The Duty to Specify

1. Introduction

This briefing supplements IPSEA's Education, Health and Care plan ("**EHC plan**") checklist. If you are scrutinising a draft plan to ensure that it does what it is meant to do for your child, please look at that checklist first.

This briefing provides legal background on specificity.

2. What is "Specificity"

In writing EHC plans, a local authority ("**LA**") must by law 'specify' the help children and young people must receive. This means describing it in enough detail so that parents and young people, among others, can clearly tell what must be delivered, how often, how long for and who by.

Once such detail is set down, it enables the help to be enforced; parents and young people can tell when provision is inadequate or is not being delivered at all. If the provision sections are vague and/or omit things, the plan will not be any use to parents/young people trying to ensure that all the help needed is actually delivered all the time. The SEND Tribunal frequently amends statements of SEN to add necessary detail, especially hours, and we expect this to continue with EHC plans.

3. How to make an EHC plan specific

If you are faced with vague or otherwise inadequate provision in your EHC plan, you will need to tell the LA or Tribunal what should be altered or inserted. You may need to:

- with the help of the IPSEA plan checklist, first check that each and every need for provision is there, in the right section and adequately described;
- delete phrases such as 'access to', opportunities for', or 'up to' as in 'up to X hours';
- go through all the reports attached to the plan and extract any useful advice which actually quantifies provision;
- if the advice is vague (e.g., talking about the necessity for 'high levels' of something or 'small groups' without any size), you may need to speak or write to the professional who wrote the report to see whether they can be more precise. Remember you are asking for precisely what the support is, who (in terms of qualifications and experience) should deliver it, how often and how long for. When looking for specification of how often the help should be delivered, remember that 'regular' as in 'regular speech

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therapy' is virtually meaningless: Christmas dinner is regular; so is Halley's comet.

If the people who wrote the reports aren't helpful, try reminding them of what the SEN and Disability Code of Practice 2014 ("**the Code**") says about their advice:

> "9.51 The evidence and advice submitted by those providing it should be clear, accessible and specific …"

If they remain unhelpful, you may need to seek independent professional advice if you can afford it. Check whether you are eligible for legal help.

4. The Legal Requirements

The duty on an LA duty to specify is 'statutory' as it is required by section 37 of the Children and Families Act 2014 ("**CAFA**"), which states:

> "an EHC plan is a plan specifying:
>
> (a) the child's or young person's special educational needs;
>
> (b) the outcomes sought for him or her;
>
> (c) the special educational provision required by him or her;
>
> (d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
>
> (e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);
>
> (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e) …"

Regulation 12 of The Special Educational Needs and Disability Regulations 2014 (SI No. 1530) ("**the SEN Regs**") requires the support needed to be set out in the following sections (we have used bold type to make it easier to see which is which):

> (f) **the special educational provision** required by the child or young person (section F);
>
> (g) **any health care provision** reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section G);

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(h) (i) **any social care provision** which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (section H1);

(ii) **any other social care provision** reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);.

There is also statutory guidance in Code which tells LAs how to carry out these duties, This advises that in Section F:

> "Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise …"
> (page 155)

The Code omits 'hours and frequency of support' in Sections G, H1 and H2, the health and care provision sections, but as the guidance on Section F is paraphrasing case law on how to interpret the word 'specifying', and case law has required a very high level of detail in its interpretation of that word in the context of statements of SEN, it can be argued that the same detail is required in these sections.

5. Needs and Provision; Needs must be adequately described first

The provision sections in a plan depend on getting the needs sections right. The case law below is about statements of SEN, but we expect these cases to be applicable to plans as the wording and duties they examine remain almost the same. This means that every special educational need described in Section B of a plan must be matched by provision in Section F.

The duty to specify has been tested extensively in the courts, and this particular aspect of the duty was established by the Court of Appeal in *R v Secretary of State for Education and Science Ex Parte E (1992) 1 FLR 277,* which approved the way the judge in the lower court compared the description of a need to a diagnosis, and the description of provision to a prescription for all the needs diagnosed.

