

# The Nationwide Shortage of Specialist Schools: Remedies

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1. There is a nationwide shortage of specialist schools for children and young people with special educational needs.
2. The BBC reports that the number of pupils with an Education Health and Care Plan (“EHCP”) now stands at just over 355,500. This is 50% more than in 2016. In a similar period, the number of young people in specialist schools and colleges in England has increased by nearly a third. Provision of school places has not kept up with the need for it. The BBC reports that half “*of state-funded schools in England for children with special educational needs and disabilities are oversubscribed*”.<sup>1</sup> While the government has announced that 33 special free schools will be built in England, in addition to 49 already planned these are thought to be “years away”.<sup>2</sup>
3. This raises the question - what remedies can families seek in the meantime? I consider three areas:
  - a. Target duties in the Education Act 1996 and complaints to the secretary of state (enforcing the obligation to secure a sufficient number of schools);

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<sup>1</sup> Elaine Dunkley, Kate McGough & Harriet Agerholm, “Overcrowded specialist schools: ‘We’re teaching in cupboards’”, BBC News 20 February 2023 accessed 23/03/2023 via <https://www.bbc.co.uk/news/education-64418797>.

<sup>2</sup> Kate McGough & Elaine Dunkley, “*New special educational needs schools years away, says heads’ group*”, BBC News 2 March 2023 accessed 23/03/2023 via <https://www.bbc.co.uk/news/education-64804555>.

- b. Special Educational Needs and Disability Tribunal (seeking that a particular school is named);
- c. Judicial Reviewing a failure to secure sufficient schools, failure to secure provision specified in an EHCP, and violation of the right to education.

### ***Target duties in the Education Act 1996 and complaints to the Secretary of State***

4. Sections 13 and 14 of the Education Act 1996 were described in the following terms in the case of *R (on the application of O) v London Borough of Hackney* [2006] EWHC 3405 (Admin):

*“28. The duties under sections 13 and 14 are target duties: see the R v ILEA, ex parte Monin Ali [1990] 2 Admin LR 822. Those target duties will be met if the local authority is taking all reasonable steps to meet those duties. The defendant's duty under section 13 and 14 is to ensure that a sufficient number and type of schools are available. The statutory obligation then passes to the parents to ensure that their child obtains and attends one of those available places. Furthermore, as was conceded in the outline written submissions for the claimant, there is nothing in the Act to suggest that the education and schools that the defendants are required to secure under these sections need be in the defendants' area.”*

5. Upon a complaint being made the Secretary of State has powers under section 496-497A of the Education Act 1996 to direct the local authority to comply with its duties. This is a powerful tool that can be used to force local authorities to do all that they reasonably can to secure sufficient schools of the appropriate type are available.

### ***Special Educational Needs and Disability Tribunal***

6. If a parent wishes their child to attend a particular type of school then they may wish to ensure that their child's needs are accurately set out in the EHCP and that appropriate provision is specified. Often, if there is a high level of need this may result in the provision only being capable of delivery in a specialist school. Section 42 of the Children and Families Act 2014 (“**CFA 2014**”) imposes a mandatory duty

to secure the provision named therein. As was for example noted in *ZK v London Borough of Redbridge* [2020] EWCA Civ 1597 by Simler LJ at [13]:

*“13. As Lewis J observed in relation to the section 42(2) duty in R (Simone and others) v Chancellor of the Exchequer and another [2019] EWHC 2609 (Admin) at [8]:*

*“It is well-established law, and accepted by all parties, that a local authority must ensure that the special educational provision specified in the EHCP is provided to the child or young person. Furthermore, that obligation is not dependent on available resources: the local authority is obliged to secure that the specified special educational provision is made available (see R (N) v North Tyneside BC [2010] EWCA Civ 135 and the reasoning, in relation to a different provision, of the House of Lords in R v East Sussex County Council ex p. Tandy [1998] AC 714 ). ”*

*There is no dispute between the parties that this statement reflects the well-established law relating to section 42(2) of the 2014 Act (and its predecessor sections in the earlier legislation) which is part of a scheme for achieving the “best possible educational and other outcomes” for children and young people with special educational needs and disabilities (see section 19(d) of the 2014 Act). It imposes a mandatory duty to secure the special educational provision specified. The word “secure” is an ordinary English word and needs no gloss. What is plain is that the duty has no “reasonable endeavours” escape clause available to excuse failure to secure the provision specified. It was accepted by Ms Rhee QC on behalf of Redbridge that once an EHC plan is in final form and specifies a particular provision, the duty to secure the special educational provision specified in it is absolute and must be met by the local authority.”*

7. Alternatively, parents are able to request the school that the parents prefer and challenge any Local Authority’s refusal to name this school in the EHCP. CFA 2014 section 39(3) contains the presumption, in relation to qualifying schools, that an LA will name the school requested by the child’s parent or young person unless it is (1) unsuitable (2) incompatible with the provision of efficient educations for others or (3) incompatible with the efficient use of resources. Further, there is in all cases

a general duty to have regard to parental preference under section 9 of the Education Act 1996.

