Hertfordshire County Council - supporting guidance for consultation responses for EHCPs

Please read the guidance carefully before completing the Consultation Response Form

This guidance document aims to support schools and educational settings in navigating the process of Education, Health and Care Plan (EHCP) consultations for school placements. EHCPs are vital tools designed to ensure that children and young people with special educational needs and disabilities (SEND) receive tailored support to meet their individual needs. This document outlines the key steps and considerations involved in EHCP consultations, providing practical advice to help schools make informed decisions that prioritise the well-being and educational development of students. By following this guidance, schools can foster inclusive environments that enable all students to thrive.

Hertfordshire

1. Statutory Duties

The Local Authority (LA) is under statutory obligation to notify parents of a child/young person ("YP") of their right to request that the LA secures that a particular school or other institution is named in the EHCP, when they are making representations about the contents of the Draft Plan.

The LA's consultation duty is triggered as soon as the parent of a child/YP nominates or makes a request for a particular school/other institution to be named in the EHCP (In accordance with and paragraph). The LA must consult the governing body/proprietor or principal of the school or other institution requested.

These duties are set out in the relevant statutory provisions:

- **S.38(2)(b)(ii)Children & Families Act 2014 ("CFA 2014").**
- **S.39(2) CFA 2014.**
- **9.80 SEND Code of Practice ("CoP").**

2.The Legal Test - overview

The LA is under a duty (imposed by S.39(3) CFA 2014) to name the requested school or other institution - unless one or more of the conditions listed in S.39(4) CFA 2014 applies.

There are 3 conditions which are set out in S.39(4). These are that:

- the school or other institution requested is unsuitable to the child/YP's age, ability, aptitude or SEN (S.39(4)(a); or

- the attendance of the child/YP at the requested school would be incompatible with:

  (i) the provision of efficient education for others (S.39(4)(b(i) or
  (ii) the efficient use of resources (S.39(4)(b(ii).

It therefore follows that in circumstances where a place has not been offered, a failure by the school (or other institution) to provide a response which shows that there has been proper consideration of the consultation documents and application of the correct legal test, will result in the LA having to name the school requested (in compliance with its duty under **S.39(3) CFA 2014).**

When a parent of a child or young person has requested that the LA secures that a particular maintained nursery school, mainstream school or mainstream post-16 institution ("a mainstream setting") is named in the EHCP, even if the placement is lawfully refused under S.39(4) CFA 2014 (on the grounds that it is unsuitable, or incompatible with the provision of efficient education for others - or the efficient use of resources), the LA still has a statutory obligation under S.33 CFA 2014 (the right to mainstream education) to provide that the EHCP names a mainstream setting - unless the child or young person's attendance would be incompatible with the provision of efficient education for others and there are no reasonable steps that the governing Body, proprietor or principal of the mainstream setting could take to prevent the incompatibility.

2.1 Reasonable steps

This is dealt with in paragraphs **9.91-9.94** of the SEND CoP. What constitutes a reasonable step will be fact specific and will depend on the particular circumstances of the individual case. Some **factors** listed in **paragraph 9.91** of the CoP that may be taken into account are:

- Whether taking the step would be effective in removing the incompatibility
- The extent to which it is practical for the early years provider, school, college or local authority to take the step
- The extent to which steps have already been taken in relation to a particular child or young person and their effectiveness
- The financial and other resource implications of taking the step, and
- The extent of any disruption that taking the step would cause

For further guidance see: What are reasonable adjustments and how do they help disabled pupils at school? – The Education Hub (blog.gov.uk)

The following are not reasons to refuse a child's admission:

- The Child/young person (CYP) requires specialist provision.
- The CYP has a poor disciplinary record.
- The CYP has a record of poor attendance.
- The school does not have the money to support the CYP.

The following in and of themselves are not valid reasons for refusing admission under S.39(4) CFA 2014 - unless you can demonstrate with reference to the correct application of the legal test (dealt with above) **how and why** it is felt that those reasons will make the admission of the single child/YP incompatible with the provision of efficient education for others - addressing all 3 components of the legal test with evidence.

- Being over your Published Admissions Number (PAN).
- The school/year group/class is full.

2.2 Equality Act 2010

Please also ensure you give sufficient consideration to the anticipatory duty to make reasonable adjustments (S.20) and have due regard to the Public Sector Equality Duty (S.149).

2.3 Best Endeavours Duty (S.66(2) CFA 2014

Section 66 of the Children and Families Act 2014 imposes duties on schools, other institutions within the FE sector, and Pupil Referral Units, in connection with a registered pupil at a school or other institution that has special educational needs to use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made. In the case of a maintained school, maintained nursery school or institution within the FE section, the appropriate authority responsible is the Governing Body. (S.66(3) CFA 2014).

This means doing everything that could reasonably be expected in order to meet the special education needs of its pupils.