This case also established that, as the Code correctly states, all needs must be described, not just those which have given rise to the EHC plan, but those which may be being catered for by the school/institution. The judges said:

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> "Whilst the authority can undoubtedly take the view that some part of the child's special educational needs can be adequately provided by his ordinary school, once they (the authority) are bound to make and maintain a statement … that statement must … specify all the special educational provision to be made for the purpose of meeting those needs, whether provided by the authority or by the school … and with a degree of particularity sufficient to satisfy [the law on specificity]."

6. Why LAs avoid specificity

One reason why LAs may wish not to specify provision is because they may then be required by section 42 of CAFA to secure provision over and beyond that which they already fund. For example, they may have arrangements with local health authorities for the provision of speech and language therapy but only to a limited extent, so that specifying speech and language therapy beyond that extent may require them to make additional and separate arrangements. However, they cannot lawfully use this as a reason for refusing to specify and, indeed, in *R v London Borough of Harrow Ex Parte M (1997) ELR62*, the Court affirmed the obligation of LAs to arrange special educational provision, even where they had asked the health authority to arrange it, where the health authority had not done so.

In *L v Clarke (Chair of Special Educational Needs Tribunal) & Somerset County Council [1998] ELR 129* ((on line at *L v Chair Of Special Educational Needs Tribunal & Anor [1997] EWHC Admin 792*), the High Court specifically considered whether a statement should be specified and quantified. The Court determined that, ordinarily, statements should have a "high degree of specificity". Of course, there may be circumstances where specificity is not possible or desirable but, generally speaking, this should be the exception rather than the rule. Indeed, the reason why specificity is so important is, as set out in the Code, so that everyone is clear as to what the child concerned is entitled to, and ought to be receiving.

Sometimes, LAs determine not to quantify or specify provision for children whose statements provide for them to attend special schools. There is nothing in law which limits the obligation to quantify and specify provision to those children not attending special schools. However, in *E v London Borough of Newham and the Special Educational Needs Tribunal [2003] ELR 286* (on line as *E v London Borough of Newham & Anor [2003] EWCA Civ 9 (20 January 2003)*, the Court of Appeal accepted that, where a child was attending a special school, a lower level of specificity may be appropriate.

LAs often seek to rely on that decision to argue generally that provision for a child at a special school should not be specified or quantified. However, the obligation still remains to specify and quantify provision, except where there are good reasons not to do so. Merely attending a special school is not a

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sufficient reason not to specify provision and "flexibility" must be something that the child needs. As the Court of Appeal said in a case brought by IPSEA, “any flexibility built into the statement must be there to meet the needs of the child, and not the needs of the system” *(IPSEA Ltd, R (on the application of) v Secretary of State for Education and Skills [2003] EWCA Civ 7 (20 January 2003))*

Another closely related issue which arose in Ex Parte E was whether it could be lawful for the LA to include provision in a statement which was subject to an assessment to be undertaken at a later date. The Court indicated that generally this would not be lawful, a view also given by the High Court in *E v-Rotherham MBC [2002] ELR 266, [2001] EWHC Admin 432* (approved by the Court of Appeal in *N v North Tyneside Borough Council* [2010] EWCA Civ 135).

However, there will also be exceptions to this rule, and in some cases, particularly where the level of provision needed will not be known until a child begins at a particular school and is given an assessment, it may simply not be possible to specify provision.

In those circumstances, one way of providing some protection is to set out a minimum, or an approximate, level of provision. This possibility has been raised by the High Court in a number of cases (including H v Gloucestershire County Council and Bowden [2000] ELR 357 and H v Leicestershire County Council [2000] ELR 471) and if the LA fails to even do this then the statement may be unlawful.

If no minimum is specified (and it may be that in some cases it is not possible to do this), there is a risk that if the statement is left with an entirely open-ended amount of provision, then the LA may be able to reduce the amount of provision at any time, without giving the parents a right of appeal to the Tribunal against that change. Accordingly, even where provision is for a time (and for a good reason) not specified and quantified, once it becomes possible for the LEA to specify and quantify provision, they should do so.

The logical approach to drafting an EHC plan is first to define the needs, then the provision to meet those needs, and finally to name a school/institution that can meet those needs. Unless all of the provision is adequately specified, the right school may not be named. Accordingly, even if the school placement is the most important aspect for a child, special educational provision should still be properly specified.

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