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Education, Disability & Public Law

What You Need to Know

(The New SEN Framework)

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SLIDE 1 – TITLE SLIDE

Joshua:

What You Need To Know (The New SEN Framework)

Suzannah:

by Douglas Silas.

SLIDE 2 – INTRODUCTION SLIDE

Douglas:

Hello, welcome to this webinar.

My name is Douglas and I'm a solicitor who specialises in representing children and young people with special educational needs (or 'SEN' as it usually referred to). I am also physically disabled myself and, as you can hear, have a speech impediment.

So, rather than you having to listen to me narrate this presentation to you as I know that it may be difficult for you to understand me sometimes, I have decided to ask some of the members of my team, Joshua and Suzannah, to help me by talking instead of me.

So, let's start the webinar…

SLIDE 3 – OVERVIEW

Joshua:

This presentation is split into three sections:

First is the main section entitled 'What the Law Says'.

The second section is entitled 'Theory vs. Practice'.

Finally, the third and last section is entitled 'Avoiding Disputes'.

This presentation is accredited by CPD UK for one hour of Continuing Professional Development for all types of professionals (i.e. from psychologists and therapists to doctors or other healthcare professionals – in fact, anyone who needs to do CPD).

Let's start first with a bit of information about who I am.

I am a solicitor who runs a small, niche, but nationally acclaimed firm of solicitors specialising exclusively in SEN cases – that is all we do!

We both advise and represent parents throughout the SEN process, including with appeals to and against the Special Educational Needs & Disability Tribunal (often referred to as the SEND) Tribunal.

I am best known for my popular website at www.SpecialEducationalNeeds.co.uk, which receives many thousands of visits every month, due to the vast array of free information it contains.

I am also the author of an eBook entitled: *'A Guide to the SEN Code of Practice (What You Need to Know)'* which includes an analysis of it, as well as the relevant legislation and Code Of Practice, together with internal and external hyperlinks to everything you need to know, so that you can always easily and quickly find the information that you are looking for.

Finally, I am also well-known as a lawyer who tries to avoid litigation or disputes wherever possible.

SLIDE 4 – WHAT THE LAW SAYS

Suzannah:

Before we look at the SEN framework though, it is important for us to first take a brief look at a history of education law itself.

Education law dates back to the Education Act 1944. Over three decades later, this was followed by the Warnock Report in 1978, an Inquiry into the needs of children with SEN. This laid the foundations for the introduction of Statements of Special Educational needs in England and Wales through the Education Act 1981. This Act introduced the requirement that local education authorities (which were then referred to as 'LEAs') had to identify and assess pupils with SEN who may require the LEA to decide on suitable provision for them. The 1981 Act was eventually superseded by the Education Act 1993.

The 1981 Act allowed for parents to appeal against decisions made about their child's SEN in the first instance to the LEA and thereafter to the Secretary of State for Education. However, as this gave rise to problems, the 1993 Act established an independent national SEN Tribunal, which was known as the SENT.

All Education law was then consolidated into the Education Act 1996 - Part 4 of which contained SEN law (please note that some relevant parts of the Education Act 1996 are still in force today; for example, section 9 still applies in relation to the concept of '*unreasonable public expenditure'* versus *'parental preference*').

There was further amending legislation over the years, most notably the Special Educational Needs & Disability Act in 2001 (known as SENDA). There were also a number of case brought in the courts from 1990 which made caselaw. The Tribunal became known as the Special Educational Needs & Disability Tribunal (commonly referred to as SENDIST) in 2001 when it started hearing disability discrimination claims and then became the SEND Tribunal in 2008 when it was incorporated into the wider Tribunals Service.

We have now entered a new era for SEN with the introduction of Part 3 of the Children and Families Act, the new SEN Code of Practice 2014 and associated regulations. This new legislation now replaces Part 4 of the Education Act 1996 and its associated regulations.

There was previously a SEN Code of Practice 2001 (in fact, many people forget now that this was actually a revised Code itself, because the original SEN Code of Practice came into force in September 1994, known as 'The Code of Practice on the Identification & Assessment of Special Educational Needs').

Although there is no time for me to talk about any more history in depth today, the main things that you should note are that, statistically, there have always been said to be approximately 20% of pupils in schools with SEN of one form or another. But only 2-3% of all pupils have Statements. This therefore means that 85-90% of pupils with SEN are educated in mainstream schools without Statements.

The debate on Statements has always overshadowed the issue of SEN. Concerns started to be formally expressed in 2002, when the Audit Commission found that 69% of SEN resources were focused on the 2-3% of pupils with Statements. Many people also felt that it was becoming a 'postcode lottery' and, although LA and/or school policies were key factors, parents would sometimes feel that they only got the necessary special educational provision (which I will refer to here as 'SEP') or preferred school for their child by bringing an appeal to the Tribunal.

There were many criticisms of the SEN framework between 2006 and 2010, with five different Inquiries on SEN and Disability issues. For example, in 2006, the Education & Skills Committee said that the SEN system was '*not fit for purpose*'. Probably, the most well-known Inquiry was called the Lamb Inquiry in 2009 which looked into parental confidence in the SEN system.

One of the final nails in the coffin for the previous SEN system was a critical Ofsted report in September 2010 entitled '*A Statement is not enough*'.

