**RE: SCHOOL FEES FOR CHILDREN WITH EHC PLAN**

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**ADVICE TO NASS**

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## INTRODUCTION

1. We are instructed to advise the National Association of Non-Maintained and Independent Special Schools ('NASS')[1] in relation to the interpretation of s.63(2) of the Children and Families Act 2014 ('s.63(2)' and 'CFA 2014'), and its implications for the question of what fees schools may charge local authorities who place children with them under an EHC Plan. We understand that NASS intends to publish this advice.

2. Given its central importance to our advice, we set out the terms of CFA 2014 s.63 in full below:

> **'63 Fees for special educational provision at non-maintained schools and post-16 institutions**
>
> (1)Subsection (2) applies where—
> (a) a local authority maintains an EHC plan for a child or young person,
> (b) special educational provision in respect of the child or young person is made at a school, post-16 institution or place at which relevant early years education is provided, and
> (c) that school, institution or place is named in the EHC plan.
>
> (2) The local authority must pay any fees payable in respect of education or training provided for the child or young person at that school, institution or place in accordance with the EHC plan.
>
> (3)Subsection (4) applies where—
> (a) a local authority is responsible for a child or young person for whom no EHC plan is maintained,

[1] NASS is the trade association for the non-maintained special school sector. It puts special schools at the heart of school policy, represents its members at national and local level including with the DfE and other parts of central and local government. Its members are mainly the independent sector. The majority of these providers are for profit organisations although there are approximately one third not for profit organisations who are members. There are also a few NASS members who are Academies (c 3% of membership). NASS is a registered charity and company limited by guarantee.

(b) special educational provision in respect of the child or young person is made at a school, post-16 institution or place at which relevant early years education is provided, and
(c) the local authority is satisfied that—
(i) the interests of the child or young person require special educational provision to be made, and
(ii) it is appropriate for education or training to be provided to the child or young person at the school, institution or place in question.

(4) The local authority must pay any fees payable in respect of the special educational provision made at the school, institution or place in question which is required to meet the special educational needs of the child or young person.

(5) Where board and lodging are provided for the child or young person at the school, post-16 institution or place mentioned in subsection (2) or (4), the authority must also pay any fees in respect of the board and lodging, if satisfied that special educational provision cannot be provided at the school, post-16 institution or place unless the board and lodging are also provided.'

3. As a preliminary point, although the section is headed 'Fees for special educational provision at non-maintained schools and post-16 institutions', in fact the substance of the s.63 duties apply to 'schools' generally. For example, in relation to children and young people with EHC Plans, s.63(2) applies requires the payment of fees as 'a school, post-16 institution or place at which relevant early years education is provided', see s.63(1). There is no limitation in s.63 as to the type of 'school, institution or place' (per s.63(2)) to which a 'fee' may be payable for making special educational provision.

**SUMMARY ADVICE**

4. The practical issue we are asked to advise on is whether local authorities are entitled unilaterally to set the fees to be paid to schools at which they place children with EHC Plans. Our answer is that they cannot do so. By s.63(2) local authorities 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.

5. There are of course controls on public expenditure at the earlier stage of the local authority's decision-making process, when a local authority is determining where to place a child. In particular, local authorities can rely on an exception to the duty to comply with parental preference as to placement if they can establish that the cost of the placement would be an inefficient use of resources, and / or would amount to unreasonable public expenditure; see CFA 2014 s 39(4).

6. As such, there is a clear practical incentive for schools to set a reasonable fee. So long as a local authority is able to meet the child's needs through a placement at a maintained school, or a cheaper[2] independent or non-maintained school, it is not required to place a child at a school which is charging a fee it considers to be excessive.

7. There are also important duties imposed on local authorities and many types of schools to cooperate, see CFA 2014 s 28. This again points towards an expectation that schools will behave reasonably in setting fee levels.

