

Public Law Advice: Notes and Key Points

Please note, this summary provides the key points of our detailed legal advice. It is not a substitute for reading the advice in full and should not be relied on as legal advice in its own right.

The public law advice should be read in conjunction with NASS's private law advice, which explores the implications for contracting between schools and local authorities.

Disclaimer and the limits of this advice

This legal advice was commissioned by NASS to give NASS an expert opinion on the extent and meaning of the law in respect of payment of school fees by local authorities (LAs) for children with education health and care (EHC) plans placed in special schools. We believe it is accurate and have taken all reasonable steps to ensure that it is accurate. However, it is acknowledged that the advice puts forward a position which is very different from the position currently taken by LAs in their discussions and negotiations on fees with schools.

This advice does **NOT** recommend a specific course of action for schools to follow. It is intended to provide NASS's and Counsel's general opinion to member schools on the underlying legal position (public law) and its general contractual application (private law) so that schools can consider their own position and preferred course of action. NASS is only able to offer general support to members on the broad areas of operational practice where the advice may be of relevance. However, each school operates in unique circumstances. It is for each school to determine the action they take and if and how they have regard to this advice.

Schools are therefore strongly advised to consider whether they need to take specialist legal or other advice before writing to their LA as it is acknowledged that LAs may disagree with the advice. The advice is not, and

cannot be, a substitute for schools taking their own independent professional advice to determine the best course of action for them to take. NASS is not qualified to offer individual legal advice to member schools and does not seek to do so by circulating the advice and supporting notes on the public and private law advice. In circulating the advice and explanatory notes on the public and private law advice, it accepts no liability towards any individual school or other person.

Notes and Key Points

1. The key issue we asked specialist leading counsel (KC) and a very experienced junior counsel to advise on is whether LAs are entitled unilaterally to set the fees to be paid to schools at which they place children with EHC plans. Their answer is that they cannot do so. By s.63(2) of the Children and Families Act 2014 LAs are required to pay 'any fees payable' for educational or training provision for a child with an EHC plan they maintain, unless it can be said that some or all of the provision in question is outside the scope of the EHC plan.
2. However, LAs and schools are free to enter into contracts for services which limit this right. In these circumstances, the contract may set out the fee to be paid and the process for seeking any amendment to the level of fee levied.
3. The advice, and the law, applies to all schools within NASS membership – independent schools, non-maintained special schools (NMSS) and academies (including free schools).
4. The fee payable by the LA must relate to education and training provision specified in Section F of the child's EHCP. Schools may set out a global fee which, for example, could include therapeutic provision which enables children to attend school and succeed in class, e.g. speech and language therapy and mental health support i.e. anything which has the effect of educating or training the child. LAs are obliged to secure suitable health provision to meet the needs set out in part G of the EHC plan and schools should be careful not to include any fee for specific health provision.
5. Academies, s41 independent schools and NMSS are under a duty to co-operate with LAs. This points towards an expectation that the fees charged will be 'reasonable'.

6. Independent schools not on the s41 register are not subject to this duty BUT placements are made on the basis that they are an effective use of public resource, so there is an incentive to set reasonable fees.
7. Academies, NMSS and s41 schools have a duty to admit where a child is named on the EHC plan. Where a LA names a school, it has a duty to pay the fees requested by the school.
8. Where LAs are unhappy with the fee levied by the school (including where schools apply an annual inflationary uplift), their remedy is to seek to amend the EHC plan and find an alternative suitable placement. LAs do not have a legal right to refuse payments to schools for fees which cover education and training, as specified in the child's EHC plan.
9. To conclude, Counsel consider that the construction of the s.63(2) duty accords both with the plain meaning of the wording of the legislation and is sensible as otherwise if LAs sought to limit the fees payable then the LA would be able to force a school take a child by 'naming' it at an uneconomic cost and this would put schools in an impossible position.

To read the private and public advice in full, please visit the [NASS Member Zone](#) on our website.

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