Something had to change …

SLIDE 5 – WHAT THE LAW SAYS

Joshua:

Part 3 of the Children and Families Act 2014 is split into 69 sections over 18 parts and cover things like:

- The definitions of SEN and SEP;
- Education, Health and Care (or EHC) provision, including the need for integration between services and the joint commissioning of services;
- The need for cooperation and assistance (both internally and externally) to do this;
- The provision of information and advice;
- The procedures for EHC needs assessments and the making of EHC plans following assessments;
- Information about appeals, mediation and dispute resolution processes; as well as
- Functions of local authorities (now commonly referred to as LAs) and schools, etc.

There is no time to go through everything in detail here today (if you want to find out more about the Act then please read Chapter 3 of my Guide to the SEN Code of Practice), but the main thing that I want you to note are the four principles set out in Section 19, the first section of the Act, that an LA must now have regard to.

SLIDE 6 – WHAT THE LAW SAYS

Suzannah:

Section 19 requires the LA to have regard to:

(a) The views, wishes and feelings of the child and his or her parent or the young person
(b) The importance of the child and his or her parent or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
(c) The importance of the child and his or her parent or the young person being provided with the information and support necessary to enable participation in those decisions; and
(d) The need to support the child and his or her parent or the young person in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes .

I have underlined here the main things that I want you to focus on but, in particular, I want you to consider the last part – the need to help a child or young person achieve the best possible educational and other outcomes.

SLIDE 7 – WHAT THE LAW SAYS

Joshua

This seems to mark a significant change in direction, doesn't it? There appears to no longer be a duty on an LA to just provide for an 'adequate' education. The Courts have previously held that no child is entitled to a 'Rolls Royce education', a 'utopian education', or the 'best possible' education. In fact, it has even been said that children are not entitled to an education that 'maximises their potential' (although personally, I believe that this may not be correct, as I think that we can probably only consider progress properly by looking at how a child is performing and their actual potential).

The main point though is that an LA now needs to have regard to achieving the best possible educational or other outcomes. This seems to raise the bar higher than it was. I realise that some people will say that 'having regard to' is not the same as being required to do something by law and that therefore the duty to still provide just an adequate education is the same as it was before. But to me, this doesn't explain why the Government has chosen to include this in the first section of Part 3. I think that we may require early litigation in the Courts to clarify what was actually meant by this.

The definitions of special educational needs and special educational provision remain roughly the same as they were before. However, as well as children, 'young people' are now referred to in their own right if they are over 16 years of age (at least at the end of the academic year in which they turn 16).

It is again still not counted as SEN if a child or a young person has a different home language as before, although now health and care provision can be considered as special educational provision, where it is provided for educational or training purposes.

SLIDE 8 – WHAT THE LAW SAYS

Suzannah

Other things to also note are that Section 30 now provides the definition of something called the 'Local Offer'. A 'Local Offer' is the publication of what provision an LA expects to be available for the children and young people with SEND, both in their area and that may be accessed out of their area.

Also, Sections 36-37, which are quite long, provide details about EHC needs assessments and plans.

Under section 43, there is also now a duty to admit a child or young person, not only to a maintained school named in an EHC plan, but also to other types of schools or institutions that may be named in it, such as an academy, a further education (or FE) institution, a non-maintained special school, or a 'Section 41 approved' independent institutions.

Section 49 also provides the definition of something else new called a 'Personal Budget', which allows for parents of children with SEN, or young people themselves, to request that the special educational provision in a EHC plan be equated to a sum of money. Please note though that there is only a right to request a Personal Budget, not a right to the Personal Budget itself (i.e. by way of Direct Payments).

Under Section 52, a parent of a child with SEN, or a young person with SEN themselves can now only appeal against an SEN decision by the LA (provided that the appeal is not only about a school) unless they have first obtained a 'Certification of Mediation'. This does not mean that they must have mediated before they can appeal (as was the requirement in an early form of the Children and Families Bill) but rather now, that they must be formally informed about the benefits of mediation before they can appeal.

SLIDE 9 – WHAT THE LAW SAYS

Joshua:

Other things that you may wish to note about this latter point is that, whereas there was previously only a legal duty on an LA to notify parents of their right to mediation when sending them an SEN decision, now LAs (and sometimes others) as well as providing for mediation rights when giving decisions, must attend for mediation itself if requested to do so by a parent or young person (for more details about this, you need to see the Code of Practice itself).

Also, the Children and Families Act says that the new SEN Code of Practice must be revised from time to time.

The clear theme running throughout Part 3 of the Children and Families Act is that the child, young person, and their family, must now be put at the 'heart' of the SEN process. The Act and the new Code of Practice also highlight the need for everyone to try and resolve disagreements before an appeal is brought.

There is also now the need for the joint commissioning and joint integration between those agencies providing education and those providing health or care services.

SLIDE 10 – WHAT THE LAW SAYS

Suzannah:

The new SEN Code of Practice 2014 is divided into an introductory chapter and eleven further chapters as follows:

Chapter 1: Principles;
Chapter 2: Impartial Information, Advice and Support;
Chapter 3: Working Together across Education, Health and Care for Joint Outcomes;
Chapter 4: The Local Offer;
Chapter 5: Early Years Providers;
Chapter 6: Schools;
Chapter 7: Further Education;
Chapter 8: Preparing for Adulthood from the Earliest Years;
Chapter 9: Education, Health and Care Needs Assessments and Plans;
Chapter 10: Children and Young People in Specific Circumstances; and
Chapter 11: Resolving Disagreements.

