

# **ADVOCACY CLINIC**

## *Education rights of looked after children*

Friday 10 November 2023, 10am-11:30am on Zoom

For members of Children and Young People's Advocates Network

# KEY MESSAGES

1. Looked after children possess a legally protected right to education that must cater to their individual needs, while also considering their wishes and feelings.
2. Social workers, Independent Reviewing Officers, the Virtual School Head, the Designated Teacher, and the Special Educational Needs Coordinator play a pivotal role in ensuring that the local authority fulfils its duty to promote the educational achievement of looked after children.
3. In instances where a child's education rights are not being respected, there are legal avenues to challenge the situation and seek redress.

## Statutory duties!

Primary legislation  
Secondary legislation  
(& statutory guidance)

- Wishes & feelings
- Safeguarding & promoting welfare
- Promote educational achievement

✓ **Human rights duties**  
(*Human Rights Act, Cafcass, IROs*)

Children Act 1989  
complaints – **LGSCO**

# KEY LEGISLATIONS AND STATUTORY GUIDANCE

Children Act 1989  
Human Rights Act 1998 (ECHR)  
Children and Social Work Act 2017



The Care Planning, Placement and Case Review (England) Regulations 2010



The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review  
Promoting the education of looked-after and previously looked-after children (2018)  
The designated teacher for looked-after and previously looked-after children (2018)

# LOCAL AUTHORITIES' STATUTORY DUTIES

## CHILDREN ACT 1989

**Section 22:** general duties in relation to looked after children

- s22(3)(a): must safeguard and promote welfare
- s22(3A): must promote educational achievement
- s22(3B): must appoint a Virtual School Head (VSH) to implement s22(3A)
- s22(4)-(5): must ascertain and give due consideration to the child's wishes and feeling (\*paras 1.10-1.14 of Volume 2 Children Act 1989 statutory guidance)

**Section 22C(8)(b):** placement must not disrupt their education or training

**Section 23ZZA:** promote the educational achievement of previously looked after children by providing information and advice

## CHILDREN AND SOCIAL WORK ACT 2017

**Section 1(1)(a)-(g):** have regard to the corporate parenting principles

# LOCAL AUTHORITIES' STATUTORY DUTIES

## CHILDREN'S HUMAN RIGHTS

- **Section 6(1)** of the Human Rights Act 1998 (HRA) requires all public authorities to act compatibly with European Convention on Human Rights (ECHR).
- ECHR rights include the right to respect for private and family life (Article 8), prohibition of discrimination (Article 14), and the right to education (Protocol 1, Article 2).
- **Section 7(1)** HRA gives the right to bring proceedings against public authorities for human rights breaches.
- **Section 3** HRA requires domestic law, such as the Children Act 1989 and the Care Planning, Placement and Case Review (England) Regulations 2010 to be interpreted and implemented compatibly with ECHR rights.
- ***A (Appellant) v Essex County Council (Respondent)* [2010] UKSC 33**: the Supreme Court clarified that a child can seek damages under the HRA where the child "has been denied the basic minimum of education under the domestic system", which amounts to a breach of Protocol 1, Article 2 of the Human Rights Act 1998 (right to education).

# LOCAL AUTHORITIES' STATUTORY DUTIES

## THE CARE PLANNING, PLACEMENT AND CASE REVIEW (ENGLAND) REGULATIONS 2010

### Care plan

[Reg 4:](#) Duty to assess and prepare a care plan

[Reg 5\(b\)\(ii\):](#) must include 'personal education plan'

[Schedule 1, para 2:](#) what information PEP must include

[Reg 6:](#) Care plan (including PEP) must be kept under review (see Part 6)

### Personal education plan (PEP)

[Schedule 1, para 2:](#)

- (1) education and training history, including special educational needs
- (2) existing arrangements for education and training, including details of any special educational provision and other provisions to meet particular needs and promote educational achievement
- (3) Planned changes to arrangements for education and training, and provisions to minimise disruption
- (4) Leisure interests
- (5) Role of appropriate person, and any other person who cares for the child, in promoting educational achievements and leisure interests

### Placement plan

[Reg 10:](#) Avoidance of disruption in education while in KS4 (Year 10 & 11)

[Reg 10\(4\):](#) Changes that disrupt the child's education or training, must meet the child's needs and be consistent with PEP

[Schedule 2, para 1\(4\):](#) must include arrangements for education and training

### Pathway plan

[Schedule 8, para 4:](#) must include the plan for continuing education or training when no longer looked after (see reg 43)

[Reg 42\(2\)\(g\)\(i\):](#) must take account of the child's wishes and feelings

### Child's review meeting

[Schedule 7, para 6:](#) must consider educational needs, progress and development and whether any change is, or is likely to become, necessary or desirable to meet the child's particular needs and promote their educational achievement, having regard in particular to the advice of the designated teacher.

