

Briefing for schools: consultations and naming of placements for mainstream schools, resource bases and special schools

This briefing paper outlines

- the statutory requirements and processes within SENAR for consulting with schools regarding potential placements for children with EHCPs
- how decisions are made about what placement should be named in Section I of the EHCP

Summary

It is important to note that consultation and naming are two separate processes. When the LA consults with a setting, it is not consulting 'for a place'. It is asking the setting to consider whether they *could* be a suitable placement for the child. In order to determine that the setting is NOT suitable at least one of two 'legal tests' must be evidenced¹

- It would be unsuitable for the age, ability, aptitude or SEN of the child or young person
- The attendance of the child or young person there would be incompatible with the efficient education of others, or the efficient use of resource

The LA must comply with a request from a child's parent or young person for a particular setting² unless one of these legal tests applies. The onus is on the setting to provide the evidence that one or more of the legal tests applies.

These tests of 'unsuitability' and/ or 'incompatibility' are the only reasons that a setting cannot be named in Section I of an EHCP. This is why a setting 'being full' is not a prohibitive factor in law for consulting or naming a setting. The threshold for proving incompatibility is very high.³

Based on careful consideration of the responses from settings consulted, taking into account parental preference, the LA then decides where to name as placement in Section I of the EHCP (i.e. whether to give a place at the setting to the child)

Schools should note that indicating that they *can* meet the child's needs, taking into account age, ability, aptitude or SEN; and that the attendance of the child or young person *is* compatible with the efficient education of others, or the efficient use of resources, does not mean that placement will be made at the setting. Consultation, considering the response

¹ (Sections 33 and 39 of the Children and Families Act 2014)

² See Paragraph 9.78 and 9.79 of the SEND code of practice

³ ***Hampshire County Council v R & SENDIST [2009] EWHC 626 (Admin) (2009) ELR 371***: if a parent or young person requests a particular school is named in a Statement (now an EHC plan) and the LA argue that it is 'incompatible with the efficient education of others', there needs to be a positive finding of incompatibility, not merely by evidence of some impact on those other children.

NA v London Borough of Barnet (SEN) [2010] UKUT 180 (AAC): The Upper Tribunal stated that this was a "*strong test of incompatibility*", which means the test is a high threshold for the local authority. The local authority needs to have clear evidence of the difference the admission of that particular extra child or young person will make, and which students will be affected by this.

and as well as other factors such as efficient use of public money, is a process that does not automatically lead to a placement being made at a setting that has 'said yes'.

FAQs

When would settings need to be consulted?

There are 5 events that trigger consultation to be required

1. A new EHCP is being issued
2. A child with an EHCP has moved into Birmingham and requires a placement
3. An annual review has taken place and based on a change in needs and provision a new placement is necessary
4. A phase transfer is due to take place (a move from Nursery to Reception; from an infant school to a junior school; and move from primary school to secondary school; a move from secondary school to post 16 education, employment, or training)
5. There is an active SEND Tribunal appeal by parents or young person against the local authority's decision to name a setting in Section I of the EHCP

There is one further circumstance that may necessitate consultation with settings which is where a child with an EHCP has been permanently excluded. However, this should be a 'never' event^{4, 5}. Through the effective use of professional advice and guidance, and the annual review process, permanent exclusion should not be necessary and these cases should appear in category 3 above.

How is the decision made about what type of placement a child needs?

The decision about what type of placement (mainstream, resource base, special school) is needed for a child is made by the SEND panel⁶. This is known as 'LA view'.

- SEND panel is a multi agency and multi disciplinary panel, consisting of 15-20 senior professionals from Education, Health and Social Care. Advice given by staff who have directly met with the child is moderated and evaluated by senior staff within each individual service; and at SEND panel. SEND panel collectively contributes to the local area's statutory duties in relation to decision making relating to EHCPs, including type of placement

What are the different 'types' of consultation?

There are three types of consultation to a setting

- The setting is parental preference: the LA is legally required to consider and consult with parental preference⁷
- There is an active appeal and the LA is required by law to consult to provide sufficient information to enable the tribunal panel to make sound judgements⁸

⁴ See pages 23- 24 of Suspension and permanent exclusions from maintained schools, academies and pupils referral units in England, including pupil movement September 2022

⁵ See [School suspension and exclusion pupils with SEND](#) for a summary of the legal risks of excluding a child with SEN and an EHCP .

⁶ SEN panel considers children and young people aged 0- end of year 11; a similar 'post 16 panel' considers cases in years 12 to age 25 year.

⁷ (e.g. Sections 33 and 39 of the Children's and Families Act)

⁸ (rule 21(2) of the Health, education and Social Care Chamber procedure rules; and Practice Direction 8)

- The LA views that the setting may be suitable. The LA is also bound by legislation to undertake these consultations as well⁹

What is the process for mainstream school consultation and naming?

When panel and parental view is mainstream, SENAR will consult with

- parental preference, and if this is not the closest school to the child's home,
- the nearest mainstream school.

SENAR teams with the support of SEN panel will agree the final naming of a mainstream setting¹⁰.