There are also two Annexes at the end of the Code of Practice entitled:

- Mental Capacity; and
- Improving Practice and Staff Training in Education Settings.

There is finally a Glossary of Terms and useful references (with hyperlinks) at the end.

SLIDE 11 – WHAT THE LAW SAYS

Joshua:

The Code of Practice lists a number of bodies who must have regard to it. 'Having regard' to a thing means something specific in law. Relevant bodies must not ignore it, must consider it and must explain any departure from it, in their decision making process. Relevant bodies include the following organisations:

- LAs - both education, and care departments (usually referred to as social services) as well as other departments that deal with housing, employment and other services;
- Schools (now including non-maintained special schools);
- FE colleges or Sixth Form colleges, which deal with post-16 education;
- Academies and others institutions which fall under the umbrella of academies, including Free Schools, University Technical Colleges or Studio Schools;
- Early years providers and Pupil Referral Units (commonly referred to as PRUs);
- 'Section 41 approved' independent schools or independent specialist providers;
- NHS Commissioning Boards or Clinical Commissioning Groups (commonly referred to as 'CCGs');
- NHS Trusts or NHS Foundation Trusts and local health boards;
- Young Offending Teams (and relevant Young Custodial Establishments);and
- The SEND Tribunal (which is now officially referred to as the First-tier Tribunal (SEND)).

Helpfully, the Code of Practice uses the emboldened word: **'must'** where it refers to a statutory requirement, but it also uses the word: 'should' to refer to best practice (i.e. it should be done if it can be).

SLIDE 12 – WHAT THE LAW SAYS

Suzannah:

The main changes to the new SEN Code of Practice 2014 from the previous Code of Practice in 2001, are things like:

- It now covers the 0-25 age range (as opposed to only covering the ages of 2-19) and includes guidance about disability as well as SEN;
- There is a clear focus on the participation of children and young people (and their parents) with decision making, both at individual and strategic levels;
- There is a stronger focus on higher aspirations and improving outcomes for children with SEN;
- There is guidance for LAs on publishing a 'Local Offer';
- There is guidance on the adoption of a 'graduated approach' for school-based intervention (there is now only one single category of school-based intervention known as 'SEN support', which replaces the previous two stage levels, known as School Action and School Action Plus);
- EHC plans now replace statements and Learning Difficulty Assessments (usually referred to as LDAs). LDAs have been supposed to replace statements for children over 16 who are no longer in school, but they have always been thought of as not having the same legal requirements or enforceability);
- There is a greater focus on a child or young person's transition to adulthood;
- It refers to duties under the Equality Act of 2010; and
- Providing information about the Mental Capacity Act of 2005

However, the most important thing I believe that the new Code of Practice changes is that it now provides guidance about the joint planning, the joint commissioning and overall cooperation in general between agencies responsible for making education, health and care provision.

SLIDE 13 – THE JOINT COMMISSIONING CYCLE

Joshua:

This is one of two pictures in this presentation that I have taken from the new Code of Practice – this first one is entitled the 'Joint Commissioning Cycle' and you can find it at paragraph 3.12.

You will see that the aim now (in the centre) is to provide 'improved outcomes' for 0-25 year olds with SEN or disability, including those with EHC plans. To achieve this the Code advises that we need to do, or there needs o be, five things (which are referred to around this):

- Establish partnerships across education, health and care and with parent groups, children and young people;
- Joint understanding;
- Joint planning;
- Joint delivery; and
- A joint review to improve the service offer.

You probably have heard the phrase 'joined-up thinking' before!

SLIDE 14 – WHAT THE LAWS SAYS

Suzannah:

With the implementation of the new SEN Code of Practice from 1 September 2014, a number of pieces of Statutory Guidance have ceased to have effect as of that date (subject to transitional arrangements) including:

- The SEN Code of Practice 2001;
- The Inclusive Schooling Guidance 2001; and
- The LDA Statutory Guidance of 2013.

There is just too much detail in the new SEN Code of Practice, so I would not be able to do it proper justice here in such a short time, so you can either read it directly for myself, or you can get a copy of my Guide.

Please don't just rely on what I say here - if you have a particular problem you will always need to go to the source to find out what you need to do.

However, I will still try to highlight what I believe to be some of the main things here …

SLIDE 15 – WHAT THE LAW SAYS

Joshua:

The Children and Families Act 2014 now provides for a number of things including:

- Section 25 – which refers to the duty to promote integration, although this duty is on LAs only in relation to education and training (as there is no reciprocal duty on health or care providers);
- Section 26 – which provides for the duty of joint commissioning for education, health and care services (chapter 3 of the Code of Practice gives practical examples about this);
- Section 28, subsection 3 – which provides for a duty of internal cooperation for LA officers! (Of course, this does not mean that there is a need to order people who work side by side physically in the same department to cooperate, but rather there is now a duty for all LA officers (even in different departments) to work together);
- Section 30 (together with schedule 2 of the associated Regulations) – which sets out a duty on an LA to publish a 'Local Offer';

Although, as before, in relation to statutory assessments for Statements of SEN, a request for an EHC needs assessment can still be made by parents or a school; by virtue of Section 36, a request for an EHC needs assessment can now also be made by a young person themselves, or if a child is brought to the attention of the LA by another body, such as a health or care agency.