[Schedule 7, para 7:](#) must consider the child's leisure interests

"Education, like health, is closely linked to quality of life in adulthood...Most parents are very preoccupied with their child's education and educational attainment is highly correlated with parental interest" (page 177)

"Children looked after by a local authority suffer from a number of interlocking educational disadvantages...a crucial factor is the level of expectation of social workers and carers about what the children in their care are capable of and the degree of priority given to educational issues in their daily lives" (page 177)

Care planning requirements in relation to education – paras 2.65-2.77 (pages 35-38)

The PEP should:

- “...be initiated as part of the care plan before the child becomes looked after” (2.71)
- “...in the case of an emergency placement...have been initiated within ten working days” (2.71)
- be “available for the first statutory review meeting of the care plan (28 days after entry to care or accommodation)” (2.71)
- “...interrelate with other strands of the care plan, particularly those relating to health, emotional and behavioural development, identity and family and social relationships” (2.72)
- “...translate into practical action” (2.72)



## THE VIRTUAL SCHOOL HEAD:

### PROMOTING THE EDUCATION OF LOOKED-AFTER AND PREVIOUSLY LOOKED-AFTER CHILDREN (STATUTORY GUIDANCE)

“...lead responsible officer for ensuring that arrangements are in place to improve the educational experiences and outcomes of the authority’s looked-after children, including those placed out-of-authority” (para 3)

“...promote a culture that takes account of the child’s views, identifying and meeting their educational needs” (para 7)

“...ensure the educational attainment and progress of children looked after by the local authority are monitored and evaluated” as if those children attended a single school” (para 4)

“...work with social workers and others in the local authority to ensure [corporate parenting] principles e) and f) are central to the authority’s ethos, and work” (para 6)

“...the educational advocate that parents are for others” (page 5)

“...ensure these children have the maximum opportunity to reach their full educational potential” (page 5)



- **Securing appropriate education (paras 8-12)**
  - VSH should ensure that social workers, IROs, admission officers and SEND departments understand and comply with:
    - [The School Admissions Code](#) (about the priority admission arrangements)
    - [Statutory guidance on school exclusion](#)
    - [Special educational needs and disability code of practice 0 to 25 years](#)
- **Asylum seeking children and refugee children (paras 13-15)**
- **School admissions (paras 16-19)**
- **The Personal Education Plan (paras 20-32)**
  - The social worker's role in supporting the PEP (para 30)
  - The IRO's role in supporting the PEP (paras 31-32)
- **School exclusions (para 68-71)**
- **Special educational needs (para 72-75)**
- **Children in custody (paras 76-80)**

### **Section 20 of the Children and Young Persons Act 2008**

- Duty to designate a member of staff at the school (designated teacher) responsible for promoting educational achievement

**The Designated Teacher (Looked After Pupils etc)(England) Regulations 2009:** reg 3 qualification and experience (s20(3) CYPA 2008)

### **The designated teacher for looked-after and previously looked-after children (statutory guidance)**

- “An unaccompanied child looked after by a local authority is entitled to the same local authority support as any other looked after child: to have a safe and stable placement; to receive the care that they need to thrive; and the support they need to fulfil their educational and other outcomes” (para 13)

### **Promoting the education of looked-after and previously looked-after children (statutory guidance)**

- Para 29: “...leads on how the PEP is developed and used in school to make sure the child’s progress towards education targets is monitored”

“...central point of initial contact within the school...making sure arrangements are joined up and minimise any disruption to a child’s learning” (para 9)

Ensures SEND code of practice, as it relates to looked after children, is followed; has “skills to identify signs of potential SEN issues, and know how to access further assessment and support where necessary, making full use of the SENCO and local authority support team” (para 53)

“...leadership role in promoting the educational achievement of looked-after children on the school roll” and “ensuring school staff understand the things which can affect how...children learn” (paras 10-11)

“...direct and day-to-day role in promoting the educational achievement...either directly or through appropriate delegation” (para 12)

