

CDC Survey Results - Legal Action Threatened Against Local Authorities in Relation to EHC Plans

Executive Summary

This report sets out the findings of a survey of nine leading claimant special educational needs and disability ('SEND') law firms and organisations, carried out in August-September 2020. The survey asked questions in relation to actual and threatened judicial review claims against local authorities, challenging failures to secure provision specified in Education Health and Care Plans ('EHCPs') and/or failures to comply with statutory timescales in carrying out steps in the EHCP process. The survey found:

- Between the survey respondents, a total of six claims were issued in the period of 1 March 2019 – 1 March 2020. Of these claims four were conceded by the local authority in full or part prior to the hearing.
- During the same period, around 370 pre-action protocol letters were sent to local authorities. In 91% of cases where a pre-action letter was sent, the action requested of the local authority was taken in full; in 5% of cases the action requested of the local authority was taken in part. That is, in 96% of cases where a pre-action letter was sent, the matter was resolved because the local authority agreed to take actions sought by the parents of children with SEND.
- The respondent firms and organisations estimate that, during this period, there were thousands of parents of children with SEND who approached them for support who they were unable to assist. The main reasons why they were unable to assist were that the potential client was not eligible for legal aid or the firm / organisation lacked capacity. All of the respondents to the survey had concerns about the ability of parents of children with SEND to gain access to justice.
- The majority of respondents stated that either all or the vast majority of the potential clients who approached them for support raised reasonable concerns about local authority compliance with EHCP duties.
- Respondents were divided as to whether parents of children with SEND were more likely to seek legal advice and take legal action than other claimant groups. For those respondents who said this cohort was more likely to seek legal advice, the main reasons given for this were that parents of children with SEND are more likely than parents of children without SEND to be aware of their legal options, and/or parents of children with SEND were likely to have been fighting the system on behalf of their child for years, with the 'incident rate' of parents with SEND needing to challenge decisions being higher.

Introduction

In August and September 2020, the Council for Disabled Children ('CDC') commissioned a survey of leading claimant SEND law firms and organisations. Based on the researcher's knowledge of this specialist legal sector, it is anticipated that the nine firms and organisations selected for this research would provide the vast majority of the legal advice and assistance for parents in relation to SEND issues. The purpose of the research was to determine whether parents of children and young people with SEND are disproportionately or unreasonably litigious, in terms of seeking to enforce the rights of these children and young people. In particular, CDC was interested in whether local authorities were threatened with unfounded judicial review claims in relation to EHCPs on a regular basis.

The particular focus of this research was on actual and proposed judicial review claims. Although disputes as to decisions not to assess or issue EHCPs for children and young people with SEND and as to the contents of EHCPs are dealt with by the First-tier Tribunal (Special Educational Needs and Disability), the Tribunal has no jurisdiction in relation to failures to deliver the provision set out in EHCPs, or other matters such as delay in the process of EHCP completion.

Recognising that many judicial review claims are resolved without reaching a court hearing, the survey explored the pre-action steps taken by law firms and organisations on behalf of parents of children and young people with SEND. In particular, the survey focussed on the number of letters sent to local authorities under the Pre-Action Protocol for Judicial Review and the outcomes that resulted from this correspondence.

The survey also explored the number of potential claims in relation to which law firms and organisations were unable to assist and why, and the number of potential clients which the firm assessed as not having a reasonable concern as to the compliance of their local authority with EHCP duties. Finally, the survey asked law firms and organisations to give their views as to access to justice for parents of children and young people with SEND, and whether this cohort were particularly litigious. The precise survey questions asked are set out in an Annex to this report.

What we already know

Official statistics published by the Department for Education on 7 May 2020 reported that there were 390,109 children and young people with EHCPs in England. The statistics also provide some insight into the rates at which local authorities were failing to comply with statutory timeframes in the EHCP process; it was reported that 40% of new EHCP were not issued within the 20 week timeframe stipulated in the applicable Regulations.

There is also data available on the rates of appeals to the SEND Tribunal and complaints to the Local Government and Social Care Ombudsman concerning EHCPs. According to official statistics published by the Ministry of Justice on 11 June 2020, in 2019 the number of SEND Tribunal appeals registered was 7,385. This made up 1.8% of the total decisions taken in that

year (413,131) which could have been appealed to the Tribunal.¹ Unfortunately, the statistics available do not provide any information on the outcome of these appeals.

