

PUBLIC & MEMBER QUESTIONS FOR CFLLC SELECT COMMITTEE – 14 NOVEMBER

Public Question from Sarah Moran

- 1) How many pre-action protocol letters - prior to seeking a judicial review - has SCC been made aware of/received in each of the last 3 years; how many of these letters led to resolution before judicial review; and how many of them relate to the following issues:
 - Failure to meet deadlines during the EHCP assessment process, after annual reviews and tribunal hearings, and for change of phase placements;
 - Failure to supply provision in sections F and G of EHCPs;
 - Unlawful exclusions/imposition of reduced or part time timetables;
 - Failure to provide education for children out of school?

Response:

In 2022, approximately 77 pre-action letters were received, in 2023 this rose to 126 and to date in 2024 there have been 71.

In the last 3 years, less than 5 Judicial Reviews have been issued.

The pre-action challenges relate to all the issues cited with the exception of unlawful exclusions / imposition of reduced or part time timetables – as these are decisions for the school to make so any challenge to these specific actions would be made to the school.

It is not possible to advise of the breakdown of letters relating to each of the issues as this would involve manual analysis of each letter however, the general themes are captured as noted above.

Public question from Amanda Lazenby

- 2) I am returning to a question which I originally asked back in July 2024 with regards to the much-hailed EHCP Recovery Plan. Here is a reminder of the main content:

"I am aware of a growing concern that plans are being issued which are totally unsuitable for the child/young person. The impact of such a plan is that the CYP remains out of education or within a completely wrong setting, where their needs cannot be met. Can you please release the figures relating to the amount of mediation and appeals lodged after issue, both prior to, and during, the EHCP Recovery Plan?"

I sent this question within the timescale (7 days prior to the meeting). I noted that [the response](#) was sent to me during the early evening of the 29th of July and the CFLLC meeting was at 10am the following day. Due to my caring commitments, I had not had enough time to fully digest the response. What I can say now, is that I was given data for previous periods but NOT inclusive of the timescales I requested - namely, during the EHCP Recovery Plan. Clare Curran kindly reassured me that this information is routinely

monitored, and she made a commitment to provide the information I requested. Can I now be given the information please?

Response:

The EHCNA recovery team has been issuing the majority of new EHCPs since November 2023. The quadrant SEND teams have continued to issue EHCPs where changes are required following an annual review, tribunal or mediation.

We do not currently record data on which team issued an EHCP that was then subject to appeal all teams are subject to the same quality assurance processes and we expect all teams to issue high quality plans.

We are confident that our new EHCPs meet the requirements in the code of practice; in September 2024, 83% consisted of sections graded either satisfactory, good or outstanding.

All EHCPs are drafted in coproduction with parents and schools who have an opportunity at draft stage to note any information that is missing. There have been occasions where schools have submitted new information shortly after the plan has been issued which has led to 5% of EHCP being revised to include this new information and has often led to a change of provision or setting. We will always consider holding an early annual review of an EHCP if parents or schools feel this would be helpful. This can be arranged via the SEND quadrant team.

Finally, we do have an appeal rate that is above national levels, but this is primarily due to appeals about the decision to assess and the levels of provision or named education provision stipulated in the plan and are not reflective of the quality of the EHCP. Please see table below.

Numbers of Appeals Registered

	2022-23	2023-24
<i>Refusal to Assess</i>	96	353
<i>Refusal to Issue</i>	80	151
<i>Appeals for sections BFI (needs, provision and placement)</i>	218	263
<i>Appeals for section I (placement)</i>	146	241
<i>Cease to maintain</i>	<i>Less than 5</i>	<i>Less than 5</i>
<i>Total number of requests for assessment</i>	3,227	2,958
<i>Total number of EHCPs issued</i>	1,844	2,903

