



BACKGROUND

The COVID-19 pandemic has brought about many changes to the legal world, one area which has seen great impact is Special Educational Needs (“SEN”). Approaching four years after the COVID-19 lockdown first began, the impact it has had on children who have SEN is still notable. One such area is around an increase in children with anxiety relating to conditions such as Autistic Spectrum Disorder (“ASD”) and their ability to attend and engage with a school setting. Education Otherwise Than At School or post-16 institution (“EOTAS”) offers a bespoke solution for some of these children but is it always the correct approach and could local authorities be in danger of failing in their legal duties when implementing these packages for some children?

WHAT IS EOTAS?

EOTAS allows for a local authority, under Section 61 of the Children and Families Act 2014, to devise a package of special educational provision to be delivered in a setting such as the home where it would be inappropriate for it to be made in a school, post-16 institution or place at which relevant early years education is provided. The threshold for this legal test should be noted as high, as it can only be made where it would be inappropriate for the provision to be made at any school (or post-16 institution etc), this includes specialist or independent settings tailored to meet high levels of need.

The meaning of the word “inappropriate” was explored by the Court of Appeal within the case of *TM v London Borough of Hounslow* [2009] EWCA Civ 859, meaning “unsuitable” or “improper”. A local authority (and the First-Tier Tribunal (Special Educational Needs and Disability) (“Tribunal”) on appeal) must consider a non-exhaustive list of factors in each case such as the child’s medical history, their educational needs, how they have responded to special educational provision, what can be provided by a school and otherwise than at school, the costs, and the wishes of the parents.



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It is important to emphasise that EOTAS is not the same as a parental decision to home educate their child (as is their right under Section 7 of the Education Act 1996), Elective Home Education (“EHE”), and conveys differing legal responsibilities on the local authority. The responsibility for the child’s education rests with their parents, although it should also be noted that where a child is receiving EHE, the local authority is not entirely discharged of its legal duties and must be satisfied that the educational arrangements are suitable as per Section 19 of the Education Act 1996. They may do this by keeping in touch with the parent or providing support where requested but this is more discretionary.

Where EOTAS is agreed or directed by a Tribunal, a bespoke educational package is set out within Section F of the child’s Education Health Care Plan. Section F being the special educational provision which is reasonably required to meet the child’s special educational needs contained within Section B. In these cases, Section I (educational placement) must be left blank as there is no setting to be attended by the child as per the guidance in *NN v Cheshire East Council, 2021 WL 04502793 (2021)*. Unlike EHE, a local authority will hold a duty to secure the provision specified in Section F as per Section 42 of the Children and Families Act 2014. This will mean a local authority has responsibility for the delivery of the provision, the parent may however also request a personal budget to be provided to them by the local authority in order to secure provision themselves.

EOTAS AND COVID-19

Children with a diagnosis of ASD can often suffer with anxiety, the National Autistic Society report that over half of those with ASD experience it in some form. This can often manifest in relation to attendance at school.

Following the COVID-19 pandemic and national lockdown many children with ASD have been reported by studies as experiencing heightened anxiety relating to going outside.¹ Anecdotally, a rise in children with this anxiety has seen a larger number presenting with school avoidant behaviours leading to SEN Tribunal appeals for EOTAS. Local authorities may be keen to get these children back into a school setting as they may have been able to engage with one prior to the pandemic and therefore, in their view, simply require extra support to transition back. However, the issue of evidence and determining what the child requires for their long-term education can be challenging and often includes consideration of whether the anxiety can be classed as a medical need or a special educational one in the first instance.

When considering recent caselaw, a child’s anxiety may lead for it to be “inappropriate” for provision to be made at school as has been set out in *M v Hertfordshire CC [2019] UKUT 37 (AAC)*. Interestingly, in this case, the child in question had physical anxiety related symptoms such as vomiting and even weight loss and hospitalisation. It should be noted that medical issues such as these were not considered special educational needs but instead medical issues which the Tribunal could only make non-binding recommendations on. The Judge did comment that the wider context of school related anxiety needed to have been considered in this case, however, a weight did appear to be given to the physical manifestation of symptoms. This perhaps tells local authorities that decisions will need to be carefully taken based on the evidence they have before them, in cases without any medical need they should consider how the school related anxiety manifests and if it is serious enough to render a placement inappropriate.