In October 2019, the Ombudsman published a *'Focus report'* considering complaints that had been received relating to EHCPs. The Ombudsman found that in 2018-19, they received 315 complaints (up 45% on the 2016-2017). Further, the Ombudsman upheld complaints in nearly nine out of 10 investigations (87%) carried out in the year before the report was published. That compared with an average uphold rate of 57% for investigations into non-SEND complaints. Common problems identified when investigating SEND complaints included severe delays, poor planning, poor communication and a lack of oversight by senior managers, with cases *'drifting'* needlessly and attempts made to *'farm out'* responsibilities to parents.

On 23 October 2019, the Commons Education Select Committee published a report on SEND. The Committee concluded:

'Let down by failures of implementation, the [Children and Families Act] 2014 reforms have resulted in confusion and at times unlawful practice, bureaucratic nightmares, buck-passing and a lack of accountability, strained resources and adversarial experiences, and ultimately dashed the hopes of many... We have a system of unmet need and strain. This unmet need is creating poor broader experiences, for children, young people, their families, schools, colleges and local authorities...'

Similarly, on 29 April 2020, the House of Commons Committee of Public Accounts produced a report entitled *'Support for children with special educational needs and disabilities'*. The Committee concluded:

'Many children with SEND are being failed by the support system. Inspections of support for children and young people with SEND, jointly carried out by Ofsted and the Care Quality Commission (the CQC), have found that half of local authority areas (47 of the 94 areas inspected by the end of July 2019) have significant weaknesses.'

However, the authors of this report are not aware, to date, on any available data concerning judicial review challenges, either actual or proposed, against local authorities concerning EHCPs.

Findings

The survey respondents were asked to provide examples of cases that their firm has been involved with concerning compliance with EHCP duties. This is a useful starting point, placing into context the nature of the disputes arising between parents with children with SEND and local authorities. Responses provided included:

¹ These figures are taken from the *'SEND Tribunal tables: statistics on the appeal rate to the SEND Tribunal'* available at <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2020>. The total appealable decisions taken in a year is calculated from data collected by the DfE from the annual SEN2 data return, which is mandatory for local authorities to complete. The total appealable decisions figure is calculated as the sum of: (i) number of initial requests for EHC assessments refused; (ii) number of assessments completed where decision taken not to issue EHCP; (iii) number of children and young people with an EHCP at January each year; (iv) number of EHCPs ceased.

'Failure to provide education to child in accordance with what was named in EHCP.'

'Failure to arrange education and special educational provision for child out of school for medical reasons.'

'Home based education programme set out in Section F. LA stopped paying invoices and provision was about to fall through.'

'A local authority failed to provide suitable full time education for a child with autism and sensory needs. The school could not meet the needs of the child and the mother had repeatedly requested a new placement and an urgent annual review, but no action was taken by the local authority.'

'Suicidal and very anxious girl left at home with no care or education support following early discharge from hospital placement... Complex pre-action letters sent re education, care and health issues: eventually resolved with adequate care at home pending tribunal, but not before the child had made another very determined suicide attempt.'

'Transport refused for unlawful reasons.'

'Failure to complete assessment within time limits and to comply with terms of mediation agreement, plus failure to provide full time education and special educational provision.'

'Failure to comply with time limits for decisions following annual review, therefore failure also to provide properly for child's SEN.'

As to the steps taken by firms and organisations in these kinds of cases, the survey found that in the period from 1 March 2019 to 1 March 2020, six judicial review claims were issued by all of the respondents to the survey. This confirms that many disputes as to EHCPs do not reach a court hearing. Of those claims that were issued against local authorities, two were conceded in full by the local authority post-issue but before any hearing, and one was conceded in part by the local-authority pre-hearing. Of the remaining claims, injunctive relief² was granted in one case and complied with by the local authority; the actual claim was not determined. The other two claims are ongoing, although a partial concession by the local authority has also been made in one of these claims. Therefore, in five out of the six claims issued, the claim had resulted in some benefit being obtained for the child. This suggests that there was some merit in these claims.

In contrast to the low number of judicial review claims issued against local authorities, during the same period (1 March 2019 to 1 March 2020), the law firms and organisations surveyed estimate that they sent 373 pre-action protocol letters to local authorities in relation to a

² An injunction is an order to act in a particular way or to refrain from acting in a particular way. Interim injunctive relief can be granted before the case is determined where relief is required urgently.

failure to comply with EHC Plan duties; that is, either a failure to secure provision or a failure to comply with EHCP process timeframes. The outcomes in cases where a pre-action letter was sent to a local authority were that in 91% of cases, the action requested of the local authority was taken in full; in 5% of cases the action requested of the local authority was taken in part; and in the remaining 4% of cases, the requested action was not taken by a local authority at all.

