

Legal Entitlements and Problem-Solving (LEaP) Project

Response to the consultation draft of the “*Home to school travel and transport for children of compulsory school age: Statutory guidance for local authorities*” (issued July 2019)

1a: Do you agree that the new guidance is clear and easy to understand?

Yes, we agree that the new guidance is generally an improvement on the previous version, subject to the comments made below.

1b: Are there any areas of the revised guidance you believe could be further improved? If yes, please provide further feedback.

Yes, we believe that the current version could be further improved, as noted in the table attached at Annex 1.

2a: Do you think the examples will help local authorities meet their statutory duties?

Yes, we believe that examples are essential to illustrate the nature of local authorities' legal obligations and the statutory rights of parents/children.

2b: Please provide additional comments on any of the examples, ensuring you refer to the example to which your comment relates.

See table below.

2c: Are there any other areas in which you believe an example may be useful, or where you could possibly provide a further example? If so, please provide further information.

Yes, please see table below.

3. Are paragraphs 15-19 clear about the interaction between Universal Credit and extended rights? If not, please explain why.

We agree that these paragraphs explain the interaction between Universal Credit and extended rights more clearly than the previous draft.

4. Do you agree this is an effective and proportionate approach to the management of children's medical needs on school transport?

Yes, we believe that this is an improvement on the existing guidance.

5. Do you agree that Part 4 and the checklist in Annex 1 will help local authorities make sure their transport policies are lawful?

While we are somewhat disappointed that the previous ‘model’ policy has been removed, we believe that the replacement checklist will help ensure that transport policies are lawful, subject to the comments in the table below.

6. Please provide any additional comments you wish to make on the draft guidance. In particular, we would be grateful for any comments on:

- paragraphs 22-26 on personal transport budgets
- paragraphs 69 and 70 on independent travel training
- paragraphs 77 and 78 on behaviour

Please refer to the table below.

7. Do you agree with the public sector equality duty assessment as stated [in the consultation document]? If not, please explain why.

No. The revised guidance (para 48) no longer requires local authorities to consider “whether one would ordinarily expect a child of that age to be accompanied” in deciding whether it’s reasonable to expect a parent to accompany a child (see paragraph 17 of the existing guidance). We believe that this will make it easier for local authorities to discriminate against disabled children and their families by insisting that parents accompany disabled children of all ages. See the table at Annex 1 for more details.

8. Do you believe the revised guidance will result in any new costs or savings for local authorities? If yes, please explain why.

We do not believe that the revised guidance should in itself result in any new costs or savings for those local authorities which have been discharging their statutory duties to date, as the guidance merely reflects the legislative position, which has not changed.

Legal Entitlements and Problem-Solving (LEaP) Project
22 August 2019

<https://www.cerebra.org.uk/research/university-of-leeds-cerebra-legal-entitlements-and-problem-solving-project/>

Table of comments on the consultation draft of the “*Home to school travel and transport for children of compulsory school age: Statutory guidance for local authorities*” (issued July 2019)

Para no.	Comment / suggested amendment	Rationale
(1)	<p>(i) Highlight “travel arrangements” in bold and add it to the ‘Definitions’ section or include a cross-reference to paragraphs 20-21</p> <p>(ii) “local authorities must provide such suitable and free home to school travel arrangements” as they consider necessary”.</p> <p>(iii) Insert cross-reference to part 3 for further information about the duty to ensure that transport arrangements are suitable</p>	<p>‘Travel arrangements’ should be defined or cross-referenced to paragraphs 20 and 21 in order to make it clear that arrangements other than the provision of transport (such as the payment of travel expenses or allowances) can only be made with a parent’s consent.</p> <p>To reflect the wording in s508B Education Act 1996 and to link this part of the guidance to the advice in part 3 on the suitability of transport arrangements.</p> <p>As above.</p>
(4)	“suitable and free home to school travel is provided by someone else”	To reflect the wording in s508B(2) Education Act 1996.
(11)-(12)	<p>(i) Add examples in respect of children who cannot reasonably be expected to walk for reasons other than purely physical impairments.</p> <p>(ii) Reinsert paragraph 31 and the Child H example from the draft chapter sent to us by the Department on 01/11/17,</p>	<p>(i) Some children with SEN or disabilities may be physically capable of walking to school but they should still not be expected to walk because of behavioural, sensory, safeguarding or other issues arising from their condition, e.g. children who have</p> <ul style="list-style-type: none"> - no sense of danger and are unable to keep themselves safe - challenging or unpredictable behaviour (e.g. running into the road) - sensory problems which cause distress when exposed to loud noises, etc. <p>(ii) ‘Mobility problems’ can include temporary as well as permanent conditions, e.g. a broken leg</p>

