

## Appeal Process - Refusal to Issue an EHCP

After an EHC needs assessment has been carried out Surrey Local Authority (LA) must notify you:

- a) of the outcome of the assessment
- b) whether it proposes to secure that an EHCP and
- c) the reasons for that decision.

Where Surrey have carried out an EHC needs assessment but decided that it is not necessary to issue an EHCP you will have the **right to appeal** and can decide to appeal to the SEND Tribunal.

### The Law:

#### The Legal Test

The legal test which Surrey must apply is found in section 37(1) of the Children and Families Act 2014 and says:

*(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan:*

*(a) the local authority must secure that an EHC plan is prepared for the child or young person, and*

*(b) once an EHC plan has been prepared, it must maintain the plan.*

This is the only legal test and it turns on the question of what is *necessary*.

The test must be applied in relation to the Special Educational Provision (SEP) required for each individual child or young person - "*in the light of*" that child or young person's assessment. It should not be viewed in the light of other matters such as LA policies.

#### Right to Appeal

The right to appeal is found in section 51 (2) (b) of the Children and Families Act 2014 and says:

*(2) The matters are:*

*(b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.*

There is also **Statutory Guidance** within the Special Educational Needs and Disability (SEND) Code of Practice: 0 – 25 Years which contains guidance about SEND Tribunal cases in Chapter 11.

**Please note:** As with all appeals under the Children and Families Act, the person with the right of appeal is the parent until the child reaches the end of compulsory school age, when the right becomes that of the young person.

- **See our Information Sheet:** Appeal Process – How to complete a SEND 35.

### **Your appeal - making the case**

The burden of proof is on you as the parent or young person. You will need to explain why your child or young person fits within the legal test (that is outlined above), explaining why it is *necessary* for the SEP to be set out in an EHCP.

The letter you received from the LA should have outlined the reasons for its decision not to issue a Plan for example,

- 1) It could be where there is a situation where your child's or young person's SEN was not previously fully understood by the school and where SEP may not have been "*well matched*". The suggestion is that in this case it is not necessary for SEP to be made in accordance with an EHCP because the school will now, in the light of the information from the EHC needs assessment, be able to better match the SEP that is delivered.
- 2) It could be that your child or young person is not progressing sufficiently, despite well-targeted provision and it means that the SEP cannot reasonably be provided from the school's own resources, an EHCP should be issued.
- 3) It could be that it is not possible to consider the accuracy of prior knowledge or the effectiveness of previous provision. This could be because your child's SEN has only recently been identified because their needs have changed significantly or because they have only been in their current setting a short while. In this case, if the SEP identified as being necessary by the assessment process cannot be provided from the school's (or college or early years provider's) own resources, an EHCP should be issued.

### **Demonstrating that the school or other setting has assessed and delivered Special Educational Provision (SEP) appropriately**

Special Educational Need support in schools and early years settings should take

the form of “a four-part cycle through which earlier decisions and actions are revisited, refined and revised with a growing understanding of the pupil’s needs and of what supports the pupil in making good progress and securing good outcomes”.

Schools are expected to **assess, plan, do and review**.

For you as parents to show that your child’s school has done this you will need to provide evidence in the form of records of assessments that were carried out in school or early years provider and that the SEP that has been put in place. It may be an Individual Education Plans (IEP), Provision Maps or similar.

These should be available from school (ask your child’s class teacher and/or SENCo as you are entitled to these). They should show that the school had accurately identified your son or daughter’s SEN, put provision in place and reviewed it regularly. Surrey have introduced the Graduated Response which includes The Profile of Need document which is divided into four areas:

- Cognition and Learning
- Communication and Interaction
- Social Emotional and Mental Health (SEMH)
- Sensory and/or Physical.

Each of these areas then has the following sections:

- Profile of Need (**assess**)
- Assessment and Planning (**plan**)
- Intervention and Support (**do**)
- Evaluating Progress and Reviewing (**review**).

### **Demonstrating that the Special Educational Provision (SEP) required cannot be provided from within the school or other setting’s own resources**

Firstly, the SEP required by your child must be identified and then evidence needs to be presented about the extent to which the school or other setting can deliver it.

#### **(1) Identifying the SEP that is required:**

The information and advice gathered by Surrey during the assessment process is your starting point. If Surrey has gathered advice in accordance with the Law they will have received information about your child’s **education, health and care needs, desired outcomes and the special educational, health and care provision that is required**.