3. Understanding how to correctly apply the legal test

This section of the document explains how to apply the legal test in section 39(4)(b)(i) of the Children and Families Act 2014 ('Incompatibility With The Provision Of Efficient Education For Others'), focusing on its three components of the legal test.

3.1 "Incompatibility With"

The meaning of these words have been thoroughly examined in various reported cases. The courts have stated that the word "incompatible" is a **"strong term"** – with a suggestion that it has a stronger meaning than the term "prejudicial to". The following points from caselaw provide a summary of the main questions, approach and factors to be borne in mind when considering the issue of incompatibility:

1. The test to be applied here is said by the courts and Upper Tribunal to be quite a "sophisticated one" – meaning that in the circumstances of a particular case, a degree of precision or detail is required (A broad-brush approach is inadequate for the sophisticated test).

2. A finding that there would be “some impact” or “some adverse impact” on the efficient education for other children does not equate with there being incompatibility with the provision of efficient education for other children.

3. The question to be asked is whether the effect of the child/YP attending the school requested and any adverse impact on the efficient education of other children with whom the child/YP would be educated, would be so great as to be incompatible with the provision of efficient education - in other words, the question to be asked is not just whether the attendance of the child/YP would have an impact on the efficiency of the education of the other children but whether that impact is so great that their attendance would be incompatible with the efficiency of their education. This will involve some judgment and some question of degree.

4. It will often be necessary (having regard to the circumstances) for there to be some ‘clear identification’ by the Tribunal of ‘just what difference’ it finds that the admission of the single child would make before it can go on to make the judgment about whether the degree of impact was so great as to make it incompatible with the provision of efficient education for others.

5. There must be an’ adequate and clear examination’ of the difference that the child/YP’s admission would have on the efficient education of the other children.

6. There must also be some evaluation of whether the alleged impact was enough to take the standard of education provided below the level of efficiency- and whether there was no way of avoiding that degree of impact, so as to meet the strong test of incompatibility.

7. Careful consideration must be given as to what reasonable steps or adjustments could be taken to avoid or mitigate the admission of the single child/YP reducing the standard of education to the other children with whom they will be educated with below the standard of efficient education.

3.2 Efficient Education

- **SEND Code of Practice (“CoP”)**

Paragraph 9.79 of the SEND CoP (to which, under S.77 of the CFA 2014 the LA and the Tribunal on appeal must have regard) defines the efficient education standard as follows:

"Efficient education means providing for each child a suitable, appropriate education in terms of their age, ability, aptitude and any special educational needs they may have."

- **Case Law Excerpt**

In the case of *NA v London Borough of Barnet UKUT 180 (AAC)* the Upper Tribunal Judge stated ***"it was not enough for the purposes of paragraph 3(3)(b) that the quality of education provided for other children would be reduced from the very highest standard to something a little lower. But, on the other hand, he submitted, it did not have to be shown that no meaningful education at all would be provided for some other child or, as the head teacher had put it in his statement, the admission of the child in question would tip the school into failure.***

"Efficient education" indicates a standard, not the very highest desirable standard or the very basic minimum, but something in between that I suggest that the members of the First-tier Tribunal are uniquely qualified by their expertise and experience to recognise in particular cases. Although "incompatible" is indeed a very strong word, indicating that there is no way of avoiding the admission of the single child involved reducing the quality of education provided to some other children with whom he would be educated below that standard, its force must be applied in the context of that standard. I do not think that the Upper Tribunal should go any further in attempting to define the standards embodied in "efficient education".[1]

[1] Those definitions have been referred to and endorsed in subsequent High Court and recent Upper Tribunal cases.

3.3 “For Others”

When identifying just what difference the single admission of the child/YP in question would have, the question must also be asked about the impact on the efficient education of **‘which children’.**

- **SEND Code of Practice (“CoP”)**

Paragraph 9.79 of the SEND CoP states: “Where a local authority is considering the appropriateness of an individual institution, **’others’ is intended to mean the children and young people with whom the child or young person with an EHC plan will directly come into contact on a regular day-to-day basis.”**

- **Case Law Excerpts**

It was said by the Upper Tribunal in the ***NA*** case (mentioned above) that the words “the other children with whom the child would be educated” do not have an artificially restricted meaning:

“30. Plainly it makes **sense to look first at children who would be in the same class or otherwise would in regular contact with the child in question**. **If there is an incompatibility with the education of some of those children, that could not be avoided by reasonable adjustments elsewhere, there would be no need to look at any wider category of children.** However, if the judge, with the benefit of submissions from counsel, had considered that the new tribunal was restricted as a matter of law to considering possible incompatibility with the provision of efficient education only for the children with whom the statemented child would come into contact on a regular day-to-day basis or something similar, one would have expected him to say so.

“31. What can be taken from the above discussion is first that the **words "the other children with whom the child would be educated" do not have any artificially restricted meaning but must be interpreted as ordinary English words as appropriate in the**

circumstances of particular cases. But inherent in that is that the words must be intended as words of limitation and do not simply allow a consideration of the impact on any children who could be said to be affected by the admission of the child in question.

