

Access to education for migrant children

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GARDEN COURT CHAMBERS



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Access to education for migrant children: SEND provision (in England)

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Key materials

- [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](#)'
- [Disabled Children: A Legal Handbook 3rd edition](#)
- [IPSEA](#)



What are special educational needs?

- 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.’*



What is a learning difficulty or disability?

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.”

See also definition of disability in s6 EA 2010.



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?

*s21(1) CAFA: “Special educational provision”, for a child aged two or more or a young person, 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.”*



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.*



Health care and social care provision

s21(3) CAFA: “Health care provision” means the 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.

s21(4) CAFA: “Social care provision” means the provision made by a local authority in the exercise of its social services functions.

Section 21(5) CAFA: “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).” E.g. speech and language therapy



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.”



Duty to secure an EHC needs assessment

Section 36 CAFA: If either

- an LA becomes responsible for a child or young person (s24)
- a request is made to an LA by a child's parent, a young person or a school or college that they carry out an EHC needs assessment (s36)

LA must determine whether it may be necessary for there to be SEP in an EHCP (s36(3))

If LA considers that child/YP has or may have SEN and that it may be necessary for SEP to be made for the child/YP, then the LA must secure the EHC needs assessment (s36(8)).

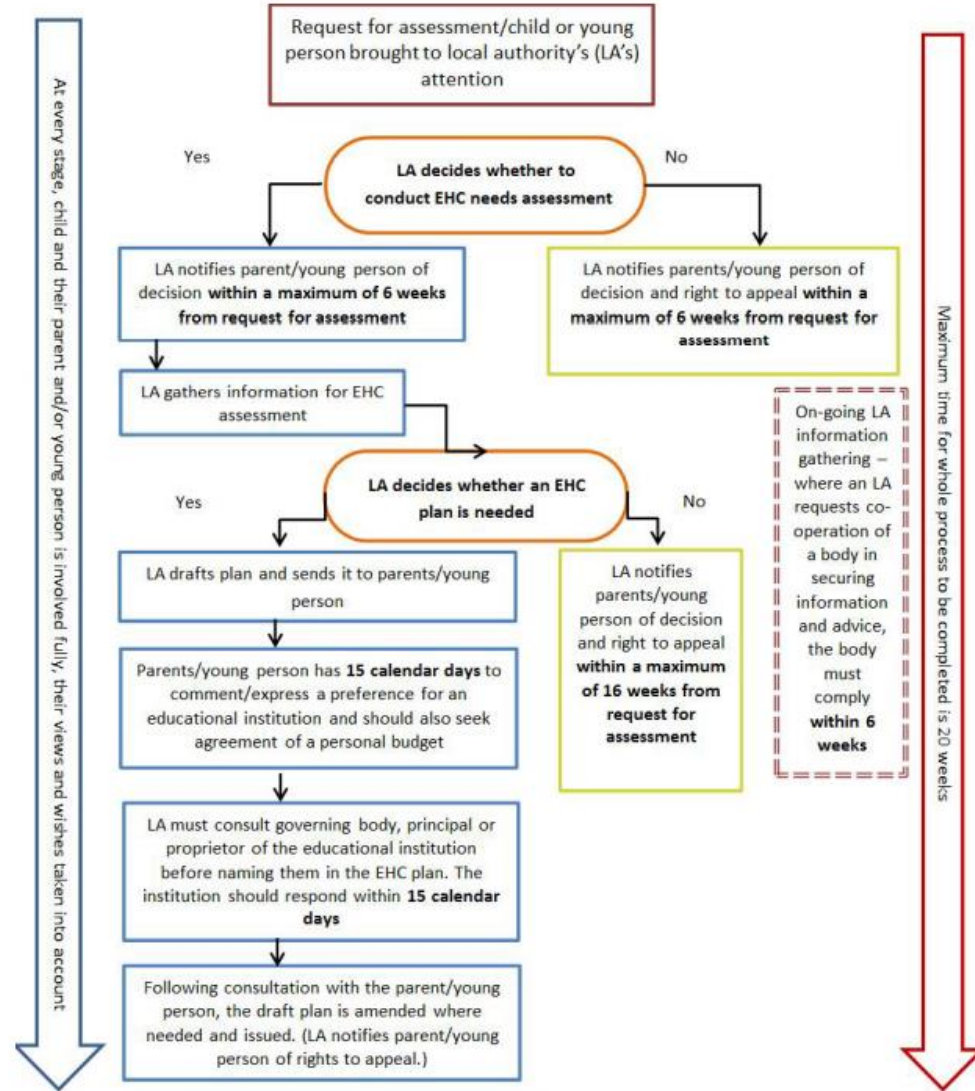


The duty to secure that an EHCP is prepared and maintained

Once the assessment has taken place, then if (based on the evidence that has been gathered) it is necessary for SEP to be made for a child/YP in accordance with an EHC plan, the LA has a duty to secure that an EHC plan is prepared and maintained (s37(1)).



