

Children out of school webinar

IPSEA Legal Team



Topics covered



Reasons for children to be out of school

- [Exclusion from school](#)
- [Unlawful exclusions](#)
- [Illness](#)
- [School anxiety](#)
- [Children without a school place](#)
- [EOTAS](#)
- [Elective home education](#)

Sources of Law

- [The Children and Families Act](#) (“CFA”) 2014 Part 3
- [Education Act](#) (“EA”) 1996
- Case law – [Noddy Guide](#) and [IPSEA case summaries](#)
- [The Special Educational Needs and Disability Code of Practice 2015](#)
- IPSEA information: [SEN and disability law](#)

Legal Definitions: Special Educational Needs

Section 20(1) of the CFA 2014:

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 to be made for him or her.

Special Educational Provision

Section 21 of the CFA 2014

Special educational provision means:

educational or training provision that is additional to, or different from, that made generally for others of the same age in

- a) mainstream schools in England
- b) maintained nursery schools in England
- c) mainstream post-16 institutions in England, or
- d) places in England at which relevant early years education is provided.

Definitions: [IPSEA quick guides](#)

Exclusion

Two types of exclusion:

- Fixed term/suspension
- Permanent
- **Suspensions and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement September 2023**
- Covers exclusions of all pupils including above and below compulsory school age
- Applies to maintained schools, academies and PRUs only

Fixed term exclusion

- Up to six days only a reasonable steps obligation on the school: “take steps” to set and mark work
- At day 6, governing body must arrange full time suitable education for pupils of compulsory school age (or LA if child attending a PRU)
- For pupils with an EHC plan, the LA must secure the special educational provision set out in section F (s42 CFA 2014)

Permanent exclusion

- LA must arrange full time suitable education for pupils of compulsory school age (s19 EA 1996)
- LA must identify new school placement
- For pupils with an EHC plan, LA must determine a new placement in consultation with parents – [rights to express a preference](#)

Exclusion as evidence of unmet needs

Para 6.21 SEND Code of Practice:

“Persistent disruptive or withdrawn behaviours do not necessarily mean that a child or young person has SEN. Where there are concerns, there should be an assessment to determine whether there are any causal factors such as undiagnosed learning difficulties, difficulties with communication or mental health issues...”

Applying for an EHC needs assessment:

<https://www.ipsea.org.uk/ehc-needs-assessments>

School duties:

<https://www.ipsea.org.uk/how-your-nursery-school-or-college-should-help>

Exclusion, updated statutory guidance Sept 2023

[Suspensions and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement September 2023](#)

- Where a pupil has an EHC plan, schools should contact the LA about any behavioural concerns at an early stage and consider requesting an early annual review prior to making the decision to suspend or permanently exclude.
- For those with SEN but without an EHC plan, the school should review, with external specialists as appropriate, whether the current support arrangements are appropriate and what changes may be required. This may provide a point for schools to **request an EHC assessment** or a review of the pupil's current package of support.

Unlawful or informal exclusion

- Exclusions should only be for disciplinary reasons and a pupil can only be excluded by the headteacher of a school or teacher in charge of a PRU
- Children should not be sent home to 'cool off', because the school can't cope or because of staffing issues.
- All exclusions must be formally recorded.
- When an exclusion is not recorded it does not give the child the same rights to education as a formal education.

Illness – schools' duties

- s100 CFA 2014 - Duty to support pupils with medical conditions
- Statutory guidance [Supporting pupils at school with medical conditions](#) applies to:
 - Maintained schools
 - Academy schools
 - Alternative provision Academies
 - Pupil referral units

Illness – LAs' duties

- s19 EA 1996 duty to secure suitable, full-time education for pupils out of school:
 - As soon as it is clear child will be out of school for at least 15 days
 - From day 6 at the latest
- Only applies to children of compulsory school age
- Statutory guidance [Ensuring a good education for children who cannot attend school because of health needs](#) states:
 - LA can ask for medical evidence
 - LA must work closely with parents and medical professionals
- s42 CFA 2014 – LA must secure special educational provision in EHC plan

What is full time education?

Page 4 of the guidance [Ensuring a good education for children who cannot attend school because of health needs](#) states:

“Full-time education” is not defined in law but it should equate to what the pupil would normally have in school – for example, for pupils in Key Stage 4 full-time education in a school would usually be 25 hours a week.

Provision should be full time *“unless the pupil’s condition means that full-time provision would not be in his or her best interests”*

School anxiety

- Previously referred to as ‘school refusal’
- Also known as ‘emotionally based school avoidance’
- s19 EA 1996 applies to children of compulsory school age who are unable to attend due to mental health needs
- Health guidance for both school and LA applies for mental health

New DfE guidance where a mental health issue is affecting attendance

Schools:

- only request medical evidence of a mental health-related absence where there is a genuine and reasonable doubt about the authenticity of the illness
- in very exceptional circumstances, where it is in a pupil's best interests, a plan to help a child to attend well may involve the use of a temporary part-time timetable to meet their individual needs
- schools should inform the LA where pupils are likely to miss more than 15 days
- prosecution should only be considered where all other options have been exhausted or deemed inappropriate
- where the pupil has a disability, there should be careful consideration given as to whether sufficient attendance support has been offered before resorting to legal intervention.