Member question from Cllr Jonathan Essex

- 3) This question seeks to confirm the way in which Surrey County Council complies with its legal duties at each stage of the EHCP process as explored in the recent internal end-to-end review. The points below are not exhaustive and do not include requirements with respect to Home to School Transport. For each of the six points set out below, please can you confirm:
- i) Surrey County Council's understanding of the statutory test / requirements that should be applied (including relevant case law);
 - ii) How Surrey County Council ensures that staff (new and on an ongoing basis) know, understands and applies the statutory test; and
 - iii) How Surrey County Council checks and/or confirms that they are applying the correct test.
1. Deciding whether a child should have an EHC needs assessment (in accordance with section 36(8) of the Children and Families Act 2014)
 2. Carrying out the EHCNA, including what information and advice should be gathered (in accordance with regulation 6(1) of the Special Educational Needs and Disability Regulations 2014) Jackie This is about Phase 2 of the statutory assessment process not the L-SPA part It will have to be responded to by someone in SEND
 3. Deciding whether to issue an EHCP (in accordance with section 37(1) of the Children and Families Act 2014)
 4. Content and level of detail in the EHCP (in accordance with regulations 11 and 12 of the Special Educational Needs and Disability Regulations 2014), including that provisions are "so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often specification of hours per week will no doubt be necessary", as noted in L v Clarke and Somerset CC [1998] ELR 129)
 5. Naming a school in section I of the EHCP, including the legal requirements around consulting schools and when the LA can refuse parental choice of school (in accordance with section 39(5) on naming an "appropriate" school, and sections 39 to 41 of the Children and Families Act 2014 more generally)
 6. Providing reasons where (i) a decision has been made not to assess for an EHCP(s36(5) of the Children and Families Act 2014) or (ii) a decision has been made to issue or not to issue an EHCP (s36(9)(c) of the Children and Families Act 2014).

Response:

- i) We are wholly confident that our approach follows the legal requirements set out in the Children & Families Act 2014, The Special Educational Needs and Disability Regulations 2014 and The Special Educational Needs and Disability (SEND) Code of Practice which set out the criteria for deciding whether a child or young person requires an Education, Health, and Care (EHC) needs assessment and, if so, whether an Education, Health, and Care Plan (EHCP) should be issued. This framework is legally binding in England under the Children and Families Act 2014.

- ii) The L-SPA statutory case work team (who make the decision about whether a statutory assessment is necessary) have all received training from the Independent Provider of Special Educational Advice (IPSEA) as to the legal test applied to Phase 1 decision making and how the legislation is applied in practice. Regular update and additional training is offered through monthly team development meetings and by each member of the team having protected, professional development time weekly in which they are expected to maintain their own learning and development. Understanding of the legislation in addition to the guidance as set out in the SEND Code of Practice 2024 is also a core part of the L-SPA staff induction programme.

The SEND teams (who produce EHCPs) also have the opportunity to attend IPSEA training, the level 3 accredited SEN training and have regular updates from the quality managers who undertake the quality audits and receive feedback from case law and tribunals to ensure that the SEND staff understand the statutory requirements for completing EHCPs. Further work is underway as part of the end-to-end review to ensure that there is triaging of case officers' knowledge at induction and that a more finely tuned training offer is in place to ensure all staff have a sound understanding of the law. It is important to note that case officers do not make decisions to issue EHCPs.

iii)

1. Deciding whether a child should have an EHC needs assessment a (in accordance with the Children and Families Act 2014) is subject to a multi-agency approach to decision making. This includes representatives from health, care and education providers and enables peer challenge and alternative, professionally informed reviews of the evidence submitted to be taken into account.

These professionals decide whether the local authority should conduct an assessment of education, health and care needs when it considers that a child has or may have special educational needs, and it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

They review evidence provided to them as to

- Whether the child or young person has not made expected progress despite interventions and support that are ordinarily available to children of the same age.
 - Information from the child's school or educational setting about the steps taken to meet the needs of the child and the impact of any support provided.
 - The views, wishes, and feelings of the child or young person, and their parents or carers.
 - External professional reports that indicate ongoing or complex needs that require further evaluation.
2. Advice is requested from all statutory advice givers (education, health and social care) once the decision to assess has been confirmed. In addition, specific professional advices that are required in accordance with the presenting needs of the child or young person will also be requested, for example speech and language therapy. Advice-givers are allocated 6 weeks to complete their reports.