36. What can be taken in particular from this section of discussion is that **the test of incompatibility with the efficient education of other children under paragraph 3(3) is also quite a sophisticated one. It must be applied by reference to the circumstances only of the child in question and other children who are already known or predicted to be in the category of those who would be educated with the child.** Although the overall context of the school will be relevant, especially in relation to whether adjustments can be made elsewhere to avoid an incompatibility that would other otherwise arise, **the circumstances of other children who might possibly be admitted, particularly as the result of other outstanding appeals, cannot be taken into account.**

In summary, it is clear from the above that when considering "the others", the following applies specifically:

- The children and young people with whom the child or YP with an EHC plan will "**directly"** come into contact on a "**regular day-to-day basis**."
- Children who would be **in the same class** or **otherwise would in regular contact** with the child in question.
- Any other children who are **already known** or **predicted** to be in the category of those who would be educated with the child.

Please note that the Upper Tribunal made clear that conversely, the **circumstances of other children who might possibly be admitted, particularly as the result of other outstanding appeals** cannot be taken into account. (see quote above on page 6).

4.Recent Upper Tribunal case law study on the application of the legal test in S.39(4)(b)(i) CFA 30214

In the case of ***OO and BO v LB Bexley UKUT 223(AAC)***, parents successfully challenged the First-tier Tribunal's ('FTT') application of the first limb of the S.39(4(b)(i) test, on the basis that the FTT did not apply the correct test when looking at S.39(4) in relation to the school of preference (Woodside Academy). The following excerpts from this case will assist in understanding and provide further insight as to how the test is to be correctly applied and the sorts of questions and evidence which will be required in an appeal (**See especially the highlighted text below):**

"Although it states that the quality of provision for existing pupils at Woodside Academy would be "materially affected" by Q's attendance there, ***the decision does not, in terms, explain why that "material effect" on the quality of provision would unavoidably result in the quality of education provided to those other pupils falling below the threshold standard of "efficient education".***

In this case, the Upper Tribunal identified the level of precision and detail required in answering the S.39(4)(b)(i) statutory test:

"The test now at s39(4)(b)(i) is, as was noted in NA v Barnet at, and again at, a "sophisticated" one, in that it requires, in the circumstances of this case, a degree of precision and/or detail as to

i. *which other children's education would be affected by Q's attending Woodside Academy?*

ii. *was the standard of those other children's education currently at, or above, the "efficient education" standard?*

iii. ***what effect would Q's attendance have on the standard of those other children's education?***

iv. ***if the effect was to reduce the standard below that of "efficient education", was that unavoidable or, for example, could adjustments reasonably be made to avoid that effect****?".*

To summarise, Woodside Academy had asserted in various witness statements that:

- They had **significantly exceeded their capacity** in their current Reception to Year 2 cohort. To exceed numbers in any of these class groups would "***severely compromise the current effectiveness*** *of provision by increasing maximum capacity causing negative impact upon staff-pupil ratios, available space, resources and developmental progress & outcomes for all pupils."*
- **All classes were full to capacity** *and "Any increase in numbers beyond this number* ***compromises*** *the available space, our* ***high-quality provision*** *and the* ***efficient education of the other pupils*** *in this phase."*
- *The addition of a further pupil and linked adult support would* ***impact significantly upon the quality of provision*** *that could be offered to the other pupils. Should Q be placed at Woodside Academy, this would have an* ***adverse effect on the quality of resources and provision*** *offered for each of the current pupils and indeed for him.*
- It was therefore not possible to admit a further child to this phase or Y1*, "as* ***the degree of detrimental impact on all children, including Q, would be too great****. To proceed to do so would* ***be irresponsible*** *as they would "knowingly be* ***placing the cohort in a more anxiety-inducing environment*** *and crucially this would n****egatively impact on the progress that the children can make"***
- *…. Admitting Q would therefore* ***be incompatible with the provision for the efficient education of others*** *and would compromise the effective use of resources".*

The Upper Tribunal in coming to a decision stated:

"Although the underlined phrases above contain some noticeably strong language ("severely" compromise; a degree of detrimental impact that would be "too great"; to proceed would be "irresponsible"), it cannot be said that these statements address the question posed by s39(4)(b)(i) in the "sophisticated" (i.e. careful and precise) way required. For example, they speak forcefully of "compromise" to the educational provision to existing pupils, but do not explain whether or how the effect of that compromise would be to reduce the standard below that of "efficient education.

…. but a broad-brush approach is inadequate for the "sophisticated" test of s39(4)(b)(i) i.e. the test must be approached with the precise special educational provision required by the newly-attending child in mind."

"The error of law identified is clearly material and so it is right that I set the decision aside. It is also right that I remit the case to a fresh tribunal, rather than re-make the decision, as detailed findings of fact must be made in order to apply the statutory test correctly, and the fact-finding tribunal is best placed to do that."