# THE PERSONAL ADVISER

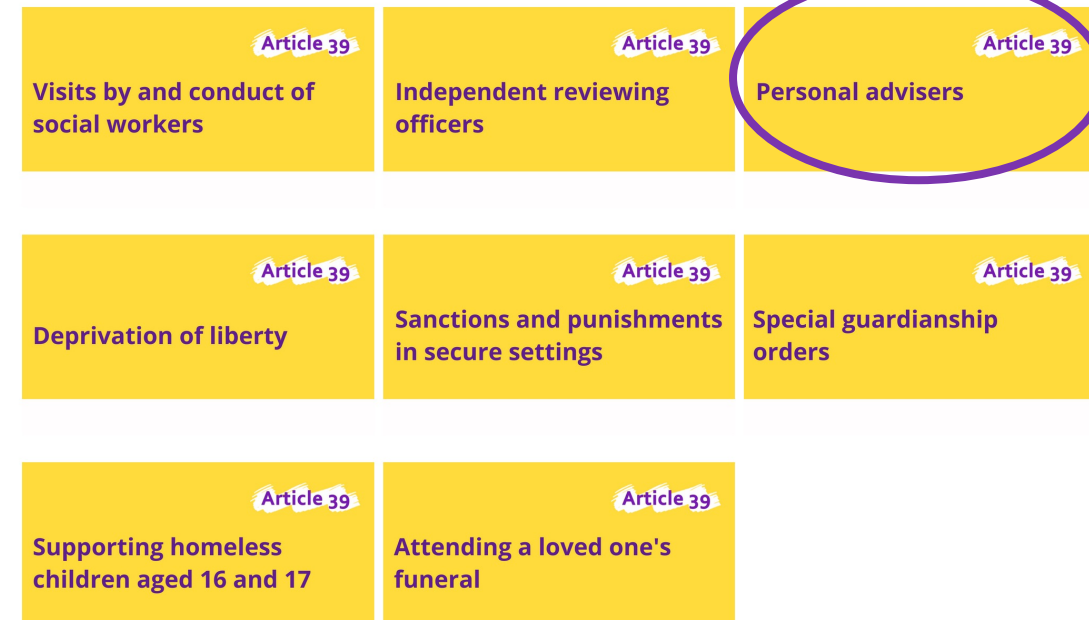
The local authority must appoint a personal adviser for every eligible child (schedule 2, paragraph 19C Children Act 1989)

## *Functions of the personal adviser*

**44.** The personal adviser's functions in relation to C are to—

- (a) provide advice (including practical advice) and support,
- (b) participate in reviews of C's case carried out under Part 6,
- (c) liaise with the responsible authority in the implementation of the pathway plan,
- (d) co-ordinate the provision of services and take reasonable steps to ensure C makes use of such services,
- (e) remain informed about C's progress and wellbeing, and
- (f) maintain a written record of their contacts with C.

(reg 44 The Care Planning, Placement and Case Review (England) Regulations 2010)



Article 39 Visits by and conduct of social workers	Article 39 Independent reviewing officers	Article 39 Personal advisers
Article 39 Deprivation of liberty	Article 39 Sanctions and punishments in secure settings	Article 39 Special guardianship orders
Article 39 Supporting homeless children aged 16 and 17	Article 39 Attending a loved one's funeral	

# LEGAL AVENUES TO CHALLENGE BREACHES OF A CHILD'S EDUCATION RIGHTS



\*The Care Planning, Placement and Case Review (England) Regulations 2010)

# THE INDEPENDENT REVIEWING OFFICER

## STATUTORY FUNCTIONS

### s25A Children Act 1989

- must be appointed for every looked after child

### s25B Children Act 1989

- must monitor the local authority's performance of its functions;
- participate in the review of the child's case;
- ensure the child's wishes and feelings are given due consideration

### \*reg 36(1)

- The IRO's role

### \*reg 45(1)-(2)

- must inform the child about their rights and help the child access legal advice and/or an advocate

### \*reg 45(3)

- must consider a referral to Cafcass if the local authority fails or breaches their duties "in any significant way"

### para 2.10 IRO Handbook

- "The primary task of the IRO is to ensure that the care plan for the child fully reflects the child's current needs...."

## STATUTORY POWERS

### \*reg 33(3)(a)

- can request a review of the child's case outside of the minimum statutory timescales

### para 6.1-6.7 IRO Handbook

- initiates the local dispute resolution process, if an issue is "not resolved in a timescale that is appropriate to the child's needs"

### para 6.9 IRO Handbook

- can make a complaint on behalf of a child who does not have the ability or understanding to do so

## IRO SHOULD (EDUCATION)

### para 3.38 IRO Handbook

- Ensure the child's education needs are addressed in the review meetings

### para 5.8 IRO Handbook

- Ensure pathway plan has contingency plans in respect of education

### Promoting the education of looked-after children

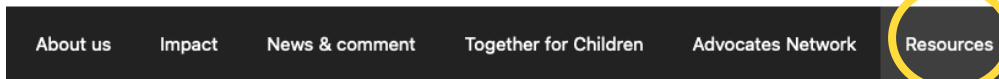
- Ensure PEP's effectiveness is scrutinised in sufficient detail (para 31)
- "...ensure review of the care plan, including the PEP, is appropriately linked with the statutory review of the EHC plan" (para 31)
- "...raise any unresolved concerns about a child's PEP or education provision with social workers and the VSH" (para 32)