SLIDE 16 – WHAT THE LAW SAYS

Suzannah:

The Code of Practice and Regulations set out timescales for EHC needs assessments and plans to be made. Previously there were 26 weeks from making a request for a statutory assessment for a statement, to a final statement being issued (which was neatly divided into periods of 6 weeks for requesting an assessment, 10 weeks plus 2 weeks for making an assessment, which hopefully would lead to a proposed statement being issued, and then 8 weeks for that proposed statement to be issued in a final form).

Now, as per Regulation 30, there are a total of just 20 weeks from the making of a request for an EHC needs assessment to the issuing of a final EHC plan. As per Regulation 5, the LA must still respond to the parents of the child with SEN or the young person themselves within six weeks of the request, to say whether or not they agree to conduct the assessment, but now, as per Regulation 10, the LA has to determine whether or not to make an EHC plan (and if so issue it in a proposed form) within a total of 16 weeks from the request. Then, as per Regulation 13, the LA must issue a final EHC plan within 20 weeks of the request.

Parents or young people have 15 days to respond to a draft plan, to make representations about it and to express their preference for an educational institution to be named (as this section is left bank in the draft plan); but as I said earlier, a request is now not just one that is made by parents or a school but can also be made by a young person themselves or others.

Although the process seems to be quicker overall (i.e. 20 weeks is 6 weeks shorter than 26 weeks) an LA can now take time from earlier on in the process to use later; for example, if they respond positively to a request for an EHC needs assessment within 2 weeks of the request, then, theoretically, they could later add these 4 weeks onto the 4 weeks between the proposing of an EHC plan at week 16 to the finalising of it at week 20. In effect, they still theoretically have 8 weeks to finalise a draft plan, as they had before with a draft Statement).

Although I welcome the fact that we are trying to do things more quickly, I am concerned that this could sometimes lead to practical problems; there is quite a lot to do now for LAs to meet timescales satisfactorily, if they are also now involving health and care more.

There is a helpful flowchart at paragraph 9.44 of the Code set out on my next slide …

SLIDE 17 – (NO TITLE)

Joshua:

This is my second and final picture in this presentation from the Code of Practice and sets out a flowchart which the Government believes should help LAs, parents and others understand the process. It seems a bit more complicated than the flowchart that was used in the previous Code, although it is a bit more colourful!

In orange boxes, you will see that there are still two main things for the LA to consider when a request for an EHC needs assessment is made (or when the child or young is brought to the LA's attention):

- Whether to conduct an EHC needs assessment; and then
- (After gathering information during the assessment), whether or not an EHC plan is needed.

On the right side, the red arrow shows the maximum time for the whole process to be completed as 20 weeks, and the blue arrow on the left side states that: '*at every stage, child and their parent and/or young person is involved fully, their views and wishes taken into account*'

Whilst the flowchart also refers to the timescales I have already spoken about in relation to the 6, 16 and 20 week deadlines, as well as the 15 days in which parents/young person has to comment/express a preference for an educational institution, you should also note that they also have a right to seek the agreement of a Personal Budget when provided with a draft EHC plan.

In addition, now, after receiving a preference for an educational institution, the LA must consult with the institution and they must respond within 15 calendar days (no longer just 15 school days) before then naming them (or another educational institution which has been consulted on and found to be suitable) in the final EHC plan.

As before, if there is dispute about the final EHC plan when it is issued, the LA must notify the parent/young person of their right to appeal.

SLIDE 18 – WHAT THE LAW SAYS

Suzannah:

One of the main concerns expressed before the new SEN framework came into effect was the structure of EHC plans. Previously, the format of statements was prescribed by law but, following a call for more 'localism' the Government has decided that the format of EHC plans should be agreed locally, but always have a statutory minimum of 12 sections - this means that we could potentially have up to 152 different types of EHC plans!

The 12 minimum sections are as follows:

Section A: The views, interests and aspirations of the child and his or her parents or the young person;

Section B: The description of their SEN;

Section C: The description of their health needs (which relate to their SEN);

Section D: their social care needs(which relate to their SEN);

Section E: The outcomes sought (this is quite important);

Section F: The description of the special educational provision required to meet the SEN described;

Section G: The health provision which is reasonably required by the SEN or disabilities;

Section H1: The social care provision to be made under the Chronically Sick and Disabled Persons Act 1970 (known as the CSDPA);

Section H2: The other social care provision that is reasonably required by the SEN or Disabilities;

Section I: The placement (which includes both the name and type of school, nursery, post-16 institution or other institution). Please note that Section I is left blank in the draft EHC Plan to allow parents or young people to express their preference for an educational institution to be named;

Section J: The Personal Budget if agreed, including any arrangements that have been made for any direct payments;

Section K: The advice and information that has been used to prepare the EHC plan (referred to previously with statement as the 'appendices'.

SLIDE 19 – WHAT THE LAW SAYS

Joshua:

As I said earlier, there has been Transitional Guidance issued in relation to transferring from the old SEN framework to the new SEN framework. In fact, although a first set of transitional guidance was originally issued with the final draft of the Code of Practice, a second version was then issued at the end of August 2014, just a few days before it came into effect on 1 September 2014.

