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# **School Inclusion Legal Aid Eligibility and scope**

Who gets it, and in what circumstances can it  
be used?

Dan Rosenberg, Partner

# Legal Aid Financial Eligibility – Key Points

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- Two types of legal aid – ‘legal help’ and ‘legal aid ‘ (or public funding certificate).
- Determining eligibility – can be complicated – broad brush approach in this talk
- Legal Help – initial work – will be based on **means of the parents**. Not on means of child. Unless special circumstances apply, will need to aggregate means of parent and child.

# Legal Aid Financial Eligibility

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- Income – either very low income, or means tested benefits (e.g. Universal Credit)
- Capital – less than £8000 savings. If somebody owns a property in London/ SE England that is likely to make them ineligible – elsewhere if they own property and are on low income will need to check eligibility properly taking that into account.
- Government website for checking yourself - <https://checklegalaid.service.gov.uk/about> (you can't get to this page normally, as for most of the cases that we are talking about Govt website wrongly says legal aid not available and one can't go further).
- If think that somebody is likely to be eligible then it is likely that they are, but legal aid provider will check.

# Legal Aid – Public Funding Certificates

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- Relevant in potential judicial reviews
- Legal action is the child's, so look at their means.
- However, can only make public funding applications once initial work is done on legal help basis or privately (or by very experienced and legally knowledgeable charity). Will need to have sent letter before action and given time for (or received) response.
- Argument for non-aggregation is that without it, due to the cost of JRs, law would effectively be unenforceable. Often have to re-argue the point anew with LAA on case by case basis- they accept it eventually each time.
- PFCs also available for Upper Tribunal SEN appeals, and for (non-disability) discrimination cases subject to merits + cost benefit issues.

# Legal Aid – Non-Eligible Parents

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- As a JR is such a powerful and (normally) quick remedy it is often worthwhile for a parent who does not qualify for legal aid to instruct a solicitor with a legal aid education law contract to advise and do an LBA.
- Normally, either the matter resolves at the LBA stage, or goes onto a legally aid certificate in the child's name – costs are thus limited.
- If a suitable charity can do an LBA for free, then that is positive, but other than for the most basic issues (SEN missed deadlines by LAs) it is likely to need solicitor input.

# Schools - Legal Aid Scope

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## Nominally three areas in scope

- Special Educational Needs
- Discrimination
- Judicial Review

# Schools - Legal Aid Scope - SEN

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All issues relating to EHCPs likely to be within scope for legal help.

- Appeals to Tribunal / Refusal to Assess / Refusal to issue / disputes re provision and placement.
- Failure to make provision / admit to school / amend following an Annual Review etc.

Effectively everything...

# Schools - Legal Aid Scope - Discrimination

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- All school based discrimination in scope
- Disability Discrimination in schools – to First Tier Tribunal
- Other protected characteristics – would be potential County Court claims.
- Relatively rare that a discrimination claim is best way to resolve an issue at school.
  - Normally **quicker** and more effective remedies available.
  - Often detrimental to ongoing relationship with school if pupil still there.
  - Can be legal aid merits difficulties – particularly damages v. cost of case. Also often evidential issues as well. Feels like discrimination to parent or child – but proving it is tricky.
  - Occasionally appropriate where discrete issue is in past but legal advice is important, particularly to advise if there is a better way of approaching problem.
- 6 month time limits



# Judicial Review – What is it?

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## Challenge to unlawful decision of public authority

- Public authority– includes all state schools (including academies / free schools) as well as local authorities.
- Is about ‘wrongs’ not ‘rights’.
- In schools relates to a wide range of scenarios – trick is to spot the potential to use this tool.

# Schools - when can a JR be used?

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- Any situation where a potentially unlawful decision has been made
- There is no JR if there is an 'alternative remedy' - e.g. an appeals process which can be followed .
- It will often be hard (even for lawyers) to work out at the outset whether there is a potential unlawful decision which can be challenged.
- Just because a decision may be a very bad one, or the parent/child disagrees does not make it unlawful.

# What sort of JRs are in scope?

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## **All education JRs are potentially in scope**

JR under used remedy in education law - Reason is that there is a lack of knowledge both:

- As to the law
- That judicial review is a potential remedy
- Of the speed and effectiveness of JRs (or to be more accurate, threats of JRs – LBAs are almost always sufficient to resolve matters)

# Judicial reviews – Urgency

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- All education judicial reviews need to be dealt with promptly – often involve child missing education.
- Normal deadline for bringing a JR – promptly and in any event within 3 months.
- **Complaints procedures generally not appropriate** for ‘forwards looking’ issues – e.g. if child unlawfully excluded from school and not receiving education, immediate JR threat is required to resolve matter – complaint would take months and be unlikely to resolve issue.