\*The Care Planning, Placement and Case Review (England) Regulations 2010

# RESOURCES FOR ADVOCATES

## Article 39

FIGHTING FOR CHILDREN'S RIGHTS IN INSTITUTIONAL SETTINGS



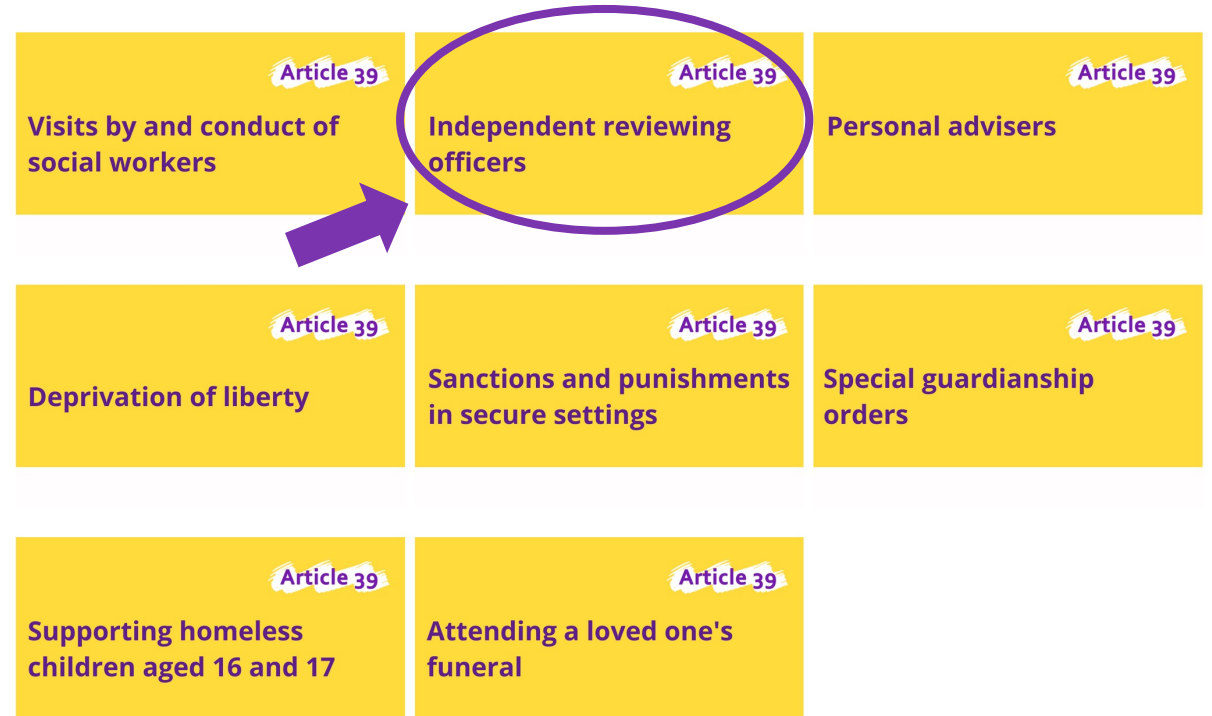
## Resources

This part of our site takes you to useful children's rights publications produced by Article 39 and others.



## 'Law maps' for advocates

Our 'law maps' offer bite-sized, accessible information about the law in the context of specific situations that children and young people bring to their advocates and children's rights officers.



For more information visit: [Clinic 3 – July 2023: The independent reviewing officer \(IRO\) – statutory functions, duties and powers](#)



# GETTING THE BEST FROM COMPLAINTS (STATUTORY GUIDANCE)

## Article 39

CHILDREN ACT 1989  
GUIDE 3

### Statutory representations (including complaints) procedure

ARTICLE 39 GUIDES FOR ADVOCATES

#### RIGHT TO MAKE A COMPLAINT

- All looked after children have the right to make complaints (s26(1) Children Act 1989)
- Local authority must offer advocacy support to those wishing to make representations (s26A(1)(b) Children Act 1989)
- "Once a complaint has entered Stage 1, the local authority is obliged to ensure that the complaint proceeds to Stages 2 and 3 of this procedure, if that is the complainant's wish" (para 3.1.5 Getting the best from complaints)

\*See The Children Act 1989 Representations Procedure (England) Regulations 2006

#### EARLY REFERRAL TO THE LOCAL GOVERNMENT OMBUDSMAN

"...right to approach the Local Government Ombudsman at any time...However, the Ombudsman would ordinarily expect the local authority to consider the complaint initially and may refer the complaint back to the relevant Complaints Manager if this has not been done" (para 3.2.4 Getting the best from complaints; see also annex 3 (page 44))

#### [Children Act 1989 guides](#)

This series of guides is designed to help independent advocates understand the key duties towards and entitlements of children and young people set out in the Children Act 1989.

# RESOURCES FOR ADVOCATES

**Article 39**

FIGHTING FOR  
CHILDREN'S RIGHTS  
IN INSTITUTIONAL SETTINGS

About us Impact News & comment Together for Children Advocates Network **Resources**

## Resources

This part of our site takes you to useful children's rights publications produced by Article 39 and others.