Each LA was required to publish its own transition plan by 1 September 2014 and has subsequently had to set up, what are known as 'transfer reviews' between September 2014 and April 2018, to transfer existing statements into EHC plans. The reason for there being nearly four years for statements to be transferred to EHC plans is because there were over 229,000 statements to be transferred and it was not possible to transfer them all at once - it was recognised that in order to do things properly more time would be needed. Transferring statements to EHC plans is also not just meant to be a simple 'rebadging' exercise (i.e. taking the word 'Statement' off a document and replacing it with 'Education, Health and Care plan').

Transfer Reviews should normally replace Annual Reviews and should be at times when a significant review of the statement would have taken place. However, the Government has identified some groups of children and young people who should be considered as a priority for transferring from statements to EHC plans between 1 September 2014 and 31 August 2015 as follows:

- Children and young people with statements who were previously issued with non-statutory EHC plans (in the Pathfinders pilot projects);
- Those moving from early years settings to school (even if the institution is the same);
- Those moving from infant to junior school or those moving from primary to middle school;
- Those moving from primary or middle school to secondary school;
- Those moving from mainstream to special school or from special school to mainstream school;
- All children in Year 6, children in Year 9 and children/young people in Year 11; and
- Those moving between one LA and another LA

SLIDE 20 – WHAT THE LAW SAYS

Suzannah:

Let's now turn to the subject of Personal Budgets and Direct Payments…

Although there was much discussion about Personal Budgets and this was a headline early on, was it a bit of a red herring? As I said before, LAs only have a duty to prepare a Personal Budget about what the special educational provision is worth if they are asked to, but there is no actual duty on them to make Direct Payments in relation to a Personal Budget. As per Regulation 4(2), an LA only has to 'consider' requests for direct payments, and Regulation 6(1) lists conditions that have to be met for a direct payment to be made.

An LA must also provide information to parents and young people about Personal Budgets as part of their 'Local Offer' (such as things like about how funding is available, the eligibility and decision making processes). An LA must also provide information, advice and assistance to allow parents and young people to make informed decisions about whether to request a Personal Budget or Direct Payments (this is also referred to at paragraph 9.97 of the Code of Practice).

In fact, as referred to in paragraph 9.102 of the Code of Practice, any funding that is actually made must also be sufficient to secure the special educational provision and, as referred to in paragraph 9.104, if direct payments are made in relation to special educational provision and it is delivered on the premises of a school or other setting, the LA must also first get the agreement of that school or setting.

SLIDE 21 – WHAT THE LAW SAYS

Joshua:

Continuing the theme of personal budgets/direct payments …

Any disagreement about the special educational provision referred to in the personal budget can be appealed to the tribunal just like any other disagreement about provision, but the personal budget itself cannot be appealed against. A personal budget can also be provided in differing ways; for example, as a direct payment to parents or a young person, or to a third party nominee, such as a school. As I said before, the personal budget must also be at a suitable level to secure the provision and should be reviewed and adjusted at the Annual Review and the personal budget itself mustn't be used as funding for a school or college place. The personal budget may also lead to potential conflicts between parents, schools and LAs sometimes, especially where it is not easy to 'desegregate' the provision.

For example, if an LA has, say, 100 children who all need speech & language therapy, they may be able to approach a provider of speech & language therapy services and, due to 'economies of scale', agree with them to provide the therapy at £30 an hour. However, if an individual parent or young person were to try and obtain the same therapy provision privately, they may not be able to get it for less than £60 an hour. As such, the one hour of speech & language therapy that may be included in the EHC plan for which £30 is provided, would actually only buy 30 minutes of therapy if taken as a personal budget. I believe that some schools are already asking parents to let them take control of a personal budget themselves, so that they can then 'pool' them together with other pupils' personal budgets and thereby obtain better rates for provision that they could get individually.

But there is also the problem of where it is not easy to 'desegregate' the provision. Again, using an example of a speech and language therapist; the LA or school may be paying a therapist to come into the school to provide 10 children with speech and language therapy - some with 1:1 therapy, some with small group therapy and some with indirect therapy (such as setting up programmes for a teaching assistant to deliver). If one parent asks for a personal budget and then seeks to get $1/10^{th}$ of the cost so that they can arrange the therapy privately; firstly that money may not get them very much therapy and secondly, and perhaps more importantly, by doing this, they may then also, potentially, jeopardise the therapy provision for other children, as it is not easy to separate or 'disaggregate' the provision.

SLIDE 22 – WHAT THE LAW SAYS

Suzannah:

Turning to the subject of EHC plans running from 0-25 as opposed to 2-19, is this also a bit of a red herring?

Looking first at where the child is under 2, it was previously rare for a child under that age to be given a statement (although, interestingly, most people didn't realise that an LA was under a mandatory legal duty to assess a child under 2 if they were asked to).

In any event, a child under two who may require an EHC plan, will usually come to the LA's attention through health and care anyway.

In respect of children aged between 2 and 5, EHC plans use the same test as before. Again, a maintained nursery has to admit a child if they are named in a plan unless they are unsuitable or they can prove that to do so would be incompatible with the efficient education of others or the efficient use of resources.

But now, the nursery must also be a mainstream nursery unless that preference is incompatible with the wishes of others (such as he parents) or incompatible with the efficient education of others.