All of these advices are used to prepare a summary of assessment document which is shared, alongside all of the full reports, to the multi-agency panel who review cases.

3. The criteria for issuing an EHCP as set out in the SEND code of practice says an EHCP should be issued if:

- the special educational provision required to meet the child or young person's needs cannot be reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions, or whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan

The case of BC v Birmingham County Council in 2018 considered when a child might require provision that is different to or additional from what other children are receiving in a mainstream school. In this case, the judge stated "The funding for the preponderance of pupils with SEN at a mainstream school is intended to come, as before from the school's annual delegated budget...and its notional SEN budget of £6,000. The school is expected to exhaust the £6000 before asking for a top-up funding from the LA." This case law is helpful in providing clear guidance regarding when to issue an EHCP.

Surrey also pays particular attention to:

- evidence of the child or young person's academic attainment (or developmental milestones in younger children) and rate of progress;
- information about the nature, extent and context of the child or young person's SEN;
- evidence of the action already taken by the school or other setting;
- evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided;
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies.

This further information is considered to ensure that the resources normally available to mainstream early years providers, schools and post-16 institutions have been used in a way that would best meet the child's needs.

4. Senior Case Managers quality assure all plans using the quality framework set out in our audit tool, which draws from the legislation and the code of practice.

We do expect provision to be specified and that targets set out in EHCPs are Specific, Measurable, Achievable, Realistic and Time Bonded (SMART). We assess the quality of written plans against this expectation.

Training on plan writing is ongoing, offered as standard for all new staff and as refresher training to all current staff by our Quality Management team.

5. To comply with Regulation 12 of The Special Educational Needs and Disability Regulations 2014 (The SEND Regulations 2014), the name of the school or other institution to be attended by the child or young person, and the type of that institution (or just the type if no specific institution is named) is named in Section I of an EHCP. On the rare occasion that a child or young person is unable to attend a school or setting, Section I is left blank.

We always consult with the parental preference school, regardless of whether it is in line with the recommendations of the local authority in respect of the type of provision required. We also consult with the closest appropriate school in accordance with the local authority recommendations.

Parents are entitled to have certain schools of their preference named in section I of the EHCP unless the following exceptions apply in accordance with s.39(3) Children and Families Act 2014:

- a. the school or institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person, or
- b. the attendance of the child or young person at the requested school or other institution would be incompatible with –
 - a. the provision of efficient education for others, or
 - b. the efficient use of resources.

Where parents request a specialist setting for their child, but the local authority assessment indicates their needs can be met in a mainstream provision, part a of the legal test would apply.

However, should the parental preference be in line with the local authority recommendation for a type of setting, but the parental preference is further away, there is an entitlement in law for the nearest school to be named unless one of the exceptions above can be demonstrated. This particularly impacts home to school transport costs rather than SEND and is covered in training for all SEND teams.

6. i The L-SPA provides the reasons for not agreeing to secure an EHC Needs Assessment in an email which we personalise as far as possible explaining the decision and a statutory notification letter which has details of the right of appeal, signposting to SEND Advice Surrey and the right to mediation.

Following the statutory letter sent to parents, parents will receive a phone call to support their understanding and answer any specific questions.

In the significant majority of cases the rationale is that there is no evidence at that time that it 'may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan'

Where possible we draw on advice from multi agency professionals who have informed our decision to offer advice or signposting to the family and school as to

what additional ordinarily available support and resources may be available that could support the child or young person to make progress and thrive in their educational setting.

The sharing of signposting or additional advice is not a statutory duty but is good practice and can facilitate positive conversations between the school and family to explore options to access additional support appropriate to that individual.

- ii. When a 'no to issue' an EHCP decision is made, the decision and rationale is shared with families and school by the case officer, electronically, after the decision-making panel has concluded. A way forward meeting is also offered. In addition, the summary of assessment is shared with the family and the school in order to support ongoing planning. This can be used in conjunction with the full reports which are shared with families as they are produced. While the no to issue decision has a clear process, we are reviewing this as part of the end to end review to ensure that the process is as effective as possible.