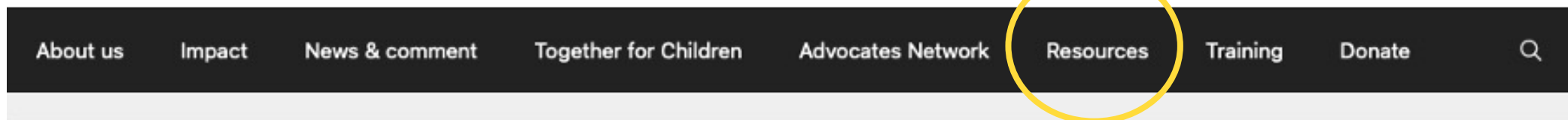
- Monthly legal digest
- Article 39 publications
- Children & young people's views
- rights4children website
- Resources for advocates
- Statistics briefings

- [April 2023](#) – School exclusion and equality and human rights duties (children with disabilities) (Upper Tribunal decision)
- [March 2023](#) – Ensuring access to suitable education for children unable to attend school due to health needs (LGO decision)
- [December 2022](#) – Local authorities' duties towards care leavers (education) (High Court judgment)
- [June 2022](#): Education health and care plans – statutory timescales (High Court judgment)
- [March 2022](#): Education health and care plans – maximum duration (Upper Tribunal decision)
- [September 2021](#): Educational achievement of looked after children (LGO decision)

# RESOURCES FOR ADVOCATES

**Article 39**

FIGHTING FOR  
CHILDREN'S RIGHTS  
IN INSTITUTIONAL SETTINGS

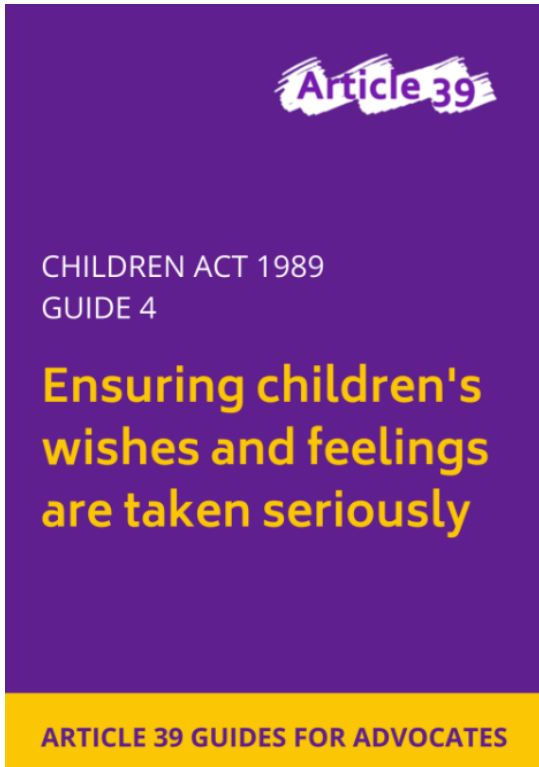


Find the legislation and government guidance you need



Protecting children's rights – law firms

# FURTHER RESOURCES



Visit: <https://article39.org.uk/resources-for-advocates/>



Visit: [article39.org.uk/on-your-side/](https://article39.org.uk/on-your-side/)



Visit: <https://rights4children.org.uk/>

# ADDITIONAL LEGISLATION AND GUIDANCE

## Primary legislation

- [Children and Families Act 2014](#)
- [Care Act 2014](#)
- [Equality Act 2010](#)
- [Children and Young Persons Act 2008](#)
- [Education Act 1996](#)

## Secondary legislation

- [The Special Educational Needs and Disability Regulations 2014](#)
- [The Visits to Children in Long-Term Residential Care Regulations 2011](#)
- [The Designated Teacher \(Looked After Pupils etc\)\(England\) Regulations 2009](#)
- [The Children Act 1989 Representations Procedure \(England\) Regulations 2006](#)

## Statutory guidance

- [Suspension and permanent exclusion from maintained schools, academies and pupil referral units in England, including pupil movement 2023\)](#)
- [The School Admissions Code \(2021\)](#)
- [Statutory visits to children with special educational needs and disabilities or health conditions in long-term residential settings \(2017\)](#)
- [Special educational needs and disability code of practice: 0 to 25 years \(2015\)](#)
- [Ensuring a good education for children who cannot attend school because of health needs \(2013\)](#)
- [Alternative provision \(2013\)](#)
- [Getting the best from complaints \(2006\)](#)

## Additional guidance (non-statutory)

- [Summary of responsibilities where a mental health issue is affecting attendance](#)
- [Support for pupils where mental health is affecting attendance: effective practice examples](#)