Statutory timescales for EHC needs assessment and EHC plan development



Structure of an EHCP

Section A: Overview

Section B : special educational needs;

Section C: health needs;

Section D: social care needs;

Section E: outcomes for the child or young person;

Section F: SEP required to support outcomes/needs;

Section G: health provision required to meet the child or young person's needs and support outcomes in Section E;

Section H social care provision required to meet the child's needs and support outcomes in Section E;

Section I: names the educational placement;

Section J: 'Personal Budget';

Section K: Appendices (e.g. professional reports).



Duty to secure SEP and health/ social care provision

Where an LA maintains an EHC plan for a child or young person, the LA must secure the specified SEP for the child or young person (s42(2)). If the plan specifies health provision, the responsible commissioning body must arrange the specified health care provision for the child or young person (s42(3)). Under SEN Reg 12(2) the health care provision specified in the EHC plan must have been agreed by the responsible commissioning body; usually the local Clinical Commissioning Group (CCG).



The Local Offer

S30 CAFA

A duty on LAs to publish provision it expects to be available within and outwith its area, for children and young people within its area who have a disability.



Common issues facing migrant children accessing SEND provision

- *Needs dismissed as relating to not having English as a first language*
- *Inaccessible information in Local Offer*
- *No translation of EHCP*
- *Lack of cultural sensitivity in assessment/provision*



Forums for challenge

- *Mediation*
- *Appeal to the SEND Tribunal – 2 month deadline*
- *JR*



What can be challenged in the SEND Tribunal?

- Refusal to assess.
- a decision by the local authority (“**LA**”) not to issue an education health and care plan (“**EHC plan**”) following an [EHC needs assessment](#)
- a decision by the LA not to carry out a [re-assessment](#) for a child/young person who has an EHC plan
- a decision by the LA not to amend an EHCP following a review or re-assessment
- a decision by the LA to [cease to maintain](#) an EHCP
- the description of the child/young person’s special educational needs in an EHCP
- the special educational provision specified in an EHCP
- the school or other educational institution named in an EHCP

“**National trial**”: SEND Tribunal can now *recommend* changes to sections C (health needs), D (social care needs), G (health provision), H1 and H2 (social care provision) but there **must** be an educational component to the appeal.



When are EHCP issues JR'd?

- Issues out of scope of SEND Tribunal- delay, placement refusing to admit child, systemic breaches by LA.
- Health and social care are only 'recommendations' – not an adequate alternative remedy.
- Urgency



Legal aid?

- Preparing a SEND appeal – in scope
- Representation at the SEND Tribunal – out of scope (but ECF starting to be granted)
- Appeal to the Upper Tribunal – in scope
- Mediation- funded by LA
- JR- public law legal aid contract



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Connor Johnston, Garden Court Chambers

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Introduction

- Adequate accommodation, suitably located in relation to a child's school, is an essential platform to secure effective access to accommodation.
- In this part of the seminar we consider:
 - Who is responsible for providing that accommodation to households seeking asylum, unaccompanied asylum seeking children, failed asylum-seekers and other persons with no recourse to public funds.
 - The legal principles governing the adequacy of such accommodation, focussing on location and quality/nature.
- My focus is on principles. But, evidentially, to make use of these principles evidence from client, school, social workers, medical professionals, environmental health etc. as to impact of living conditions on household will generally be a pre-requisite.



1. Who is responsible for the provision of accommodation?



Asylum-seekers

- Duty under s95 Immigration and Asylum Act (IAA) 1999 owed by Home Office to asylum-seekers and dependants who appear to be destitute or likely to become destitute within 14-days (s95(1) IAA 1999; reg 7(a) Asylum Support Regulations (AS Regs) 2000 SI No 704).
- Asylum-seeker is ‘...a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined’ (s94(1) IAA 1999).
- But note extended definition: if an asylum-seeker's household includes a dependent child under 18, they are to be treated as continuing to be an asylum-seeker while the child is under 18 and they remain in the UK (s94(5) IAA 1999). I.e. if household includes a child, applicant continues to be classed as an asylum-seeker for support purposes after asylum claim rejected.