¹ Sarah Pais and Martin Knapp, The Impact of COVID-19 on Autistic People in the United Kingdom Final report (Policy Innovation and evaluation research unit 2021)

In these cases, often a relationship with a specific school has broken down, this has led to a child's refusal or inability to engage and increased anxiety. It should be noted that it is not enough for the relationship with the school to have broken down, however, as *per L v Wandsworth [2006] EWHC 694 (QB)*, the Tribunal may consider this fact and give some weight to it within its decision when determining suitability of the placement. It noted the success of a particular school placement could be contingent on a very close working relationship between the home and the school.

What the local authority should have clear is; whether the school related anxiety meets the legal definition of a special educational need and whether the provision reasonably required to meet it is special educational provision. Section 20(1) of the Children and Families Act 2014 dictates the following definition:

"A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her."

Section 20(2) goes further to provide that:

"A child of compulsory school age or a young person has a learning difficulty or disability if he or she—

- (a) has a significantly greater difficulty in learning than the majority of others of the same age, or*
- (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions."*

Additionally, as per Section 21 of Children and Families Act 2014, *"health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)."*

Therefore, a local authority should ask 'does the child's anxiety equate to a special educational need', 'does it call for provision to be made to educate or train'? Usually, the answer is likely to be yes, especially if it curtails them from receipt of their education or social and emotional development. There is not a vast amount of caselaw on the topic, but this analysis could be considered when looking at provision which of course will then stipulate whether a school placement is inappropriate.

Local Authorities must also take into account Section 19(d) of the Children and Families Act 2014: *"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."* This must also be considered with the parents wishes and feelings, it would be useful for local authorities to take a collaborative approach and identify a potential long-term plan and future goals for the child having regard to their wishes and feelings.

LEGAL RISKS

Firstly, if there is a dispute over whether EOTAS should be made for a child or young person, the family can appeal this to the Tribunal.

Also, frequently, where EOTAS disputes arise children can find themselves out of education entirely, sometimes for long periods of time or alternatively where the appropriate monitoring is not given an unregistered or inappropriate provider identified. If a local authority fail to keep the process under review, they could face legal consequences.

As discussed above, the local authority has a duty under Section 19 of the Education Act 1996 to provide a suitable education for children of compulsory school age, which means “*efficient education suitable to his age, ability and aptitude and to any special educational needs he may have*” (Section 19(6)). This must be full-time education or part-time if the local authority consider that for reasons relating to the physical or mental health of the child, it would not be in the child's best interests for full-time education to be provided. Failure to provide this can result in judicial review action as was the case in *R (Q) v Staffordshire CC [2021] EWHC 3486 (Admin)*. This saw a child who had been excluded from a mainstream school where it was deemed that a school provision would be inappropriate. Provision was then arranged at VIP Stop gap a temporary facility, the claimant had alleged the placement was not suitable as it did not employ qualified SEND teachers, nor did it employ a dedicated SENCO. They also raised complaints that the provision was part-time, and that the local authority had not acted in a timely manner.

The court did not accept that to be suitable, the provision had to be equivalent to a school-based provision, did not accept that part-time provision was a breach as that was a needs-based decision and the local authority had therefore provided education otherwise than at school. It also rejected that the local authority had not acted in a timely manner as it had met the deadline for processing the Education Health Care Plan.

CONCLUSION

Local authorities should be prepared for an increasing number of children who may require EOTAS and will also need to be aware of the legal implications and risks of these packages. When making a decision on a request local authorities should have regard to the specific case facts in relation to the child's anxiety or special educational need.

Documenting of evidence and decision making is ever important for local authorities, they must ensure that they act in accordance with the statutory timeframes and that their proposals are backed up by evidence from professionals. They must also ensure that where a child is out of school they ensure suitable education is being arranged for the child. Failure to do so could have potential legal consequences.

About Pathfinder Legal Services Ltd's SEN Team

We have a highly skilled team of lawyers specialising in Special Educational Needs and Disability Tribunal cases. We advise and represent local authorities in appeals and advise schools in respect of disability discrimination claims. Our lawyers have a wealth of experience in identifying needs, provision, and placement issues and work closely with SEN officers, educational psychologists, and other specialist witnesses. We pride ourselves on our collaborative approach with parents, for whom the tribunal process can be very stressful. We get to know our client and their schools and colleges very quickly and are able to tailor our service to our client's needs.

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