- “Local authorities should...avoid any delays for looked after children and carry out the EHC needs assessment in the shortest possible timescale. Addressing a looked after child’s special educational needs will be a crucial part of avoiding breakdown in their care placement” (para 9.38)
- Where a child or young person moves to another local authority, the ‘old’ authority must transfer the EHC plan to the ‘new’ authority on the day of the move OR within 15 working days of becoming aware (para 9.157; reg 15 SEND Regulations 2014)
- “Where an assessment for an EHC plan has been triggered....the assessment must be carried out by the authority where the child lives (i.e. is ordinarily resident), which may not be the same as the authority that looks after the child” (para 10.8; s24 Children and Families Act 2014)
- “...ensure the annual review of an EHC plan coincides with one of the child’s Care Plan reviews. This could be done as part of the review of a child’s PEP which feeds into the review of the wider Care Plan” (para 10.11; s44 Children and Families Act 2014; Part 2 (reviews and re-assessments) SEND Regulations 2014) *\*IRO should ensure this (para 31 Promoting the education of looked-after children and previously looked-after children)*

## SCHOOL SUSPENSION AND PERMANENT EXCLUSION (STATUTORY GUIDANCE)

- The Designated Teacher should contact the VSH as soon as possible where a looked-after child is likely to be subject to a suspension or permanent exclusion. They should consider what additional assessment and support need to be put in place (para 60).
- PEP should be reviewed every term and any concerns about the pupil's behaviour should be recorded, as well as how the pupil is being supported to improve their behaviour and reduce the likelihood of exclusion (para 61).
- The school and the local authority should work together to arrange alternative provision from the first day following the suspension or permanent exclusion (para 94).
- The governing board must consider any representations made by or on behalf of the VSH/ social worker (para 115)
- Social workers and VSH should attend the governing board meeting (paras 128-130) and advise the independent review panel (paras 236-237)

### **Education Act 1996**

- Section 19 places a duty on local authorities to make arrangements for the provision of suitable education at school or elsewhere for those children of compulsory education age who, because of illness, exclusion or another reason, can't receive suitable education for any period of time, unless such arrangements are made for them (section 19(1)).
- When deciding what arrangements to make, local authorities must have regard to any relevant statutory guidance (section 19(4A)).

### **Alternative provision (statutory guidance)**

- “Good alternative provision is that which appropriately meets the needs of pupils which required its use and enables them to achieve good educational attainment on par with their mainstream peers. All pupils must receive a good education, regardless of their circumstances or the settings in which they find themselves. Provision will differ from pupil to pupil, but there are some common elements that alternative provision should aim to achieve.” (para 30)

### **Ensuring a good education for children who cannot attend school because of health needs (statutory guidance)**

- Key points available [[here](#)], below the red boxes – Article 39 children's rights legal digest March 2023



# CASE STUDY ANALYSIS



**Angela Jackman KC (Hon)**  
Solicitor, Irwin Mitchell Solicitors



**Ollie Persey**  
Barrister, Garden Court Chambers

## CASE STUDY 1, M

- I am an advocate supporting a 13-year-old boy, M, who is accommodated under section 20 of the Children Act 1989 and lives with his elderly grandma.
- M has not attended school in over six months due to past experiences of bullying and anxiety and being sent home from school on a couple of occasions for 'aggressive behaviour' (which M explained as defending himself from the bullies).
- Home-schooling was provided for several weeks but ended due to shortage of tutors. At the last review meeting it was noted that the search for a tutor is ongoing. M says he's happier out of school. His grandma told me that M has become increasingly withdrawn and that he's increasingly reluctant to leave the house.

# OUT OF SCHOOL CASE-STUDY

Angela Jackman KC (Hon)

 0370 1500 100

 [irwinmitchell.com](http://irwinmitchell.com)

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# Key facts

- 13-year-old: either in Year 8 or Year 9
- Looked after under section 20 Children Act 1989
- Lives with elderly grandmother
- 6 months since last attended school due to bullying/anxiety
- Sent home on couple of occasions: circumstances are unclear
- Find out whether he has been excluded formally and lawfully or if there has been an unofficial exclusion
- Impact of PEP

# Issues

- A managed move/recognition that YP may have support needs due to anxiety?
- Home-schooling only seems to have stopped due to tutor shortage, as opposed to LA deciding not to continue providing home schooling
- Last review meeting: was that a Looked After Child or PEP review meeting?- need to clarify
- Issues of concern: M is becoming isolated at home and becoming more withdrawn/ reluctant to leave the house so the current position should not continue long term
- Check SEN position: Was M receiving extra support? Education Health and Care Needs assessment to be considered?

# Question 1: Next steps- legal steps

- Urgent Letter before claim to local authority (LA)
- Consider abridging response time due to urgency from 14 days to potentially 7 days
- LA has to make suitable educational provision and not leave a child without educational provision
- Test whether LA really has exhausted enquiries for tutors
- If proceed with issuing a JR after letter before claim: seek a feasible remedy
- Interim relief based on number of hours suitable for M

# Legislation

Section 19 Education Act 1996:

“Each local education authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them “

“Suitable education” means suitable to the age, aptitude, ability and any special educational needs that the child may have (s1(96) of the Act), and as per the case of *R v East Sussex CC ex p Tandy [1998] AC 714*, suitable education must be determined purely by educational considerations; resource considerations are irrelevant.