8. Where a school is named, it is under a duty to admit the pupil or young person. As it was put by Phillip Mott KC in *R v Medway Council* [2019] EWHC 156 (Admin) at [26] “Section 43 imposes a statutory duty on the governing body, proprietor or principal of school named in an EHC plan to admit the child or young person for whom the plan is maintained.” (This only relates to qualifying schools and the reference to section 43 is to the Children and Families Act 2014).

### ***Judicially Review a failure to secure sufficient schools***

9. Judicial Review may provide a remedy to parents who have not been provided with a suitable school. This may be brought on three bases.
10. **First, failure to secure sufficient numbers of schools of the right type:** Judicial review is generally a remedy of last resort. As such if a complaint to the Secretary of State would offer an equally effective remedy, then permission for Judicial Review may be refused. Whether a complaint to the Secretary of State is an adequate alternative remedy was considered in the case of *M and W v London Borough of Hounslow* [2013] EWHC 579 (Admin) (per Mr Justice Sales at [9]-[13]). In that case permission was granted to proceed but this was principally because the issue related to legal interpretation on which judicial guidance was deemed to be most apposite. The case was expressly contrasted to *R. v Essex CC Ex p. Bullimore* [1997] ELR 327 in which permission was refused because the Secretary of State was considered to be better placed than the Court to judge the issue and the Claimant had not availed himself of this remedy.
11. **Second, failure to secure provision specified in the EHCP:** Judicial Review of a failure to secure provision specified in an EHCP may of course render the Local Authority liable to Judicial Review under section 42 of the Children and Families Act 2014. Mandatory non-delegable duties which do not have a best endeavors defense will likely be enforced by mandatory order. Even here the Court has however allowed a reasonable period to comply with the order (see for example

*The Queen (on the application of BA, by his litigation friend and father, PA) v Nottinghamshire County Council* [2021] EWHC 1348 (Admin) in which the LA were given four weeks to comply with the mandatory order.)

## 12. Third, breaches of Article 2, Protocol 1 European Convention on Human Rights (“A2P1”):

- a. Per section 8(1) of the Human Rights Act 1998, if the Court finds that the act of a public body is unlawful it may award such relief or remedy, or make such order, within its powers as it considers just and appropriate. The Section 31(3) of the Senior Courts Act 1981 gives the High Court the power to award damages on an application for Judicial Review.
- b. A2P1 sets out, insofar as relevant here, that “*No person shall be denied the right to education.*” The test, while acknowledged as highly pragmatic, was put in the following terms by Lord Bingham in *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363 at [24] “*have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?*”. In the same paragraph Lord Bingham acknowledged that the right to education is relatively weak in that there “*is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil (as in Eren v Turkey).*”
- c. In the case of *R (on the Application of SB and ZB) v London Borough of Croydon and NHS South West London ICB* [2023] EWHC 489 (Admin) at [38], it was noted that the Ombudsman tends to provide damages in the sum of £200-£600 for each month of education lost. As such, in appropriate

cases, claimants may wish to seek damages in addition to remedial action from the Local Authority.

## Conclusion

13. It is clear that the shortage of school places is a crisis that is attracted the Government's attention. Where necessary, legal challenges may be appropriate to shine the spotlight upon parts of the country where the position is particularly bleak. Happily, the law provides the mechanisms through which to do this.

14. Local Authorities will want to take steps to insulate themselves against potential legal action arising from the national shortages in special schools. At the very least they should ensure that they do all that they reasonably can to secure appropriate schools and take care to deliver upon their duties when providing an EHCP. Local Authorities should also be alive to the litigation risk when children transfer into their area. *R (on the Application of SB and ZB) v London Borough of Croydon and NHS South West London ICB* [2023] EWHC 489 (Admin) is covered elsewhere within this newsletter but provides a salutary reminder to Local Authorities in this regard.

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