As such the pre-action process is proving to be highly efficient and effective in prompting local authorities to take steps which parents and their advisers consider to be required by law in relation to EHCPs. Although it may be that in some cases local authorities took the 'path of least resistance' and took steps that were not strictly required to avoid litigation, the overwhelming scale of the cases in which the action requested was taken in full suggests that in many of these cases the local authority had simply failed to comply with the law prior to receipt of the pre-action letter.

Where a claim was not issued in the cases where the requested action was not taken fully or at all, the reasons given for this included that the parents did not come back to the firm/organisations, the issues in the case being overtaken by circumstances, issues regarding the merits of the case and funding issues.

The high rate at which local authorities provide what parents of children with SEND request, after a pre-action protocol letter is sent, is further illustrated by narrative responses provided by firms and organisations:

'Typical case which resolves... is that the LA [local authority] has failed to comply with EHCP deadlines. So long as we agree this is correct, we send an LBA [letter before action] and when the LA responds, they will normally have taken the action required to resolve the breach. With regards to failure to implement the EHCP these are not always clear cut due to poor drafting of Section F [of the EHCP which sets out the provision to be secured]. So long as we are happy the wording in Section F is clear, we will then send an LBA. This normally results in the LA confirming they will implement provision... In a very small number of cases we have had to issue a JR [judicial review] claim for the failure to implement. In these cases we continue to liaise with the LA... to try and get them to resolve the matter without the need for the Court to determine at Hearing.'

'Most LBAs are sent with reduced timescales which then results in the LA doing what it should have done all along and the claim then falls away.'

'In all of the cases where the clients had a genuine concern that the LA were acting unlawfully, this was confirmed by us. Pre-action correspondence was issued and 100% were conceded in full by the LA without a claim having to be issued.'

Respondents to the survey had difficulty estimating the number of potential clients who contacted them with concerns that EHCP duties were being breached who they are unable to assist. A large number of parents sought assistance without this resulting in a pre-action protocol letter being sent or a claim being issued. Across the survey respondents collectively,

the number of parents in this position between 1 March 2019 to 1 March 2020 was estimated to be in the thousands. The main reason why the firms and organisations surveyed were unable to assist this cohort was that the client was not eligible for legal aid (78% of respondents identified this as a reason why they were unable to assist). Almost half of respondents (44%) also stated that a reason why they were unable to assist was because their firm / organisation lacked capacity. A third of respondents stated that they were unable to assist because, although the client was eligible for legal aid, their firm or organisation did not have the relevant legal aid contract in order to carry out the work. Another reason given for being unable to assist was that the potential judicial review was not viable for various reasons. One example provided was where a claim was in relation to a failure to implement provision, but Section F of the EHCP was poorly drafted such that it would be very difficult to enforce. In these cases, instead of sending a pre-action letter, the firm/organisation would assist in getting the plan improved instead, so that the provision was then legally enforceable.

All the respondents said they had concerns about the ability of parents of SEND children to access justice. The respondents set out their concerns as to access to justice in narrative form, with the following being key excerpts:

‘With the threshold for public funding so low, there is a group of parents who earn too much to qualify for public funding but don’t earn enough to be in a position to fund a solicitor. Therefore there is a huge number of parents who don’t have access to justice.’

‘Few charitable organisations that can assist with no funding.’

‘[S]ervices of charities such as IPSEA and SOS!SEND then become an absolute lifeline, but their own resources are of course limited.’

‘Unfortunately, the reason that people end up instructing us is that they have tried to resolve matters themselves and have failed. They have therefore had no choice but to instruct a solicitor, in circumstances which should not be necessary in particular when considering how quickly LA’s concede once we are instructed. Furthermore, we regularly have parents coming to us when their child has been out of school for months, or in some case years. Sometimes the parents are being prosecuted. Everything they have tried to do to resolve matters has failed. A JR pre-action letter on the basis of section 19 Education 1996, often combined with a challenge relating to the failure to hold an annual review (or emergency review when a placement has broken down) gets things back on track. At one level it is depressing to sort out things in a matter of weeks that a parent has been failing to fix for months, in circumstances where a child has been without education... Similar issues arise with s.42 CFA 2014 [the duty to secure provision in an EHCP] JRs. Parents will have been complaining for ages that the provision is not being made, often to the school. An LBA to the LA will force somebody senior to engage, normally resolving the problem.’