# Guidance

Alternative Provision Statutory Guidance (January 2013):

[Additional health needs guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

*Confirms that 'local authorities are responsible for arranging suitable full-time education for permanently excluded pupils, and for other pupils who – because of illness or other reasons – would not receive suitable education without such provision. This applies to all children of compulsory school age resident in the local authority area, whether or not they are on the roll of a school, and whatever type of school they attend'.*



# Legislation

If M has an Education Health and Care Plan (EHCP):

- Section 42 Children and Families Act 2014(CFA): duty to deliver the provision set out in section F of EHCP
- Section 19 CFA: secure best possible outcomes
- Section 22(3A) Children Act 1989: duty to safeguard and promote the welfare of a LAC: this includes a duty to promote the child's educational achievements

# Guidance

**Mental health issues affecting a pupil's attendance: guidance for schools**

**[Summary of responsibilities where a mental health issue is affecting attendance  
\(publishing.service.gov.uk\)](https://publishing.service.gov.uk)**

**February 2023**

List of other guidance also at the end of the above guidance

# Steps to take to address emotionally-based school avoidance/ school anxiety

- GP
- If medical position is that M is currently unfit to attend school, request letter to provide to LA for evidence re non- attendance
- Request referral to Child Adolescent and Mental Health Service(CAMHS) if appropriate
- Speak to the school
- Consider if school is meeting its duties to identify and support any special educational needs under CFA 2014

# Question 2: role of PEP

Section 22 (3A) Children Act 1989: duty to safeguard and promote the welfare of LAC and in particular a duty to promote the child's educational achievements

The Children Act guidance Volume 2

[The Children Act 1989 guidance and regulations \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/424242/children-act-1989-guidance-and-regulations-volume-2.pdf): from 2.65 covers PEPs

Further guidance related to the above includes

[Promoting the education of looked-after children and previously looked-after children \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/424242/children-act-1989-guidance-and-regulations-volume-2.pdf)

# PEP

- Local authorities are required to promote educational achievement as an integral part of their duty to safeguard and promote the welfare of the children they look after [section 22(3)(a) Children Act 1989].
- This means that the authority must give particular attention to the educational implications of any decision about the welfare of those children.
- This duty applies to all children looked after by the responsible authority, wherever they are placed. It includes making sure that young children access nursery or other high quality nursery provision and extends to supporting relevant and former relevant children to do as well as they possibly can in education.

# PEP

- All looked-after children must have a care plan, of which the PEP is an integral part.
- The PEP (pre-school to age 18) should be initiated as part of the care plan. It is an evolving record of what needs to happen for looked-after children to enable them to make at least expected progress and fulfil their potential.
- The PEP should reflect the importance of a personalised approach to learning that meets the child's identified educational needs, raises aspirations and builds life chances.

# PEP

- The school, other professionals and the child's carers should use the PEP to support achieving those things.
- The quality of the PEP is the joint responsibility of the local authority that looks after the child and the school.
- Social workers, carers, VSHs, designated teachers and, as appropriate, other relevant professionals will need to work closely together.
- All of those involved in the PEP process at all stages should involve the child (according to understanding and ability) and, where appropriate, the child's parent and/or relevant family member..
- The PEP should cover the full range of education and development needs including:
- Provision of immediate suitable education where a child is not in school

# Question 3: Missing education remedies

- Complaints
- Exhaust LA internal complaints procedure
- Complain to Local Government Ombudsman seeking compensation
- Examples of recent compensation awards: £2000 for 14 months of missed education and £1000 for one year
- Judicial review
- Include claim for Human Rights Act 1998 (HRA) damages
- Convention rights are referred to in section 1(1) and included in Schedule 1 HRA
- Article 2 of Protocol No. 1 – Right to education “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”



# UN Convention on the Rights of the Child

- The United Nations Convention on the Rights of the Child (UNCRC) is an international human rights treaty to which the UK is a signatory,
- It grants all children and young people aged 17 and under a comprehensive set of rights. These include the right to:
  - special protection measures and assistance;
  - access to services such as education and health care;
  - develop their personality, abilities and talents to the fullest potential;
  - grow up in an environment of happiness, love and understanding;
  - be informed about and participate in achieving their rights in an accessible and active manner.
- Make submissions under UNCRC

# Home-schooling

- Challenge if M and grandmother oppose long term home-schooling
- LA should be supporting them to find a school and M should be receiving therapeutic input to assist with school anxiety
- Seek educational psychology advice via LA
- Seek M's views but clearly not ideal for him to lack socialisation at this young age and being set up with life- long difficulties
- Not the first option due to the need for M to socialise and not become over-dependent on adults
- In PEP: seek to set out reintegration programme for return to school

# Potential long-term home schooling

- Education otherwise than at school (EOTAS)
- Can be sought in EHCPs if child's needs cannot be met in a school within reasonable travel distance
- If YP has a draft EHCP, a request can be made for an EOTAS package.
- If YP already has an EHCP in place, a request can be made for EOTAS at the Annual Review.
- If Annual Review not taking place for some time, can submit a request for a reassessment of YP's needs for an EHCP.
- These options provide the formal routes to request an EOTAS package from the LA