Para no.	Comment / suggested amendment	Rationale
	<p>which refer to children who have temporary physical conditions / mobility problems:</p> <p><i>Temporary mobility problems</i> 31. Children may be eligible for free transport because of temporary mobility problems, or at times of ill health that affect their ability to safely walk to school.</p> <p><i>(Example)</i> Child H attends her nearest primary school which is 1.5 miles from her home. When she began attending the school her parents knew she would not be eligible for free home to school transport, as there is a safe walking route from her home to the school. The walking route involves climbing over a stile. However, Child G is then involved in a serious road accident. After several weeks she is well enough to return to school, but it will be a few more weeks before she will have recovered enough to be able to manage the stile. Child H is eligible for free home to school transport until she is fit to walk the route again.</p>	
(26)	<p>Amend as follows and move to the previous section (after paragraph 20):</p> <p>“Local authorities must ensure that the travel arrangements they make are suitable and take account of the needs of the child concerned. For example, it would not be appropriate to provide a pass for free travel on a service bus to a child whose special needs meant they would be unable to travel on a service bus. More information on the suitability of transport can be found in part 3”.</p>	<p>To emphasise the link to part 3 of the guidance and improve the flow of the guidance (the reference to a free bus pass follows on from a similar reference in paragraph 20).</p>
(29)	<p>The guidance should make it clear that while parents should apply for the nearest suitable school, they do not necessarily have to name it as their <u>first</u> preference in order to qualify for transport – the determining factor is whether a place would have</p>	<p>See the Ombudsman’s decision in the following case: Essex County Council (16 005 580), paras 32-34</p>

Para no.	Comment / suggested amendment	Rationale
	<p>been available at the nearest suitable school, regardless of whether it was named as first preference.</p>	<p>- “The legal advice that the Ombudsman has received is that a council can make suitable arrangements by requiring an application to be made for the nearest school because, without applying for a place at the nearest school, there would be no real prospect of getting a place at the school. However, our legal advice also says there is no basis in law for the Council to require a parent to put the nearest school as a first preference. We consider that if a parent chooses to apply in first place for transport to a school beyond the statutory walking distance that is not their nearest school, the Council should not automatically refuse transport...the Council cannot just say that it has made suitable arrangements by asking parents to put the nearest school first and then refusing transport if they have not done so. This approach takes no account of whether the child would have had a real prospect of being offered a place at the nearest qualifying school and therefore whether that school is “suitable”. If there were no place available at the nearest school, then it could not be a suitable school”.</p> <p>See also LGO reports on complaints against: <u>Essex County Council (17 007 919)</u> <u>Medway Council (17 015 628)</u></p>
<p>Child L example</p>	<p>“Child L attends a school 3.4 miles away from her home. It is her second nearest school. Her parents applied for her nearest suitable school but it was oversubscribed and she could not be offered a place. She is eligible for free home to school travel. Mid way through the school year, a place becomes available at the nearest suitable school. Child L should not be expected to move schools as her eligibility was determined during the normal admissions round The local authority enables Child L to retain her transport entitlement”.</p>	<p>This example suggests that the council would be within its rights to expect a child to move schools but has chosen to allow her to remain – this contradicts paragraph 28 of the guidance which makes it clear that the availability of a school place should be considered during the normal admissions round or when a family moves to the area.</p> <p>See also the Ombudsman’s decision on a complaint against <u>Manchester City Council (17 014 534)</u>, paras 16-18</p> <p>- “The statutory guidance says that transport eligibility will usually be considered “during the normal school admissions round when places are allocated” – in other words, when a child is due</p>

Para no.	Comment / suggested amendment	Rationale
		<p>to start at a new school. This means, for the most part, when a child is about to enter Year 7, but might also refer to children who are changing school for some reason. The Council's actions, however, suggests that children who are about to enter Years 8-11, in the same school that they have attended in the previous year(s), should be prepared to change to a nearer school if an appropriate place has become available there. However, this approach is not supported by the statutory guidance. This is fault. Changing to a different school after one or more years represents a significant disruption to a child's education. It can also break important social bonds they will have built with friends. It is not something which children should be expected to do, unless it is unavoidable."</p>
(33)	<p>"Where the parent's preferred school is further away from their home than the nearest school that can meet the child's special educational needs, the local authority can name the nearer school if it considers it to be appropriate for meeting the child's special educational needs, subject to the considerations in paragraph 34-36 below. Alternatively, they may agree to name the preferred school but are able to ask the parent to provide some or all of the transport funding.</p>	<p>This paragraph may be open to misinterpretation by local authorities if read in isolation, as it suggests that the suitability of the school is the only determining factor.</p>
(34)	<p>"In deciding whether to name the nearest or preferred school in the plan, the local authority should must consider whether transporting the child to the preferred school would be compatible with the efficient use of resources."</p>	<p>As required by the Dudley case.</p>
(35)	<p>"It should first determine the cost of providing the child with free travel to each of the two schools. It should then decide whether the any additional cost of providing travel to the parents' preferred school is compatible with the efficient use of resources. In doing so, it should have regard to whether any extra costs are outweighed by the educational benefits and other advantages that the preferred school will provide for the child."</p>	<p>For clarity.</p>