How does SENAR decide whether to consult with a RB or special school as LA view?¹¹

Whether to consult a special school or RB as LA view based on a range of factors and information including

- a live data tracker which shows the vacancies at special schools and resource bases. This includes information about places that are already occupied; live tribunal cases that may result in a place being taken; future placements already agreed. This tracker is maintained by colleagues in the commissioning team, rather than SENAR staff
- distance from the family home as the aim is always for children to be educated in their local community¹²
- efficient use of public resources which includes factors such as cost of the placement and travel
- where a setting is full or has more pupils than their commissioned numbers, senior leaders in SENAR consider whether it is necessary to consult with the setting as LA view.

However, as indicated above a setting 'being full' is not a prohibitive factor in law for consulting or naming a setting. The threshold for proving incompatibility is very high.

⁹ (see Section 36, 37, 38, 39, 40 and 44 of the Children and Families Act 2014 and Regulations 4, 5, 8, 10, 13, 22 and 28 of the SEND regulations 2014)

¹⁰ See paragraph 9.89 pf the SEND Code of Practice: mainstream education cannot be refused by a local authority on the grounds that it is not suitable

¹¹ RB is not a separate/ stand alone entity: it is part of the mainstream school. Technically, the consultation is with mainstream school and not just with the RB. The mainstream school is named in Section I and provision offered by the RB sits in Section F. On appeal, Tribunal cannot order a separate unit which is part of a school to be named in Section I

¹² As well as the importance of children and young people being educated in their local community the local authorities transport duties mean that CYP will only be eligible for free school transport if they attend their nearest suitable school (s.508B(10) Education Act 1996). Para 9.214 Code of Practice which outlines when the local authority can use transport disclaimers i.e. agree to name a further away school but only if parent funds transport

How is a decision made about the naming of a resource base or special school placement in Section I?

SENAR carefully consider all the responses received to consultations¹³ whether these have been made on the basis of parental preference or LA view¹⁴. If a setting indicates that they believe one of the 'legal tests' will be met if the pupil is placed, senior staff in SENAR consider whether the justification for this is robust, or whether concerns identified can be overcome through 'reasonable steps'¹⁵.

Once SENAR have identified a resource base or special school setting that can be named in Section I, the case is referred to Placement panel. This panel considers in-year placement requests in respect of RB, special and independent settings in order. The panel considers individual cases alongside the priorities for placements (CYP out of school/awaiting special etc) and maintains oversight of available spaces and sufficiency. In making its decisions, it must also consider the use of resources/public expenditure and appropriate control of High Needs Block (HNB) of the Dedicated Schools Grant (DSG).

What happens at phase transfers?

When children are due to move from

- Nursery to Reception
- infant school to a junior school
- primary school to secondary school
- secondary school to post 16 education, employment, or training

Parents are asked what their preferences are for placement for the following academic year. Parents are given the opportunity to make 2 choices, as are parents whose children do not have an EHCP, although some may choose not to make all 2 choices. Consultations are made to all of the parent's preferences. If the LA view is different to the parental preference, then a setting (or settings) representing LA view will also be consulted.

The decision making about placement is made by a panel of SENAR staff who carefully consider the responses to the various consultations. Working with the commissioning team, the panel takes into account the number of available vacancies for the following year and well as factors indicated in 'How is a decision made about the naming of a resource base or special school placement in Section I?'

What can be done to manage to volume of consultations to settings?

As indicated above, the local authority is bound by legislation and statutory duties in relation to consultations and placement. However:

Where a resource base of special school is full, or has more pupils than their commissioned numbers, senior staff within SENAR will consider whether it is necessary to consult with the setting as LA view. However, as indicated above a setting 'being full' is not a prohibitive factor in law for consulting or naming a setting. The threshold for proving incompatibility is very high

¹³ See paragraph 9.80 of the SEND Code of Practice

¹⁴ The Tribunals team undertake consideration of responses to consultation for the cases that are subject to appeal. The team will try to resolve the appeal without the need to go to tribunal.

¹⁵ See paragraphs 9.91 and 9.92 of the SEND Code of Practice

The local authority is reviewing our processes for phase transfers to try to extend the period of time over which consultations take place so that these are more evenly spread for schools

Schools can help to reduce the volume of consultations that RB and special schools receive by discussing 'pathways' with parents, carers and children at all ages and stages during the annual review process remembering

1. the presumption of a mainstream education
2. that any suggestion that the current setting type may not be suitable during the next phase of education is based on professional advice and evidence. Parents, carers, schools and the wider professional network should take an evaluative approach which considers a child and young person's needs and provision, with a clear understanding of the requirement for schools to make reasonable adjustments and use best endeavours to meet pupil needs

We complete lots of consultations but never hear anything back. Why?

Before finalising a placement there are several factors that the LA has to consider, and many issues that can mean that the plan for placement has to change. For example, a parent may change their parental preference; and schools respond within different time periods to consultations. A consultation response is considered valid for a number of months, and given the dynamic nature of cases, it is impossible to give a guaranteed definitive indication to a school whether a place at a setting will be needed. Even when a placement is named, the parent may submit an appeal and in trying to resolve the appeal without the need to go to court, the LA may need to reconsider previous consultation responses.