



IPSEA

Independent Parental Special Education Advice

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My son/daughter is 16 or over and their statement is transferring to an EHC Plan – what happens now?

The first point to note is that the Children and Families Act 2014 is based on the assumption that once a young person reaches the age of 16, they will become the decision maker in the EHC process rather than the parent (although the parent will still have an important input to the process). The assessment of capacity is decision-specific. Under sections 2 and 3 of the Mental Capacity Act 2005 a person lacks capacity if he or she is unable to make a decision for himself or herself in relation to a particular matter because of an impairment of or a disturbance in the functioning of the mind or brain.

A person is unable to make a decision for him/herself if he/she is unable:

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his/her decision (whether by talking, using sign language or any other means).

If the young person does lack the capacity to make the relevant decisions, the parent will generally remain the decision maker. The decision as to whether a young person has mental capacity to make a particular decision is something that they and their parents should make in the first instance. It would be very rare for a school or college or local authority not to agree with their assessment of the situation. You can find further information about mental capacity here:

<https://www.ipsea.org.uk/what-you-need-to-know/mental-capacity>

This will be relevant, as it is likely to mean that a young person who is involved in the transition process from statement to an EHC plan will be expected, (provided they do not lack capacity) to play a larger part in that decision-making process that they might have done in decisions related to their statement of SEN.

The process which Local Authorities are required to follow to move children and young people from statements to Education Health and Care Plans are set out in the Children and Families Act 2014 (Transitional and Saving Provisions) (No.2) Order 2014. The process is known as “Transition” and to learn more about this process and how it should work, you may wish to consider the resources on the process of transition – which can be found on the website here:

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<http://www.ipsea.org.uk/what-you-need-to-know/transition>

You could read section 5 of the Departmental Advice on transition (in the 'Resources' tab of that link) which sets out how the process should work. Paragraph 5.8 confirms that the LA **must** give at least 2 weeks' notice that they are starting the 'transfer review' process and invite the parent to a meeting to discuss their child's needs. The other key point to note is that a LA **must** conduct an EHC needs assessment in order to complete that transfer review process and the 2 weeks' notice that the LA give you should indicate when they intend starting that assessment. This will involve seeking professional advice and reports and seeking views of parents and young people, in the same way as if they were carrying out a statutory assessment for the first time. The list of people from whom advice must be sought is set out in SEN Reg 6(1) and is set out on the website here:

<http://www.ipsea.org.uk/what-you-need-to-know/ehc-needs-assessments/what-happens-during-an-ehc-needs-assessment>

The only exceptions to the need to seek professional advice from the people listed are:

- if the advice has been previously sought for any purpose, AND
- the LA, the person giving the advice **and the parent or young person** agree that the advice is sufficient for the purposes of an EHC needs assessment.

Parents cannot be forced to accept that advice is sufficient for these purposes and in many cases, if the report is out of date then it may not be seen as sufficient, and fresh advice would have to be sought as part of the transfer review process. Another very important feature of the new SEN system is that planning should focus on 'outcomes' – things that you want the child to achieve, which will be evidence of progress in areas of difficulty (not just in academic terms). Reports which have not been prepared with this in mind, and which do not refer to these 'outcomes' may also not be seen as sufficient for the purposes of an EHC needs assessment. The process of the EHC needs assessment should, therefore, include obtaining evidence about a child's needs and how best to support them over the longer term, which will help determine how the EHC plan should be drafted to reflect those needs / the provision needed to meet them. The resources also make clear that a parent has a right to request a report during the EHC needs assessment process and if it is a 'reasonable' request, then the Local Authority should seek such a report.

Once the assessment is complete, the LA then has to decide whether or not to prepare an EHC Plan. The legal test, as set out in section 37(1) of the Children and Families Act 2014, is whether it is *"necessary for special educational provision to be made for the young person in accordance with an EHC Plan"*.

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If they decide not to issue a Plan, the LA must notify you of that fact within 14 weeks of the date on which they notified you that they were starting the EHC needs assessment as part of the transfer process. They also have to notify you of your right of appeal against this decision to the First Tier Tribunal (SEND Tribunal).

You may also wish to consider the resources on the website dealing with the contents of EHC plans, including the EHC checklist to confirm what should appear in each section of an EHC plan, and details of what rights you would have to ask for a particular school to be named in the EHC plan. These resources are here:

<http://www.ipsea.org.uk/what-you-need-to-know/ehc-plans>

An EHC plan (and indeed a statement) should make provision for **all** of a child's special educational needs, and there should be an expectation that any needs and provision which are currently included in Parts 2 and 3 of a child's statement would be transferred over to the EHC plan when it was eventually being issued, unless the assessment had shown that they were no longer needed (which is, of course, extremely unlikely).

Under article 14 of the Transitional Provisions Order referred to above, if a child is transferring to a different phase of education (such as primary to secondary school or early years education to primary school), the LA **must** complete the transfer review process and issue a final EHC Plan by 15 February (or within the statutory deadlines we set out below, whichever is the sooner).

If they decide not to issue a Plan, the LA must notify you of that fact within **14** weeks of the start of the EHC needs assessment which is being carried out as part of the process. They also have to notify you of your right of appeal against this decision to the First Tier Tribunal (SEND Tribunal).

If they do decide to issue a Plan then they are required to complete the transfer process and issue a final EHC Plan within **18** weeks of expiry of the two weeks' notice of commencement of the transfer process

If the Local Authority doesn't follow the statutory process, then this is a breach of statutory duty and it is open to you to complain to the Director of Children's Services. Local areas are being inspected by OFSTED and the CQC as to their compliance with their duties under the Children and Families Act 2014 (and this will include their duties in relation to transferring statements to EHC Plans).

You can find out more details about how to complain (including how you might take action if a complaint to the LA doesn't resolve the issue) through our "Challenging Decisions" resource, found here:

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<https://www.ipsea.org.uk/what-you-need-to-know/challenging-decisions>

If the Local Authority fails to conclude the transfer process within the statutory deadlines, we have a model letter which can be used to request the final EHC Plan:

<https://www.ipsea.org.uk/what-you-need-to-know/model-letters/model-letter-11>

We can only provide information through this service, rather than offer direct advice. So if you need this, or you wish to discuss the situation with someone, you should book a call with one of our Advice Line volunteers:

<https://www.ipsea.org.uk/contact/advice-and-support/advice-line>