Whilst a maintained nursery must admit a child if they are named in a plan, an independent private or voluntary nursery has no duty to admit them and, in any event, an LA will only name them in a plan if it thinks it is 'appropriate' to do so.

SLIDE 23 – WHAT THE LAW SAYS

Joshua:

Turning to Post-16 provision - is this also another red herring?

Although we have been told that EHC plans now go to 25, in fact, plan only goes up to 25 if the 'outcomes' in it have not yet been achieved. There is no automatic right for an EHC plan to be kept until a young person is 25 and they can still finish their education or training by the age of 19.

As I said before, a child automatically becomes a young person at the end of the academic year in which they turn 16. All legal rights then pass automatically from their parents to them provided they are accorded mental capacity. The young person then will have a right themselves to request an assessment, a personal budget or express a preference for a placement, although they can still continue to involve their parents or family in these processes if they so wish to.

Regarding young people over 18 years of age, the test for an EHC needs assessment is the same as it is before that age, but an LA must also consider if the young person requires additional time to complete their education or training (as compared to a young person who does not have their additional needs).

We must also remember that Post-16 provision is also more varied - it can involve Sixth Form schools or colleges, 16-19 academies (both mainstream and special), Further Education colleges, special post-16 institutions, and even things like vocational learning or training (such as supported apprenticeships, etc.).

SLIDE 24 – WHAT THE LAW SAYS

Suzannah:

When the young person is over 16 and considering post-16 provision, they have the same rights as their parents had to request the name and type of institution to be set out in Section I of the EHC plan.

The test is again the same for this and the LA needs to consider whether it is unsuitable or incompatible with the efficient education of others or the efficient use of resources.

It must also be a mainstream placement unless that is incompatible with the wishes of the young person or the efficient education of others.

This also includes the right for them to request an independent school or college placement (if it is a section 41 approved institution).

But there are other things to watch out for if a young person is over 16 …

SLIDE 25 – WHAT THE LAW SAYS

Joshua:

Firstly, in respect of social care, the LA has to ensure that there is no gap in provision if moving them from child to adult care services (please note that the Care Act 2014 did not come into force until April 2015).

In relation to healthcare provision, the LA and the health agency must cooperate to ensure that the EHC plan and the healthcare plan are aligned. Again, the LA must ensure that there is no gap in provision if they are moving from child to adult healthcare services. For example, moving from CAMHS (the child & adolescent mental health service) to adult mental health services.

The main problem though, is when an LA can cease to maintain an EHC plan.

As statements could only continue to 19, there was some confusion as to whether a statement could be ceased on the day that the young person turned 19, or whether it would remain in place until the end of the academic year in which they turned 19. The courts also caused some confusion about this, by issuing conflicting decisions and eventually the Court of Appeal decided that they had to interpret the law literally, so that a statement could be ceased on the day the young person turned 19. To their credit though, many LAs agreed to continue the statement until the end of the academic year in which the young person turned 19, as otherwise it would be unfair to those who turned 19 in the autumn term of their last year at school.

But now, LAs may not cease to maintain EHC plans just because a young person is 19 or over. As I said before, an EHC plan will theoretically be able to continue up to 25, but there is no automatic entitlement or expectation that it will continue until then. As per Section 425 of the Children and Families Act, an LA can only cease to maintain an EHC plan if it is 'no longer necessary'– i.e. because the young person no longer requires the support in the plan.

The real question though is whether the education or training 'outcomes' have been achieved since, as I said before, a young person may need extra time (compared to someone without their needs) to complete or consolidate their learning.

SLIDE 26 – WHAT THE LAW SAYS

Suzannah:

The main aim is that the EHC plan should now prepare a young person for adulthood. An LA cannot just cease to maintain a plan even if the young person who is over 18 ceases to attend the institution named in it, it can only cease to maintain the plan if it reviews it first and ascertains that the young person does not wish to return to education or training or the LA considers that a return to education or training would not be appropriate for them.

The main problem though is probably about the question of 'mental capacity'. The only definition of 'capacity' makes reference to the Mental Capacity Act which needs a presentation in itself to explain!

The main thing to realise though is that there will always be an assumption of capacity unless it can be proven that all practicable steps have been taken to help without success. But there is a difference between a young person having no capacity and making unwise decisions. Just because a young person makes a decision which their parents or the LA would not make, does not of itself mean that they do not have capacity to make that decision.

You can find out more information about capacity in Annex 1 of the Code of Practice.

SLIDE 27 – WHAT THE LAW SAYS

Joshua:

Turning to the need to review EHC plans, it is still the same concept of annual reviews as we had before - we need to review EHC plans within 12 months of the plan being issued in its final form, or within 12 months of the last review that took place. However, as I said earlier, there is now also the need for transfer reviews to transfer from a statement to an EHC plan.

There are still the same deadlines for some transfers, such as 15 February in Year 6 for primary to secondary transfers ahead of transfer to Year 7 in September that year, but there are also now some deadlines for other types of transfers.

For example, for transfer from secondary school to post-16 institutions, final plans have to be issued by 31 May 2015. After 1 September 2015, final plans have to be issued by 31 March. Also, since young people sometimes transfer between post-16 institutions mid-year, an EHC plan must be amended to name a new institution at least five months before the transfer.