8. However, it is in our view <u>not</u> open to a local authority to refuse to pay a fee which a school is seeking for a particular child, if the authority has determined that it is going to place the child there (perhaps because there is no other suitable school available), unless
    a. Some or all of the fee relates to non-educational provision (most likely health provision); and/or
    b. The local authority can argue that some or all of the educational provision is not being made 'in accordance with' the child's EHC Plan.

9. The statutory obligation on the local authority is to pay 'any fees payable' for educational or training provision made in accordance with the Plan. Independent schools are, by definition, independent non-statutory bodies. The relationship between the school and the local authority in relation to provision

[2] Taking account of the relatively complex rules by which placement costs are calculated for the purposes of Part 3 CFA 2014 – for example, school transport costs fall to be included within the cost of each placement.

for the child will usually be governed by contract. It is therefore open to the school to enter into the contract on any terms that it wishes, or to refuse to do so. This must remain the case notwithstanding that for non-maintained schools and 's.41' independent schools (discussed further below), the local authority can in practice require the school to admit the child by naming it in section I of the child's EHC Plan. The corollary of such a power on the part of the local authority, must be the requirement under s.63(2) to pay 'any fees payable' in respect of the provision it requires the school to make.

10. A school may choose to negotiate with a local authority as to its fees – perhaps for example with its 'host' local authority, which it might be assumed would be asked to place multiple children there. Such negotiations may take place with a view to the school remaining competitive in the market, on the basis that if cheaper suitable placements exist the local authority will not be required to place children with the school. However, it is ultimately a matter for each school to set whatever fee it considers to be appropriate for the placement. If the local authority then names the school in section I of a child's Plan (whether voluntarily or because it has been ordered to do so by the Tribunal), it must pay whatever fee the school has informed the local authority it charges for the educational or training provision it will deliver in accordance with the Plan.

11. If the local authority is unhappy with the fee and the school is not prepared to negotiate (further or at all), the only lawful options open to the local authority in our view are to refuse to place the child at the school, or to carry out an annual review and name a different school if the child is already placed there. Either of these decisions will of course trigger a right of appeal for the child's parents (or young person if post 16).

12. It therefore follows that there is no lawful public law basis in our view for local authorities to respond to a school's uplift in fees by refusing to pay the fee sought unless evidence of specific provision is provided, or on any other ground unless it relates to the terms of the EHC Plan.

**DETAILED ADVICE**

13. The starting point for our analysis of the law is the plain language of s.63(2) of the Children and Families Act 2014: ‘any fees payable’. The word ‘any’ is usually construed broadly and to exclude any limitation. There is no reason in our view why it should be construed differently here.

14. In the Concise Oxford Dictionary (8th ed), “fee” is defined as '1. a payment made to a professional person or to a professional or public body in exchange for advice or services…’. So where a school identifies a specific sum for payment for making specified special educational provision for a child or young person, this will constitute a ‘fee’ so as to trigger the s.63 obligations.

15. The statutory predecessor of s.63(2) was s.348(2) of the Education Act 1996. It provided that ‘the local authority shall pay the whole of the fees payable’. Such words tend to support the construction for which we contend in the successor Act i.e. that the whole fee is payable, without restriction, unless such restriction relates to the child’s EHC Plan.

16. The interpretation for which we contend is also consistent with the wider statutory scheme of the 2014 Act. The scheme places a high degree of emphasis on parents being able to choose the school they wish their child with an EHC Plan to attend. That, in combination with a local authority’s power to require provision by naming a school, would only be workable if the authority had to pay the fee the school considered it appropriate to charge.

17. There, is, however, a brake on the possibility of unreasonable fees being charged by the qualification of parental rights to choose a school. In particular, s.39(4) sets out certain narrowly defined exceptions to the duty on local authorities who are making an EHC Plan to comply with parental preference as to placement. The relevant exception for present purposes is underlined below:

> ‘the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or

(b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
(i) the provision of efficient education for others, or
(ii) the efficient use of resources.'