‘... without JR all that parents can do is seek to complain. These complaints last for months, take up huge amounts of time and effort, and generate animosity, when all that is often required is a short sharp letter. Obviously, it is only because LAs know that solicitors can follow through and that they will end up paying costs that they engage.’

'We find it regularly comes as a surprise to parents that JR is available as a remedy and is much more effective than using the complaints system.'

'There are numerous [concerns] to name a few... 1. Inequality of arms. 2. Inaccurate information given by LA's schools, SENDIASS etc to parents. 3. LA contact putting parents in fear of repercussions if they pursue them (care orders etc.). 4. Parent's own capacity, if caring for a child with significant needs do not have ability to also run a case alongside. 5. Funding – HUGE concern. 6. Legal aid do not cover representation. 7. Legal aid firms at full capacity for parents who cannot afford to instruct privately. 8. Not having access to the information they need to pursue a claim (many parents do not know what the LA are doing is unlawful).'

'Some parents are simply too worn down by battling the system whilst dealing with disabled children to pursue their rights.'

'Parents fearing litigation and perceived impact on their child's education.'

When asked to estimate the number of potential clients who had approached their firm/organisation for assistance but were assessed as not having a reasonable basis for being concerned about their local authority's compliance with EHCP duties, six of the respondents said that there were no such cases or the numbers were very low. Another respondent explained that, as above, the merits of a challenge might not be strong because the drafting of the EHCP itself was poor, such that seeking to enforce provision would be difficult. One respondent said it was difficult to assess. The final respondent said that half of those they were unable to assist are assessed as not having reasonable concerns. This is a mixed picture. Nevertheless, it is clear the majority of respondents (66%) did not assess potential clients as raising unreasonable concerns about local authority compliance with EHCP duties.

As to whether the firms/organisations surveyed considered that parents of SEND children were more likely to seek legal advice and assistance in bringing legal claims than other client groups, 38% of respondents said yes and 62% said no. In relation to those who responded yes, reasons offered included:

'Parents of children with SEND are far more likely to seek legal assistance and advice than parents of children without SEN who have a serious problem with school. This is for 3 main reasons (i) Many will have experienced [sic] of the Tribunal system, and because in their minds tribunals mean some sort of legal process they may think that lawyers may help... (ii) They approach lawyers when they have been fighting the system and failing to get help for their child for years... (iii) Parents of children with SEN are a good resource to each other... Therefore, if a parent is not aware there is a potential legal claim, we often see that other parents point this out to them and make recommendations for assistance... Parents of children without SEN on the whole are less likely to know that there are legal remedies...'

'The "incident" rate of needing to challenge a decision appears very high, as does the rate of success in challenge...'

'In the last few years parents in local areas have banded together to form action groups, local Facebook pages, and have campaigned against cuts to services. Twitter has also been a powerful tool. This has led to more parents being aware of their rights to seek judicial review/bring Tribunal appeals...'

As to those who responded no:

'We have lots of enquiries from university students and those in need of community care services. The majority of enquiries are from university students who seem more likely to seek advice than parents of SEND children.'

'While parents of SEND children are vocal advocates for their children, clients from other groups, such as mental health, or mainstream education, such as parents of children who are home schooled seek advice and assistance in similar numbers.'

'We are seeing increasing numbers of parents who do their own research and want to bring a legal claim but the cost, exhaustion of continuously fighting for their children and not believing things will change permanently often puts parents off.'

This is a mixed picture. Nevertheless, the reasoning offered by those who considered parents of children with SEND were more likely to seek legal advice and assistance did not suggest that this cohort seek out legal support when it is unreasonable for them to do so. Instead, to the extent parents of children with SEND do access legal support at higher rates, this is because of greater awareness of legal options amongst this cohort.

Conclusion

Overall, it is clear that access to legal support is an important resource for parents of children and young people with SEND. In the 96% of cases where assistance is sought and a pre-action protocol letter is sent to a local authority challenging their failure to comply with their EHCP duties, the local authority will respond by taking all or some of the steps requested. This is the case even if parents have, prior to seeking legal assistance, engaged in a long complaints process with the local authority without securing any change. This suggests that those parents of children and young people with SEND who are taking legal steps to challenge local authorities are not doing so on unreasonable grounds. If local authorities generally had a good legal defence to the arguments set out in pre-action correspondence, it would be unlikely that 96% of those letters would result in the local authority acceding to the parents' requests in full (91%) or part (5%). Despite the value of seeking legal support for parents of children with SEND, as evidenced by these findings, there are significant concerns within the sector as to access to justice for parents of children and young people with SEND, due in particular to the narrow scope of legal aid and the lack of capacity in the sector to meet demand.