Asylum-seekers

- Approach of SSHD/FTT to this definition has not always been correct: provision does not require person to have received asylum support previously. See AS/18/12/39001 15 Jan 2019, FTT (Asylum Support) June Legal Action 30 for correct approach.
- Extended definition very important as local authorities may not provide ‘assistance’ under s17 Children Act (CA) 1989 to any child or family where SSHD is providing support under s95 or there are reasonable grounds for believing that she would have to if application made (s122(5) and (7) IAA 1999). See *R (FA) v Redbridge LBC* Feb 2018 Legal Action 24 to illustrate complexity. Clear chronology essential: when were children born and when did applicant become Appeal Rights Exhausted (ARE)?
- But note exclusion from ‘assistance’ under s17 only extends to ‘accommodation’ and ‘essential living needs’ (s122(6) IAA 1999). Other (e.g. disability related) needs of those owed s95 IAA 1999 duty can be met under s17.



Asylum-seekers

- For recent and incoming Afghan nationals who have been granted limited leave to enter with recourse to public funds under Home Office resettlement scheme consider eligibility for mainstream homelessness assistance under Part 7 Housing Act 1996 (ss185-186 Housing Act 1996; class B and class F reg 5 Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294).



Unaccompanied asylum-seeking children (UASC)

- UASCs not eligible for asylum support as definition of asylum-seeker excludes under-18s (s94(1) IAA 1999) and fall to be accommodated by local authority (LA) under s20 CA 1989.



Failed asylum-seekers

- Generally responsibility of LA under s17 CA 1989, subject to exclusions in Nationality, Immigration and Asylum Act (NIAA) 2002.
- Where child(ren) born after applicant became ARE, household may – notionally – qualify for support under s4(2) IAA 1999. But *R (VC) v Newcastle City Council* EWHC 2673 (Admin), [2012] PTSR 546: local authority will not be able to rely on availability of s4(2) support to justify refusal of support under s17 unless it can be shown that:
 - SSHD is able and willing (or if not willing, can be compelled) to provide s4(2) support; and
 - support under s4(2) will suffice to meet the child's assessed needs.
- Minimal nature of s4(2) support means ‘a local authority faced with a child who is assessed as being “in need” is... very unlikely in the general run of such cases to be able to justify non-intervention by reliance upon section 4’.



Other persons with no recourse to public funds (NRPF)

- Referring here to persons who require leave to enter or remain in the UK and do not have it *and* to persons with leave to remain subject to NRPF restriction.
- Not eligible for Home Office support (in relation to Sch 10 Immigration Act 2016 support, exclusion is a matter of policy) and fall to be accommodated by LAs under s17 CA 1989, subject to exclusions in Sch 3 NIAA 2002.
- For those with leave, application for change of conditions to lift NRPF restriction may mean that applicant can access mainstream homelessness assistance under Pt 7 Housing Act 1996 (e.g. class G of reg 5 Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294 for those with limited leave to remain granted under Appendix FM to the Immigration Rules).



2. Suitability of accommodation



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Context

- [English Housing Survey Headline Report, 2019-20](#) (MHCLG, December 2020):
 - 7% (302,000) of private renters and 9% of social renters (344,000) live in overcrowded conditions, measured by the 'bedroom standard'.
 - This is the highest level of overcrowding since 1995-96.
 - In 2019, 17% (4.1mn homes) failed to meet the decent homes standard.
 - Within this, 23% of homes in the private rented sector failed to meet this standard and 13% of privately rented homes contained Category 1 hazards under the Housing Health and Safety Rating System adopted under the Housing Act 2004.



Asylum-seekers

- Accommodation provided by SSHD under s95 must appear to the Defendant to be 'adequate' (s96(1) IAA 1999).
- Assessment of adequacy must take into account whether accommodation is 'reasonable to continue to occupy' (reg 8(3)(a) AS Regs 2000). Requires consideration of how long applicant will remain in accommodation: what is reasonable in short-term may not be reasonable in long-term (*R (A) v National Asylum Support Service* [2003] EWCA Civ 1473 at [54]-[57]).
- Article 13(2) Reception Directive 2003/9/EC requires accommodation to be sufficient to 'ensure a standard of living adequate for the health of applicants' (see *R (NB) v SSHD* [2021] EWHC 1489 (Admin) at [145]-[158] for continued application of Reception Directive in this context).