18. It is well understood that the language of 'incompatibility' in s.39(4)(b) means that it is not simply a question of whether one school costs more than another. If the cost difference is marginal, there may be no 'incompatibility' with the efficient use of a local authority's resources in paying the difference. Even if there is such an 'incompatibility', the local authority must still balance the benefit to the child of attending the parents' chosen school with the additional cost. However, where there is a substantial cost difference between the schools (for instance a difference of more than £10,000 per annum) and the cheaper school is suitable and appropriate for the child, the local authority will generally be able to rely on the exception in s.39(4)(b)(ii) to avoid any duty to name the chosen school.

19. The s.39 tests apply to schools which are covered by s.38(3), including:
    a. non-maintained special schools; and
    b. schools approved by the Secretary of State under s.41 (independent special schools and special post-16 institutions: approval).

20. For independent schools which have not been approved under s.41[3], the question will be whether placement there constitutes unreasonable public expenditure for the purposes of s. 9 of the Education Act 1996, the general duty to educate children in accordance with their parents' preferences. In many cases, the outcome will be the same whether the s.39(4)(b) or s.9 tests applies (and it should be noted that the s.9 test is generally applicable, and can occasionally result in a different outcome in non-maintained special school and s.41 independent school cases).

[3] Which will include those schools who wish to avoid being forced to admit children whose Plans name them, a point discussed further below.

21. Once a non-maintained special school or a s.41 independent school is named in section I of an EHC Plan, it has a duty to admit the child; s.43(2) of the 2014 Act.

22. The central provision of the 2014 Act for present purposes is s.63, headed 'Fees for special educational provision at non-maintained schools and post-16 institutions'. The material parts of section 63 in relation to children and young people with EHC Plans read as follows:

> '(1) Subsection (2) applies where—
> (a) a local authority maintains an EHC plan for a child or young person,
> (b) special educational provision in respect of the child or young person is made at a school, post-16 institution or place at which relevant early years education is provided, and
> (c) that school, institution or place is named in the EHC plan.
>
> (2) The local authority must pay any fees payable in respect of education or training provided for the child or young person at that school, institution or place in accordance with the EHC plan.
> …[4]
>
> (5) Where board and lodging are provided for the child or young person at the school, post-16 institution or place mentioned in subsection (2) or (4), the authority must also pay any fees in respect of the board and lodging, if satisfied that special educational provision cannot be provided at the school, post-16 institution or place unless the board and lodging are also provided.'

23. As such, the local authority's liability under s.63(2) is limited to paying 'any fees payable' in respect of 'education or training provided for the child…in accordance with the EHC plan'. We consider the use of the term 'any fees' by Parliament in s.63(2) to be highly significant. Parliament has not chosen to use language such as 'any reasonable fee', or 'any fee agreed between the local authority and the school'. The obligation is simply to pay 'any fees payable' for the relevant educational and/or training provision, and what is 'payable' will be in accordance with any express or implied contractual arrangements.

[4] Sub-sections 3 and 4 concern children without EHC Plans.

24. We can see how in an extreme case, where a school sought to provide a child with some form of expensive therapeutic provision which was outside the scope of the provision in the EHC Plan, a local authority may be able to argue that it is not required to pay the fee for that provision – because it is not being made 'in accordance with the EHC plan' and so the duty under s.63(2) does not arise. By way of example, if a school chose to commission speech and language therapy for a pupil with an EHC Plan, where section F of that Plan made no reference to any such therapeutic provision, we can see how the local authority would not be liable for this fee. But aside from this type of case, it seems to us open to a school to set a global fee for placements, to include all education and training provision to be made, and in those cases a local authority must pay that fee for a child who it decides to place there – because that is the fee for the education or training to be provided for the child in accordance with their EHC plan.

25. It is notable that no timeframe for the payment obligation in s.63(2) is imposed by the statute. As such, the obligation to pay the fees arises as soon as special educational provision begins to be made for the child at the school; see s.63(1)(b), being one of the qualifying criteria for the s.63(2) duty to arise.