ANNEX – Survey Text

Survey – Legal Action Threatened Against Local Authorities in Relation to EHC Plans

This survey, conducted on behalf of the Council for Disabled Children, concerns actual or proposed claims for judicial review brought on behalf of children and young people with Education Health and Care ('EHC') Plans or who are in the process of seeking such a Plan. Accordingly, the survey is focussed on assistance your firm/organisation has provided to clients where it is alleged a local authority has failed to secure the provision specified in an EHC Plan or has delayed in completing a step in the EHC Plan process. This survey is not concerned with challenges that can be brought in the First-tier Tribunal, such as challenges to the content of EHC Plans.

The data from this survey will be collated and published in an anonymised format; it will not be possible to identify any firm, organisation or individual respondent from the published report. Once the data is collated in anonymised form, all data which identifies specific firms, organisations and/or individual respondents will be deleted.

We have requested your name and contact email address should it be necessary to follow up to clarify any answers submitted. As above, this personal data will be deleted as soon as the answers to this survey have been collated in anonymised form.

The results of this survey will be shared with the Department for Education.

Thank you in advance for your assistance.

1. Please provide your name, the name of your firm/organisation and your contact email address.
2. How many judicial review claims did your firm/organisation issue against local authorities in relation to a failure to comply with EHC Plan duties (either a failure to secure provision or a failure to comply with EHC Plan process timeframes) in the period from 1 March 2019 to 1 March 2020?
3. How many judicial review claims did your firm/organisation issue against local authorities in relation to a failure to comply with EHC Plan duties (either a failure to secure provision or a failure to comply with EHC Plan process timeframes) in the period from 1 March 2019 to 1 March 2020?
 - a. Successful at hearing in full
 - b. Successful at hearing in part
 - c. Unsuccessful at hearing
 - d. Conceded in full by the local authority post-issue but pre-hearing
 - e. Conceded in part by the local authority post-issue but pre-hearing
 - f. Withdrawn without concessions by the local authority
 - g. Other (please specify)

4. How many pre-action letters did your firm/organisation send to local authorities in relation to failure to comply with EHC Plan duties (either a failure to secure provision or a failure to comply with EHC Plan process timeframes) that did not result in a judicial review claim being issued, for the period of 1 March 2019 to 1 March 2020? If the exact number cannot be ascertained, please provide your best approximation.
5. What were the outcomes in the cases where you sent a pre-action letter, but did not issue a claim? Please provide the number of cases in relation to each outcome for the period of 1 March 2019 to 1 March 2020. If the exact number cannot be ascertained, please provide your best approximation.
 - a. Requested action taken by local authority in full
 - b. Requested action taken by local authority in part
 - c. Requested action not taken, but claim not issued for other reasons (please specify)
 - d. Other (please specify)
6. Please approximate the number of potential clients with concerns about EHC Plan duties being breached (either due to a failure to secure provision or a failure to comply with EHC Plan process timeframes) that approached your firm/organisation for assistance but your firm/organisation was unable to assist for the period of 1 March 2019 to 1 March 2020.
7. Why was your firm unable to assist these potential clients?
 - a. Lack of capacity
 - b. Client not eligible for legal aid and cannot afford to instruct privately
 - c. Client eligible for legal aid but firm/organisation does not have relevant contract
 - d. Other (please specify)
8. Does your firm/organisation have any concerns about the ability of parents of SEND children to access justice?
 - a. Yes
 - b. No

If you have concerns, please explain what these are.

9. Please approximate the number of potential clients who approached your firm for assistance but were assessed as not having a reasonable basis for being concerned about their local authority's compliance with EHC Plan duties (either in relation to a failure to secure provision or a failure to comply with EHC Plan process timeframes) for the period of 1 March 2019 to 1 March 2020.
10. Does the firm/organisation consider that parents of SEND children are more likely to seek advice and assistance in bringing legal claims than other client groups?

- a. Yes
- b. No

Please explain your answer.

11. Please provide anonymised examples of cases that your firm has been involved with concerning compliance with EHC Plan duties, including what steps were taken by your firm and what outcome resulted.