The SEND Code of Practice says that the evidence and advice submitted should be “*clear, accessible and specific and provide advice about outcomes relevant for the child or young person’s age and phase of education and strategies for their achievement*”.

The assessment advice needs to be reviewed using the two-coloured highlighter method (a) highlight the needs in one colour and (b) the provision in another. If there is not corresponding SEP (provision) for each identified SEN (need) this should be noted and the professional who identified the SEN should be asked to **specify the provision required**. It may be useful to look at our Information Sheet about Checking a Plan.

It maybe necessary for you to email Surrey to ask them to provide the missing information (remembering to give them a period of time to comply - 3 working days ).

## **(2) Identifying how much SEP can be provided by the school or other setting:**

It is always helpful if the school (or early years provider or post-16 institution) is in agreement with you that an EHCP is required because of the information required about their ability to meet your child's needs. If the school does support the application, then they can provide written evidence.

Schools are required to publish an **SEN Information Report** which should be available on the school's website. The report should contain information about the type and extent of SEP that they provide. If it is not on the website, then you should email to ask for a copy.

Surrey has a **Local Offer** - [www.surreylocaloffer.org.uk](http://www.surreylocaloffer.org.uk) – which must set out (amongst other things) the SEP it expects to be available for the children and young people for whom they are responsible. If the Local Offer is not helpful, then Surrey could be asked to explain how much SEP it expects schools to be able to deliver. (It maybe that Surrey refers to having delegated money for the school so that it can provide the SEP your child requires without the need for an EHCP).

Surrey gets delegated money from central government to pay for SEP in maintained schools and there are three elements to this funding:

- **The Age Weighted Pupil Unit (AWPU):** this is the basic per pupil funding which schools receive for every child on their roll
- **Additional Support Funding (ASF)** – this is an identified figure within the delegated budget which each school receives yearly. It is provided by LAs for mainstream schools and the Education Funding Agency for Academies and Free Schools. This element of funding is used to fund the SEP for children on SEN Support and a proportion of funding for children with Plans
- **The 'Top up' (or 'high needs')** funding for individual pupils. This funding comes as and when required and on the basis of the child's assessed needs. It is usually, although not exclusively, used to fund support for children with an EHCP.

Mainstream schools usually have to demonstrate that they have spent the AWPU plus £6,000 per annum from the ASF before they can revert to the LA for further funding. Surrey may therefore argue that provision which costs less than this total by definition cannot be provision which it is necessary to be set out in an EHCP.

Just because provision may cost less than this amount does not automatically mean the LA should refuse to issue an EHCP. You (as parents) will need to show that unless the SEP is provided via an EHCP, the provision is not in fact going to be made.

SEP is not always about cost, for example a child with sensory needs may need a completely different environment to that which can be provided in a mainstream school and you would need to show that any *reasonable adjustments* which were made to help were not been successful. Therefore, you need to show that the SEP required to support your child (in this example) cannot be provided without an EHCP as it is something which the school cannot provide.

### **Input from external specialists:**

You should ask which outside / external specialists the School or early years provision is able call in, e.g. Surrey's educational psychologist (EP), the behaviour support team, health service speech therapists and/or specialist teachers.

Schools can generally access a certain amount of advice and support from external specialists. If there is evidence that your child or young person needs a high level of on-going input from one of these services, then it is unlikely that it will be possible for it to be provided from the school's own resources.

It is worth remembering that if a School is applying for a certain service (or even resource) then it could be argued that what is required is (SEP) over and above that which is ordinarily available from within the school's own resources.

### **What if the Special Educational Provision (SEP) required *can* be provided from within the school's own resources but it is not being delivered?**

Whether it is because of poor leadership, lack of expertise or just bad practice, not all settings have regard to their duty under section 66 of the Children and Families Act to use their best endeavours to secure that the SEP.

An appeal with this sort of background can be challenging. Success will rely on the SEND Tribunal accepting that the school's failure or unwillingness to put SEP in place for your child means that it should be made in accordance with an EHCP.

- See our Information Sheet on Best Endeavours.

### **Outcomes of a refusal to issue an EHCP appeal:**

We would always say that you need to manage your expectations about what can be achieved by an appeal. The form of the EHCP itself is not part of the appeal process. If you 'win' your appeal then Surrey will be ordered to issue a draft EHCP, to consult with yourselves and then issue a Final. If you are not happy with the EHCP you will be able to lodge another appeal against the contents of the EHCP or the school named in Section I, once it has been finalised.