Asylum-seekers

- Additional statutory considerations:
 - Duty to discharge functions with 'regard to the need to safeguard and promote the welfare of children' (s55 Borders, Citizenship and Immigration Act (BCIA) 2009; *ZH (Tanzania) v SSHD* [2011] UKSC 4 at [23]- [25]; [Allocation of accommodation policy](#) (Version 6.0, 27 May 2021) p6). Requires SSHD to identify principal needs of any children, both collectively and individually, and have regard to the need to safeguard and promote those needs when making her decision. (*Nzolameso v Westminster CC* [2015] UKSC 22 at [27], dealing with s11 Children Act 2004).
 - Public sector equality duty (PSED) (s149 Equality Act (EA) 2010). Note that immigration based exceptions to PSED in para 2, Sch 18 EA 2010 do not apply to protected characteristic of disability. For requirements of PSED in homelessness context see *Hackney LBC v Haque* [2017] EWCA Civ 4 and *Lomax v Gosport BC* [2018] EWCA Civ 1846.



Asylum-seekers

43. The next question is what, in that context, does the PSED as set out in section 149 of the Equality Act require of the reviewing officer on the particular facts of this case? In my judgment, it required the following:

(i) A recognition that Mr Haque suffered from a physical or mental impairment having a substantial and long-term adverse effect on his ability to carry out normal day to day activities; ie that he was disabled within the meaning of the EA section 6 , and therefore had a protected characteristic.

(ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of room 315 as accommodation for him.

(iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using room 315 as his accommodation, by comparison with persons without those impairments: see section 149(3)(a) .

(iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons *785 without such impairments, and the extent to which room 315 met those particular needs: see section 149(3)(b) and (4) .

(v) A recognition that Mr Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see section 149(6) .

(vi) A review of the suitability of room 315 as accommodation for Mr Haque which paid due regard to those matters.



Asylum-seekers

- Specific principles relating to location
 - Default position is dispersal, on a 'no choice basis' outside London and the South East (s97(1)(b) IAA 1999; *Allocation of Accommodation Policy* p5).
 - But requests should be considered on a case by case basis (p5).
 - Requests made to 'avoid unreasonable disruption of any treatment or assistance to cope with the disability' to be 'considered carefully' and accommodation 'should normally be arranged close to where' local authority support is provided (p9).



Asylum-seekers

- ‘[F]inal school or college year leading up to their GCSE, Scottish Highers, AS or A-level exams’ recognised as critical time, providing person has been enrolled for significant part of past year (p10).
- For children with special educational needs with entry to an ‘appropriate’ school ‘accommodation should normally be provided near to the school, ‘unless it is clear that accommodation can be arranged near to another location where there is an appropriate school that the child can be transferred to’ (p10)
- See further [Healthcare Needs and Pregnancy Dispersal Policy](#) (Version 3.0, 28 January 2016) para 4.10 for factors to be considered in cases where child is receiving medical treatment. The standard line that accommodation in a particular area is not ‘medically essential’ is unlikely to comply with this policy (see *R (IO) v SSHD* [2020] EWHC 3420 (Admin)).



Asylum-seekers

- Specific principles relating to nature/quality of accommodation:
 - Ground floor/level access with lift for those with mobility problems and wheelchair users will require accommodation that allows them to access all key areas of (*Healthcare Needs and Pregnancy Dispersal Policy* para 4.9).
 - Contractual requirements between Home Office and Serco etc governing (a) accommodation standards and (b) overcrowding (Annexes B & C [Asylum Accommodation and Support Contracts, Schedule 2](#)). E.g. accommodation with ‘mould on the walls or ceilings of a type or scale which represents a serious hazard to... health and safety’ is uninhabitable unless permanently rectified within 5-working days (B.3.1.18) and single parents should not have to share room with more than one child under-10 (C.1.3.6). Evidence from LA environmental health may be required. Breach of contracts held in *NB* not to be determinative of adequacy. But arguably still relevant to adequacy and to action SSHD should take.



UASCs

- Placement of looked-after child governed by s22C CA 1989, Care Planning, Placement and Case Review (England) Regulations (CPPCR Regs) 2010 SI No 959 and [*The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review*](#) (Department for Education, July 2021).
- Various implied and express requirements for accommodation to be ‘suitable’, ‘appropriate’, ‘consistent with C’s welfare’ and ‘suitable to C’s particular [disability related] needs’ (s20(1) CA 1989; s22C(4)(a), (5), (7) and (8); reg 27A and Sch 6 CPPCR Regs 2010).
- In deciding on placement, LA should ensure, so far as reasonably practicable, that it does not disrupt child’s education or training (s22C(7)(b) and (8)(b)CA 1989; *Care and Placement guidance* paras 3.15-3.20).