26. It is clear in the language of the statute that the obligation on local authorities is limited to payment of fees related to 'education or training provided for the child'. There is no obligation on local authorities to pay for health provision, for example, and it may well be unlawful for a local authority to do so (as health provision is the responsibility of the local NHS in the form of ICBs).[5] See here the Upper Tribunal decision in *East Sussex CC v KS* [2017] UKUT 273 (AAC) at [68]:

> 'the duty to pay the fees imposed by s.63(2) arises only in respect of fees "payable in respect of education or training" does not extend to other matters, at any rate where because of the clear statutory distinction referred to above in relation to health care provision, it cannot be regarded as purely incidental to education or training.'

[5] Note however section 21(5), by which provision which would normally be treated as health provision becomes special educational provision in the context of EHC Plans where it has the effect of educating or training the child (or young person).

27. 'Health provision' is defined in s.21(3) CFA 2014 as 'provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.' This would ordinarily include many therapy services, such as physiotherapy and occupational therapy. *However*, s.21(5) CFA 2014 provides that:

> 'Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).'

28. In *EAM v East Sussex CC* [2022] UKUT 193 (AAC), the Upper Tribunal stated that s.21(5) 'does not apply just because health care provision involves educational provision. It only applies if health care provision itself educates a child.'

29. As such, for present purposes, any provision which has the effect of educating or training the child or young person is 'educational provision', and therefore falls *within* the scope of s.63(2). This should include most therapeutic services; it will only be where the effect of the therapy is not to educate or train the child that this provision should appear in section G of the Plan as health provision, which falls outside the scope of the s.63(2) duty. An example of this kind of provision might be nursing support in relation to continence issues (unless the nursing support has the effect of supporting the child better to manage their own continence, in which case it would probably fall within the definition of 'educates or trains' for the purposes of s.21(5)).

30. Schools will need to take care to ensure that any global fee being charged to local authorities to admit the child does not include any fee for 'health provision'. See here *East Sussex CC v KS* at [68]:

> 'As the question is which body is required to secure or arrange what provision, the matter is not resolved merely because the cost of something for which a local authority is not otherwise required – or allowed – to pay is wrapped up in a more all-encompassing fee.'

31. However, where there is no dispute that the fee in question relates solely to education and/or training provision, and where all such provision is within the

scope of section F of the EHC Plan, then in our view it is clear that the local authority must pay the full fee being charged by the school, or otherwise find itself in breach of the s.63(2) duty – a public law error which could be remedied by way of an application for judicial review by a party with sufficient interest in the decision. This would seem to us to include both the school and the child in question, and their parents.

32. It is not open, in our view, to a local authority to refuse to pay fees at a particular level on the basis that they are above the cost of level of support required to meet the provision in the EHC Plan in the local authority's view. This fails to comply with the requirement in s.63(2) to pay 'any fee payable' for the educational and training provision being made by the school in accordance with the Plan.

33. It would only be open in our view for the local authority to seek to argue that the provision being made is excessive by reference to the wording of section F of the Plan, if the evidence supported this (for example, if twice as much speech and language therapy provision was being made as the Plan specified). In that context, it might be said that the provision actually being made is not 'in accordance with' the EHC Plan, and so the s.63(3) duty does not apply (at least in relation to the cost of the 'excessive' element of the provision).

34. The construction of the s.63(2) duty set out above, which in our view accords with the plain meaning of the wording of the legislation, is also a sensible one. If, instead, it were open to a local authority to seek to limit the fees payable for educational and training provision made by a school, then the local authority would be able to force a school to take a child (by naming it in section I of the EHC Plan) at a fee which the school considers is below the cost of the provision the child needs. That would put schools in an impossible position; however, the plain reading of the statute avoids this consequence.

**CONCLUSION**

35. We hope this advice assists NASS and its members to understand the obligations on local authorities to pay their fees, when a child is placed with them under an EHC Plan.

FENELLA MORRIS KC
STEPHEN BROACH
39 Essex Chambers

1 December 2023