LAs:

- LAs must not follow an inflexible policy of requiring medical evidence before making their decision about alternative education. LAs must look at the evidence for each individual case, even when there is no medical evidence, and make their own decision about alternative education

New DfE guidance, additional considerations for children with SEND

- school staff should consider whether a child with a SEND need may be more anxious about attending school
- where a child is disabled within the meaning of the Equality Act 2010, schools will need to consider their duty to make reasonable adjustments under section 20 of that Act
- for children with EHC plans, consider communicating with the LA at an early stage
- may require the LA to review and amend the EHC plan

LGSCO report July 2022 [Out of school, out of sight](#)

“We are seeing increasing numbers of cases where children are unable to attend school because of anxiety. Often, these cases involve children with special educational needs which have yet to be fully understood. There may be little, or even conflicting, evidence about the child’s needs. Nevertheless, councils must assess the available evidence and decide for themselves whether they have a statutory duty to make other arrangements for the child’s education. They should take action without delay.”

“The key learning point we want to highlight in this report is that the local council has the duty to arrange alternative education, not the school a child attends.”

Attendance Orders

- Guide for parents on school attendance published by the Office of the Children's Commissioner: [Working together to improve school attendance](#)
- [Government information about attendance orders](#)
- Steps to take:
 - Remain in contact with school and LA
 - Speak to Education Welfare Service
 - Seek legal advice if necessary

Getting temporary education in place

- Steps to take:
 - Inform your child's school of your child's needs and reason for absence
 - Inform your LA of the need for temporary education and remind the LA of its duty under s19 EA 1996 for children of compulsory school age
 - Submit evidence of your child's needs if available
 - Include copy of EHC plan if your child has one
 - Use [model letter 22](#)
 - Request copy of your child's school record using [model letter 18](#)

Children without a school place

Children with or without an EHC plan can find themselves without a school place.

LA has duty under s19 EA 1996 to provide suitable, full time education for those of compulsory school age with immediate effect.

Steps to take:

- Complain to [Director of Children's Services](#) at your LA
- Use [model letter 22](#)
- Escalate complaint to [Local Government and Social Care Ombudsman](#)
- Consider [Judicial Review](#) as an alternative to LGSCO
- Contact your [local MP](#) or [Department for Education](#)

Education otherwise than at a school/institution

- Sometimes abbreviated as “EOTAS” or “EOTIS”
- LA has a power (not an obligation) to arrange for special educational provision to be made otherwise than at a school or institution where education in a school or institution would be inappropriate (s.61 CFA 2014)
- Case law sets out the factors LAs must consider when deciding whether education in a school/institution is "inappropriate"
- Where the LA exercises this power – the special educational provision will be specified in Section F, but Section I will be left blank
- A child can also receive part time EOTAS, part time school placement

Elective home education

- EOTAS and EHE are not the same thing
- Parents can choose to home educate their child but should not feel obliged to do so purely because the child's needs are not being met at school.
- If a parent chooses to EHE, they take responsibility for providing all education for their child and relieve LA of its duties. LA has discretion to support and duties to ensure child is receiving appropriate education.
- Department for Education guidance for parents:
<https://educationhub.blog.gov.uk/2020/10/20/all-you-need-to-know-about-home-schooling-and-elective-home-education-ehe/>

Children above or below compulsory school age

Compulsory school age starts the term after the child turns age 5, and ends on the last Friday in June in the academic year that the child turns age 16.

Steps to take:

- Speak to your child's setting about how they can support your child
- Speak to any professionals involved in your child's care
- If your child does not have an EHC plan, consider if an EHC needs assessment is necessary and [request an assessment](#)
- If your child does have an EHC plan, [remind the LA of its duty to secure the special educational provision within section F](#)
- Speak to your LA as it has a discretion to arrange suitable, full-time education for this group.

Key points

- Children of compulsory school age are entitled to a suitable, full time education
- For those with an EHC plan, the LA will continue to have a duty to secure the special educational provision in it even when the child is unable to attend school
- Remember to remain in contact with school, LA and relevant professionals, and remember that everyone should work together to support your child
- You can seek legal advice if needed

Useful links for information and support

- IPSEA resources:
 - Information for [children out of school](#)
 - Information about [schools' duties](#)
 - [Model letters](#)
 - [Helplines and services](#)
- Your local [Information Advice and Support Service](#) (IASS or SENDIASS)
- Check your eligibility for [legal aid](#)

Questions & Answers



For further information on our work, visit:
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