These types of transfers (sometimes referred to as 'phase transfers'),not only again cover transfers between infant to primary school, primary to middle school, primary to secondary school and middle to secondary school; but now also cover new things such as transfers between early years settings to school and, as I just said, secondary school to post-16 institutions.

SLIDE 28 – WHAT THE LAW SAYS

Suzannah:

LAs must always ensure that they review EHC plans for children under 5 every 3-6 months. This is because the needs of a child under 5 can change very quickly and they might require different provision as a result. This doesn't mean to say that a full annual review meeting with everyone attending should be held.

Again, two weeks' notice of an annual review taking place should be given to all those who are invited but now the annual review not only looks at the needs and provision in the statement as before which was focused on many of the educational needs and provision but now also reviews the education, health and care provision and the progress that has been made towards the outcomes on the statement as well as reviewing any personal budget arrangements.

Annual reviews from Year 9 at the latest must also focus on preparing child/young person on 'preparing for adulthood' including looking at employment, independent living and participation in society generally.

Again the school (or other institution) must send a report of the annual review meeting to the LA and everyone invited within two weeks of the meeting being held (or at least by the end of the term if that comes sooner).

However, now that the LA must decide whether or not to keep, amend or cease the plan within four weeks, which is new. Also, if they decide that they are amending the plan they must do so without delay (as prescribed in paragraph 9.176 of the Code of Practice).

Also when it comes to requests for reassessment, like before, the LA has no legal duty to agree/refuse and give a right to appeal to the Tribunal, if an assessment/reassessment has been requested or carried out within the six months prior to this new request.

SLIDE 29 – WHAT THE LAW SAYS

Joshua:

In terms of appealing against SEN decisions, this is the same set as before. You can appeal in the following situations:

- Where the LA has refused to assess or reassess;
- Where the LA has refused to make an EHC plan after an assessment or reassessment;
- Against the contents of a final or amended EHC plan - in relation to the description of SEN set out in section B, the special educational provision set out in section F, or in relation to the school or institution name in section I (or if no school or institution is named in section I);
- Against a refusal to amend an EHC plan following an annual review or reassessment; and
- Against a decision to cease to maintain an EHC plan.

Whilst appealing against EHC plans can sometimes be quite confusing, the main thing is to remember that you can still only really appeal against the special educational provision set out in the plan (although you can also appeal against the description of SEN or in relation to the school or other institution named as well).

There is still a right to bring judicial review proceedings against the LA or the commissioning health authority, where the education or health provision in the EHC is not being made in the plan, but there is no legal duty to arrange the care provision in a plan.

SLIDE 30 – WHAT THE LAW SAYS

Suzannah:

In terms of things you need to know about appealing in general, you need to remember that you cannot appeal against the outcomes or personal budget referred to in a plan. Also remember that parents of a child still have a right to appeal against a SEN decision if the child is under 16, but if they are a young person over the age of 16, they now have the right to appeal themselves. In fact, Section 58 of the Children and Families Act now even provides for pilot schemes to be set up in the future to allow a child to appeal directly.

And the Tribunal still has the same powers as before when determining an appeal - they can dismiss or allow the appeal in part or in full.

In terms of transitional provisions, existing appeal rights continue against a statement until there is a transfer review; so there will still be the usual rights of appeal that are accorded under the Education Act 1996 when the dispute concerns a statement and a parent does not have to consider mediation before appealing.

Additionally, an LA cannot now commence an EHC assessment or make an EHC plan if an appeal is pending.

SLIDE 31 – WHAT THE LAW SAYS

Joshua:

So let's now talk about resolving disagreements. As I said at the outset, the aim now is to resolve disagreements across education, health and care as early as possible. There are many ways to resolve disagreements, not just through mediation.

There is a helpful table in the Code of Practice under paragraph 11.2, which tells you where to go for what, but it is a bit confusing as it is set out over two pages in landscape format.

Disagreement resolution is also designed to resolve disagreements about other things as well as well as the SEN provision itself, including performance duties, such as where, say, therapy provision is already specified and quantified in the EHC plan but is not being made.

It can also help to resolve disagreements about health or care provision as well as educational provision and be used to help resolve disagreements between health commissioning bodies and LAs.

All of these ways of resolving disagreements are voluntary and can be used at any time if both parties agree, whereas mediation is often more specific.

SLIDE 32 – WHAT THE LAW SAYS

Suzannah:

In April 2008, the Department of Education (or DfE as it is known) provided an example EHC plan on its website - you can now find other examples there and also find information about EHC plans or helpful checklists on the websites for the Council for Disabled Children and IPSEA (Independent Parents for Special Educational Advice).

Originally, the Government example EHC plan was one from Southampton LA (which you can find at www.sendpathfinder.co.uk/infopacks/ap). The Government said that the original example followed the main requirements for writing EHC plans, but I need to point out that the example plan was issued in April 2014, but the final draft of the Code of Practice was not issued until June 2014 and then finalised in July 2014.

The example EHC plan though ran to 14 pages and I have now seen many EHC plans running to over 20 pages, so I have some concerns which I want to share with you…

SLIDE 33 – WHAT THE LAW SAYS

Joshua:

At 14 pages or more, EHC plans do not seem to fit the requirement for them to be as ‘clear, concise, understandable and accessible as possible’, as referred to in paragraph 9.61 of the Code of Practice.