UASCs

- LA must assess child's need for services and prepare a care plan (reg 4(1) CPPCR Regs 2010). Assessment must consider whether placement meets requirements of Pt 3 CA 1989 (reg 4(2)) e.g. duty to 'promote the child's educational achievement' (s22(3A)). Care plan must include (among other things) personal education plan (reg 5(1)(b)(ii) and Sch 1, para 2) and placement plan (regs 5(1)(c), 9 and Sch 2 para 1) and should describe developmental needs of child, services required to meet those needs and why particular placement has been chosen (*Care and Placement Guidance* para 2.29).
- Other statutory obligations require local authority to discharge functions with regard to 'the need to safeguard and promote the welfare of children' (s11 Children Act 2004; see s55 above) and to the corporate parenting principles (s1 Children and Social Work Act 2017).



UASCs

- Specific principles relating to location of accommodation:
 - Unless not reasonably practicable, placement should be within area of LA (s22C(7)(c) and (9) CA 1989; *Care and Placement Guidance* paras 3.30-3.45). Special procedure applies for out of area placements involving approval of senior officers (reg 11 CPPCR Regs 2010).
 - So far as reasonably practicable, placement should not disrupt education or training (see above) which means, generally, keeping child in same school and may require funding of transport (*Care and Placement Guidance* para 3.16).
 - Decisions to move child at KS4 that would disrupt child's education subject to particular procedural requirements (reg 10; *Care and Placement Guidance* paras 3.18-3.20): education should not be disrupted save in emergencies.



UASCs

- Specific principles relating to nature/quality of accommodation:
 - B&B's/hotels/nightly let accommodation not suitable for 16/17 year olds (*Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation* (MHCLG & DfE, April 2018 paras 5.10 and 5.13).
 - For placements in 'unregulated settings' LA must have regard to safety and state of repair of accommodation among other things (reg 27(a) CPPCR Regs 2010 and Sch 6 para 1).
 - Children with disabilities must have needs 'thoroughly assessed' to ensure accommodation suitable and to identify particular requirements, and should have access to same facilities as non-disabled children (s22C(7)(b) and (8)(d) CA 1989; *Care and Placement guidance* paras 3.26-3.29).



Failed asylum-seekers and other persons with NRPF

- No express requirement that accommodation be suitable but flows from public law requirement of reasonableness (*R (Yekini) v Southwark LBC* [2014] EWHC 2096 (Admin) at [47]).
- Courts have been reluctant to impose high standards:
 - *R (C, T, M, U) v Southwark LBC* [2016] EWCA Civ 707 - mother and three children in single room of B&B for seven months not irrational;
 - *R (MM) v Hounslow LBC* [2015] EWHC 3731 (Admin) - accommodating 15-year old autistic boy with challenging behaviour who sometimes needed to use wheelchair to go outside, in upper floor maisonette not irrational;
 - *R (AE) v Brent LBC* [2018] EWHC 2574 (Admin) - accommodation within 1 hr of Claimant's parents and children's school not unreasonable, despite assessed need for her to maintain links with parents to safeguard her mental health and children's welfare.



Failed asylum-seekers and other persons with NRPF

- Successful challenges likely to be procedural e.g. failure to:
 - assess (*R (G) v Barnet LBC* [2003] UKHL 57);
 - re-assess, following change in circumstances (*R(ES) v Barking and Dagenham LBC* [2013] EWHC 691);
 - consider relevant medical/educational evidence etc; or
 - identify (by means of assessment) how LA has had regard to need to safeguard and promote the welfare of children and demonstrate that impact on welfare proportionate (s11 Children Act 2004; *R (C, T, M, U) v Southwark LBC* [2016] EWCA Civ 707 at [15] and [17]).



Failed asylum-seekers and other persons with NRPF

- Specific principles relating to location of accommodation:
 - ‘34. ...Best practice suggests that the maximum each way length of journey for a child of primary school age to be 45 minutes and for secondary school age 75 minutes, but these should be regarded as the maximum. For children with SEN and/or disabilities, journeys may be more complex and a shorter journey time, although desirable, may not always be possible.’ ([Home to school travel and transport guidance Statutory guidance for local authorities](#) (DfE, July 2014))
 - ‘35. ...For [transport] arrangements to be suitable, they must also be safe and reasonably stress free, to enable the child to arrive at school ready for a day of study.’



Thank you

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