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## CASE STUDY 2, A

- I am advocating for a 9-year-old, A, who is the subject of a care order. A has cerebral palsy and autism.
- Three months ago, A moved to a children's home outside of her local authority after the home where she lived closed down. A has now been offered a place at a special school near to where she lives. She has visited it and is not happy about it; she would like to attend a mainstream school.
- When I spoke to the staff at the children's home, they told me A would do just fine in a mainstream school. When I checked A's EHCP, I saw it was 18 months old.
- A is very unhappy but feels like she has no say in the matter. The situation is urgent as school term will be starting in two months' time.

# SEND Nuts'n'Bolts

Ollie Persey, Garden Court Chambers



GARDEN COURT CHAMBERS



 @gardencourtlaw

# Key materials

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- [Children and Families Act 2014- Part 3](#)
- [The Special Educational Needs and Disability Regulations 2014](#)
- [The SEN and Disability Code of Practice 2015](#)
- [The SEN 'Noddy Guide'](#)
- [IPSEA](#)
- [Disabled Children: A Legal Handbook 3rd edition | Council For Disabled Children](#)



## What is SEND?

S20(1) CAFA: ‘A **child or young person** has special educational needs if he or she has a **learning difficulty or a disability** which **calls for special educational provision [SEP]** to be made for him or her.’

S20(2) CAFA: “A **child of compulsory school age** or a young person has a learning difficulty or disability if he or she—

- (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
- (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.”



What is a learning difficulty or disability?

Section 20(4):

*"A child or young person does not have a learning difficulty or disability **solely** because the language (or form of language) in which he or she is or will be taught is different from a language (or form of language) which is or has been spoken at home."*

*SEND Code of Practice: "5.30 Identifying and assessing SEN for young children whose first language is not English requires particular care. Early years practitioners should look carefully at all aspects of a child's learning and development to establish whether any delay is related to learning English as an additional language or if it arises from SEN or disability. Difficulties related **solely** to learning English as an additional language are not SEN."*

## What is special educational provision?

*SEND CODE of Practice 5.33 “...The special educational provision made for a child should always be based on an understanding of their particular strengths and needs and should seek to address them all, using well-evidenced interventions targeted at areas of difficulty and, where necessary, specialist equipment or software. **This will help to overcome barriers to learning and participation. Support should be family centred and should consider the individual family’s needs and the best ways to support them.***

*5.34 Reviewing the **effectiveness of interventions in enabling children to make progress** can itself be part of the assessment of need, informing the next steps to be taken as part of a graduated approach to support, as described in ‘SEN support in the early years’ below. It may be necessary to test out interventions as part of this process, both to judge their **effectiveness for the child** and to provide further information about the precise nature of their needs.*

# Promoting participation

## Section 19

Local authority functions: supporting and involving children and young people

“In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—

- (a) the views, wishes and feelings of the child and his or her parent, or the young person;
- (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
- (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
- (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.”

## Local authority's duty to identify

*S22 CAFA: A local authority in England must exercise its functions with a view to securing that it identifies—*

- (a) all the children and young people in its area who have or may have special educational needs, and*
- (b) all the children and young people in its area who have a disability.*

## Responsible local authority

### *S24 CAFA*

“(1)A local authority in England is responsible for a child or young person if he or she is in the authority’s area and has been—

- (a)identified by the authority as someone who has or may have special educational needs, or
- (b)brought to the authority’s attention by any person as someone who has or may have special educational needs.”

# Education plans for looked after children

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Regulation 5 of the Care Planning, Placement and Case Review (England) Regulations 2010 specifically requires the care plan to include a personal education plan (PEP). Social workers, Virtual School Heads and Independent Reviewing Officers, school admission officers and special educational needs departments should work together to ensure that appropriate education provision for the child is arranged at the same time as a placement. Some unaccompanied children who have recently arrived in the country may have never had access to education before. Appropriate education for unaccompanied children may include a period of time in a setting where their full educational needs can be assessed and integrated into the PEP. They may need time to be prepared for and then acclimatise to formal education, and their initial educational outcomes may include cultural orientation and life skills appropriate to their age. Further guidance on promoting the education of looked after children can be found in Promoting the education of looked after children and previously looked after children (2014).



# Looked after children and annual reviews

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## 10.11 SEND CoP:

“ The Care Planning Regulations specify the frequency with which Care Plans are reviewed. It is important to ensure the annual review of an EHC plan coincides with one of the child’s Care Plan reviews. This could be done as part of the review of a child’s PEP which feeds into the review of the wider Care Plan. Social workers and SEN teams will need to work closely together to ensure that transitions from being looked after to returning home are managed effectively, to ensure continuing provision.”



# Article 39

**Thank you.**