Member question from Cllr Liz Townsend:

- 4) The details of how many appeals have been registered YTD vs Previous Year are difficult to extract from the public KPI Data.

Given that this is a definitive and objective measure of improvement in relation to EHCPs, could a full breakdown please be provided of the following:

- a) How many year-to-date appeals have been registered relating to a new EHCP application, specifically:
 - i. Refusal to assess,
 - ii. Refusal to issue,
 - iii. Disagreement with final plan content or placement.
- b) Of these 'new' EHCP appeals, how many relate to plans completed by the EHCP Recovery Team?
- c) How many year-to-date appeals relate to annual reviews?
- d) How many SENDIST appeals in total are currently pending for Surrey County Council?

Furthermore, can it be confirmed whether or not there have been any adjustments over the past year to the criteria for the internal quality assessment ratings for EHCPs to reach 'good' or 'outstanding'?

Finally, how does the service ensure that quality assurance assessments align with the statutory requirements of the Children and Families Act 2014, as tested in tribunal? There

have been concerns raised with me about the focus on other metrics rather than the fundamental issue of lawfulness; is this something that is recognised?

Response:

- a) The data provided below is for the academic years 2022-23 and 2023-24, in line with the DFE reporting.

Numbers of Appeals Registered

	2022-23	2023-24
<i>Refusal to Assess</i>	<i>96</i>	<i>353</i>
<i>Refusal to Issue</i>	<i>80</i>	<i>151</i>
<i>Appeals for sections BFI (needs, provision and placement)</i>	<i>218</i>	<i>263</i>
<i>Appeals for section I (placement)</i>	<i>146</i>	<i>241</i>
<i>Cease to maintain</i>	<i>Less than 5</i>	<i>Less than 5</i>
<i>Total number of requests for assessment</i>	<i>3,227</i>	<i>2,958</i>
<i>Total number of EHCPs issued</i>	<i>1,844</i>	<i>2,903</i>

- b) The EHCNA recovery team has been issuing the majority of new EHCPs since November 2023. The quadrant SEND teams have continued to issue EHCPs where changes are required following an annual review, tribunal or mediation.

It is important to note that the above data will relate to the work of both the recovery team and the quadrant teams. We do not currently record data on which team issued an EHCP that was then subject to appeal all teams are subject to the same quality assurance processes and we expect all teams to issue EHCPs in line with the SEND code of Practice

- c) As above, our systems do not record whether a tribunal relates to a new EHCP or an existing one (Annual Review).
- d) At present there are 588 live tribunals pending a hearing, there is around a 12-month delay in hearing dates which significantly impacts the time in which an appeal can be heard and as such the number of live appeals the LA has at present.
- e) The SEND service ensures that quality assurance assessments align with the statutory requirements of the Children and Families Act 2014, by using a nationally accredited audit tool for completed EHCPs in addition to its own internal service quality checks during the EHC needs assessment process.

There are both monthly and bi-annual audits where each section of the EHCP is graded individually. The monthly audit is undertaken by the SEND Quality Team through dip sampling of new EHCPs. The bi-annual audit is a multi-agency audit and can include new EHCPs and EHCPs that have been subject to an annual review.

There has been an increase in the percentage of the quality gradings given to individual plan sections since August, rising from 73% to 82% good or satisfactory in September.

In Surrey, satisfactory indicates that the plan is compliant with all of the 'musts' in the statutory code of practice. There have been no changes to the standards required for plans to be recognised as good or outstanding since 2021.

Where plans that are unsatisfactory have elements that need to be addressed, but not such that they impact the ability of any professional working with the child to deliver the required provision for that young person, these issues are addressed at the next annual review (without the need for immediate action). Where there are elements that are inadequate, these require immediate action, these are resolved as soon as they have been identified.

In this way our plans adhere to the statutory requirements set out in the code of practice.

This page is intentionally left blank