# Potential JR Areas

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- SEN
- Children out of school
- Alternative provision
- Admissions
- Exclusions / Off-rolling
- Progression
- Behaviour policies
- Others

# SEN JRs

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- Extremely useful in respect of missed deadlines by local authorities
  - Deciding whether or not to conduct assessment
  - Whether or not to issue a plan
  - Not amending plans following annual reviews
  - Not conducting reviews
  - Not finalising plans
- Not making provision set out in EHCP.
- Other issues as well – JRs (or the threat of them) are extremely effective at speeding up matters.

# Children Out of School

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- If a child is out of school, there may well be a JR, but likely to be legally complicated, and unclear who JR will be against (there are often many potential options/ solutions).
- Anything with a child out of school is like to be in scope.
- Sometimes a child will be out of school and not in education as a result of poor decision making by parents – but most of the time there is likely to be a potential solution. Again – JRs (or the threat of them) can make things happen faster.

# Children Out of School – Potential JRs

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## Action against schools

- Unlawfully excluding – JR the appropriate and most effective remedy
  - E.g. ‘you can’t come back to the school’
  - ‘You can’t return as your attendance is too low’
  - ‘If you return to school you will be excluded’
  - Can’t do that...**any informal** exclusion is unlawful
- Refusing to admit – see below



# Children Out of School

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- Not providing suitable education to children out of school
- Many reasons why children can't go to school – gangs / health / no school place / not reasonably practicable (particularly with children with SEN who have a named school which they cannot be got to).
- Providing very little education (ie not full time) – potentially unlawful and potential for challenge via JR.

# Children Out of School - JRs against LAs continued

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- Not directing schools to take pupils
- Particularly relevant for looked after children
- Likely to be discrimination on the part of schools as to why they are not taking children/why the local authority is reluctant to force them to do so – but **JR most effective way to get child into education quickly.**
- Not using the ‘fair access protocol’

# Alternative Provision

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- Actions against schools:
  - Placing children in alternative provision without following proper process
  - Alternative provision not being full time education
  - Something else relating to alternative provision when parents are not happy –particularly when children placed in alternative provision which will lead to them not obtaining any meaningful qualifications when capable of so doing
  - Any action relating to alternative provision likely to be tricky legally.

# Admissions

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- Admissions appeals are not in scope
- However challenges are:
  - Schools not admitting when they have places (non-SEN)
  - Brushing off applications without giving right of appeal
  - Withdrawing previously offered places

# Exclusions

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- If formal exclusion (permanent or fixed term) with right of appeal, no JR and not in scope for legal aid.
- May be other aspects that are in scope for legal aid– e.g. issues relating to SEN or potential discrimination – but couldn't get legal aid for the actual exclusion process.

# Off-rolling

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- Off-rolling - a child being removed from the school's roll for the benefit of the school as opposed to the child.
- Many ways in which this happens – likely to be a potential JR therefore in scope – need to move very quickly.

# Exclusions / off-rolling

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- If not a formal exclusion, is an unlawful exclusion. In scope.
- Placing children in isolation until they leave/ agree to managed move otherwise will exclude etc – all unlawful. In scope
- Potential JRs of Governing Body decisions not to readmit following successful Independent Review Panel appeal. In scope (but would need to think carefully re wisdom of return in those circumstances...).

# “Non Progression”

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- Anything preventing children from continuing from Year 12 to Year 13 likely to be unlawful.
- Anything preventing children continuing from Year 10 to Year 11 likely to be unlawful.
- Anything keeping children down a year, or threatening to keep them down a year (e.g. ‘unless your behaviour improves, you will not graduate to year 9)..
- Any academic or attendance criteria stopping progression will be unlawful
- Stopping children taking exams for which they have been prepared also unlawful.
- Even stopping children continuing with one A level subject/ forcing them to change to BTEC half way through A levels likely to be unlawful and susceptible to JR.
- Anything along these lines will be in scope.



# Looked After Children

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- Duty to promote their educational achievement – section 22(3A) CA 1989.
- Powers to direct schools to take them
- Anything involving a LAC likely to be in scope given the amount of legal duties on local authorities.
- All LACs likely to be eligible for legal aid – look at the means of the LAC only – NOT the foster carer / children's home manager / Local authority social worker...

# Behaviour Policies & Use of Isolation

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- Behaviour policies are of course a matter for schools. They will be given considerable leeway.
- Issues relating to repeated and egregious use of isolation in particular are potentially in scope, but complex legally.

# Non-attendance prosecutions / School Attendance Orders

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- The non-attendance prosecutions themselves are not within scope.
- However, the underlying problems as to why the child is not attending often are, and are often capable of being remedied via a JR threat.

# Other Areas Where They May Be an Education JR Within Scope

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- Issues relating to police in Schools
- Bullying – generally only if egregious failure by school to deal with it and protected characteristics involved.
- School transport (but only if all internal appeals exhausted).
- May to be something lawyers can do if county lines issues present (particularly common for children in PRUs / out of school)
- Other issues that didn't spring to mind of when preparing this talk...

# Contact Details

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Get in touch on:

Email: [Dan.Rosenberg@simpsonmillar.co.uk](mailto:Dan.Rosenberg@simpsonmillar.co.uk)

Telephone: 0345 357 9412