I have noticed that statements have become lengthier and more detailed over the years, so are we again overcomplicating things?

As I have become experienced in these types of cases, I have actually sometimes found that ‘less is more’. Whereas it used to be necessary sometimes to get as many needs or provisions into a statement, in order to justify a placement being sought, is now the best way forward to have a more targeted approach?

But how does this sit with what we are used to and what we are aiming for now?

SLIDE 34 – THEORY vs PRACTICE

Suzannah:

Let's turn now to the question of Theory vs Practice.

We already know that most disputes about SEN involve a question about provision or placement in a statement (or now EHC plan). We also know that most Tribunal appeals are against decisions concerning refusals to assess or against the contents of a statement (or now EHC plans).

We also know that some LAs are better than others about knowing what to do.

I often say that it took us 10-20 years to get used to the old system, but we now seem to be starting again.

On the face of it though many things are still the same, although a few things have been changed or 'tweaked'.

However, the main thing that we all need to realise is that it will take time to effect a proper culture change.

SLIDE 35 – THEORY vs PRACTICE

Joshua:

I am glad about some things that have changed. For example the fact that:

- We are now bringing education, health and care together;
- There is now more of a focus on resolving disagreements and mediation;
- There is now more of a focus on 'outcomes'; and
- There are now clear timescales to ensure that an LA has to respond within four weeks after receiving annual review report (as this was a lacuna in the law before).

But the new Code of Practice does seem to be a bit more complicated than it was before.

Also, does the aim for a 'joined-up' system quickly seems too ambitious?

SLIDE 36 – THEORY vs PRACTICE

Suzannah:

So are EHC plans really just E plans with a bit of H and C tagged on?

Are we going to be able to change things from a ‘fight’ culture between ‘warrior parents’ and LA ‘bureaucracy’ to now ‘working together towards agreed outcomes’?

Are we going to see a lot of inter-agency disputes?

How are we going to square the concept of ‘best possible’ outcomes with the previous requirement to only provide an ‘adequate’ education and the fact that no pupil is entitled to a ‘Rolls Royce’ education?

I also need to polint out that, although the House of Lords approved the final version of the Code of Practice at the end of July 2014, in June 2014, when the final draft of the Code of Practice was issued, its Scrutiny Committee stated that:

‘*There is a ‘real risk’ that [the code of practice] may imperfectly achieve its glossy objectives*’

SLIDE 37 – AVOIDING DISPUTES

Joshua:

So how can we avoid disputes?

The first thing that we probably need to do is to recognise that there will always be an inherent tension in the SEN system. Parents understandably want the 'best' for their child but LAs may only have to legally provide an 'adequate' education.

I know that parents sometimes says that LAs are short-sighted. as less provision now is less cost now but may be more cost in the future, whereas more provision now is more cost now but less cost in the future.

But we also have to recognise that emotions run high regarding SEN issues and there is a history of deep rooted mistrust between parents, LAs and schools.

For example, LAs are often accused of making 'resources-led' assessments and decisions and LAs (and sometimes even schools) say that parents have unreasonable expectations.

There are also difficulties sometimes between schools and LAs; for example, schools sometimes say that LAs are not supporting them enough, both financially and otherwise.

Finally, there is a lot of mistrust between LAs and parental organisations; for example, organisations often accuse LAs of being too bureaucratic or say that they see many Tribunal appeals or cases argued in the courts where the money could have been better spent on the child or young person concerned.

SLIDE 38 – AVOIDING DISPUTES

Suzannah:

We must realise that there will always be the dilemma of limited resources and extensive statutory duties to meet for LAs. We must also recognise that there have been extended funding cuts over recent years with austerity measures.

I have found that cases have become more complicated over time. But I hope that SEN provision will not prove again to be a 'postcode lottery'.

I believe that we still can and should find ways of resolving disagreements. Unfortunately, I often see people 'sleepwalking' into problem situations that could have been avoided. It is sometimes like they seem to be in some form of denial, as though they are hoping that if they don't think about or face a problem, it will just go away.

SLIDE 39 – CONCLUSION

Joshua:

I think that we now need to take a more pragmatic appropriate and work with what we have.

Importantly, we always need to remember the child or young person. I know that this seems obvious, but it is very easy to forget the child or young person sometimes, with too much focus on policies, rights, funding and the law.

We must also remember that children, young people and their families have now been put at the 'heart' of the process.

We also cannot always leave it to a Tribunal appeal to sort disputes out. We could even say that we have already failed if we get to a hearing before the Tribunal.

In addition, we must now remember that other agencies, such as health, care and other institutions such as colleges are 'joining the party'; there is a lot for them to learn or do in a short space of time and they may understandably feel a bit overwhelmed, asking themselves: *'what should we do first?'*

That being said, even LA education departments and schools now need to undergo a bit of a cultural change, as they should no longer just do the same as before.

Finally, EHC plans are <u>not</u> meant to be just statements by another name that now go up to 25.

SLIDE 40 – FINAL SLIDE

Douglas:

This is Douglas again.

I really hope that you have enjoyed this presentation and have learnt something from it.

Also, I really hope that what I have said here helps you to understand things a little better. But, if you need more information about SEN, you should feel free to use my website at www.SpecialEducationalNeeds.co.uk.