welfare Checklist. This can be found in Section 1 of the Children Act 1989 which states that where the court makes a decision in respect of a child, the child's welfare should be the court's paramount consideration. The circumstances the court shall have particular regard to are set out in Section 1(3). Of practical application to this article is Section 1(3)(b) – the child's physical, emotional and educational needs and Section 1(3)(d) – the child's age, sex, background and any characteristics of theirs that the court considers relevant.

Applying the above legislation, a parent of a child with SEND will want to ensure that the child's specific needs and/or disabilities are well documented and evidenced to ensure that they are fully considered by the court when making any determinations in respect of the child and the arrangements for them.

It is important that the court has a proper understanding of each child's needs when making welfare decisions and the starting point will be to provide evidence of any diagnosis and prognosis for the child. The court is likely to want to consider how this impinges on the child's day to day life. Evidence may be contained in medical records, either from their GP or treating clinicians (or both). Treating therapists and the child's educational placement may also have documents that would assist the court in making decisions.

Parents with a SEND child will know that Special Educational Needs is defined in Section 20 of the Children and Families Act 2014 (when a child or young person has special educational needs):

- (2) *A child of compulsory school age or a young person has a learning difficulty or disability if he or she has a significantly greater difficulty in learning than the majority of others of the same age, or has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.*
- (3) *A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).*
- (4) *A child or young person does not have a learning difficulty or disability solely because the language (or form of language) in which he or she is or will be taught is different from a language (or form of language) which is or has been spoken at home.*

The majority of children with SEND will be able to be supported through the resources already available in their school.

A useful resource for parents is the Local Offer. Each local authority has to publish its own and they can be accessed online. The Local Offer is an indication of what is available for children with SEND although it is not a

guarantee that these resources will be provided to a specific child. If a child receives additional support, then the parent can obtain both a letter from their child's GP or treating clinicians as well as the school's SEN coordinator (SENCO) who may be able to comment as to the child's needs and the provision they require.

Some children require an Education, Health and Care Plan (EHCP) which documents their individual needs and lists the provision in place to meet those needs. If the parents hold differing views about the child's needs or the provision they require, then both parents can express their individual views to the local authority when it is considering the EHCP. The EHCP will also be reviewed on an annual basis and parents should be involved in the review process.

The EHCP will also name a school the child should attend or will make it clear if a child is unable to attend school and receives education otherwise than at school (EOTAS). If the child attends a specialist or an independent school this could help defend against an application to re-locate or to remove/change a child's school if that relocation or proposed school fails to satisfy the child's needs.

Evidentially, the EHCP could be of real importance as it contains appendices from the various professionals involved with the child, this could include a report from an educational psychologist, psychiatrist, speech and language therapist, occupational therapist, and/or physiotherapist which will possibly negate the need to instruct independent experts within any Children Act proceedings. In addition, it may prevent unnecessary delay within the proceedings and distress to the child which could be caused if duplicate reports are sought.

The EHCP and the appendices may also detail whether the child has any social, emotional or mental health needs; whether the child has difficulties coping with change; whether they have any sensory issues; whether they need a certain physical environment; insight into sibling attachment and relationship dynamics and may comment on the differences between the child's needs in school compared to at home.

This could provide a wealth of evidence in support of a parent's position within any litigation whether that is to challenge a parent's position who overstates a child's needs or to challenge a parent's position who minimises a child's needs. A parent may wish to ask the court to carefully consider the content of the EHCP.

If a therapist can only attend one household, then any ordered arrangements would need to take this into consideration and would need to work around those therapies. Conversely, if the therapist can attend different households as long as the required equipment is made available, this may not be a bar to contact taking place at another property.

If the parents have formerly lived together, arrangements could be considered wherein each parent stays at the child's home during the child's time with them during which time they are responsible for the child's care. This would enable a child to remain in the family home and spend time with each parent there. This has coined the term 'birdnesting' or 'nesting'. And whilst the practicalities of such an arrangement would need to be carefully considered this could potentially offer a good solution to arrangements where a child needs access to specially adapted equipment etc.

It is important to remember that every child with SEND is different, with differing abilities, strengths and differing needs and that careful analysis of the EHCP and appendices may be required.

It is also important to remember that the court wouldn't just consider additional needs and disregard other factors when making its decision. The presumption currently held by the court is that as long as it is safe, the involvement of a parent in the life of the child concerned will further the child's welfare. This will be subject to careful consideration of any safeguarding risks that are alleged such as domestic abuse or allegations in respect of the ability to parent or meet a child's needs. 'Involvement' does not automatically mean direct contact and could mean maintaining a relationship with a child through letters, phone calls etc and there are occasions wherein a court will determine that it is in the child's best interests for contact not to take place.

*If you require further advice about the arrangements for your child with SEND, please do not hesitate to contact either **Kadie Bennett** – associate solicitor at Anthony Collins Solicitors at kadie.bennett@anthonicollins.com or call 0121 214 7417 or to instruct **Aimee Fox** on a family or education law matter, please contact her clerk Ian Charlton on ian.charlton@3pb.co.uk or call him on 0121 289 433.*

In Brief

Deputy Head Banned for Use of Inappropriate Restraint

A Deputy Head Teacher has been banned from the profession by the Secretary of State for Education following a recommendation by a panel of the Teaching Regulation Agency (the TRA).