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(36)	<p>“If it decides it would be compatible with the efficient use of resources to provide free home to school travel to the parents’ preferred school, it should name only that school in the child’s EHC plan. If a parent’s preferred school is named alone and unconditionally in an EHC plan, then it is the child’s nearest suitable school and the local authority has a duty to make travel arrangements if the child is eligible. If it decides the additional cost is incompatible with the efficient use of resources, it may name both schools in the EHC plan on the condition that the parents pay the cost of transport to their preferred school.”</p>	<p>The guidance needs to explain the implications of the Dudley case in clear terms, i.e. if a parent’s preferred school has been named alone and unconditionally in an EHC plan, it must be treated as the nearest suitable school and the local authority will have a duty to provide transport if the child is eligible.</p>
(43)	<p>“Local authorities should assess the eligibility of children with special educational needs, a disability or mobility problems on a case by case basis, having regard to each child’s individual needs.”</p>	<p>To emphasise that eligibility decisions should be based on individual needs.</p>
(43) – (45)	<p>Reinsert paragraph 24 of the draft chapter sent to us by the Department on 01/11/17: “The statutory walking distances do not apply in relation to children who are eligible for school transport on the grounds of their special educational needs, disability or mobility problems. If a child attends their nearest suitable school and cannot reasonably be expected to walk there, the local authority must provide them with free home to school transport, regardless of the distance between their home and the school.”</p>	<p>We are aware of a number of cases where local authorities have refused transport for children with SEN, disability or mobility problems solely on the grounds that they live within walking distance – as such, we believe that the guidance should explicitly state that the walking distances do not apply when assessing children with SEN, disability or mobility problems (as in paragraph 16 of the existing guidance)</p>
(48)	<p>“When assessing route safety and when assessing whether a child with special educational needs, a disability or mobility problems can reasonably be expected to walk to school, local authorities should consider whether the child could reasonably be expected to walk if accompanied and, if so, whether a parent can reasonably be expected to accompany their child. This will involve taking account of the child’s age, any special educational needs that are relevant to their ability to walk to school safely and</p>	<p>We believe that the revised guidance does not adequately address potential disability discrimination.</p> <p>Paragraph 17 of the current guidance states that:</p> <p>“When considering whether a child’s parent can reasonably be expected to accompany the child on the journey to school a range of factors may need to be taken into account, such as the age of</p>

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	<p>whether one would ordinarily expect a child of that age to be accompanied. Parents are responsible for escorting a child where it is age appropriate, but local authorities are responsible for meeting transport needs which arise solely from special educational needs or disability.”</p>	<p><u>the child and whether one would ordinarily expect a child of that age to be accompanied.</u></p> <p>The phrase underlined above makes it clear that parents can only be expected to accompany disabled children to the extent that it is age appropriate.</p> <p>We believe that it is essential to reinstate this phrase in order to avoid an increase in cases of disability discrimination, where local authorities insist that parents must take responsibility for escorting disabled children of all ages. Infantilising disabled young people by expecting their parents to accompany them, whatever their age, amounts to direct discrimination and requiring parents to act as escorts in these circumstances constitutes direct discrimination by association.</p> <p>See the Ombudsman’s decision in a complaint against <u>London Borough of Lambeth (18 008 409), para 31</u></p> <ul style="list-style-type: none"> - “The Council says it expects parents to accompany children regardless of their age. This approach is not compatible with the Guidance that Councils should take into account ‘age and whether one would ordinarily expect a child of that age to be accompanied’. The question the Council (and appeal panel) had to ask itself was at what age would it usually expect a child to be able to independently travel the route concerned and then having reached a view on that point, it then had to go on to consider whether if parents of other children the same age would not have to accompany their children, whether it was reasonable to ask a parent of a child with SEN/mobility needs to do so and give a rationale for its decision.” (para 31)
<p>Para 49 - Child L M example</p>	<p>Insert another example to show that it is not reasonable to expect parents to accompany a disabled young person when a typical child of the same age would ordinarily be expected to walk to</p>	<p>To highlight the disability discrimination issue referred to above. A parent can only be expected to accompany a child to the extent that the child’s age, or the safety of the route for children in general,</p>

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	<p>school alone – his/her transport needs are solely attributable to SEN or disability and as such should be met by the local authority.</p> <p>e.g. Child M is 14 years old and has learning disabilities. She attends her nearest suitable school which is 2.8 miles from her home. She is able to walk to school but needs to be accompanied because of her disability. The route to school has been assessed as safe for typical children of the same age to walk alone. As parents of typical children of the same age are not required to accompany their children, the local authority decides that it would be unreasonable to expect Child M's parents to do so and she is eligible for free home to school travel.</p>	<p>requires it. It is the child's age which determines the need to be accompanied by a parent, not his/her SEN or disability.</p>
(50)	<p>"Local authorities should must provide free home to school travel for all eligible children, regardless of whether they or their parents receive further benefits or allowances. Being in receipt of additional benefits or allowances such as Disability Living Allowance, a Motability vehicle or Foster Care Allowance does not affect a child's eligibility for free home to school travel."</p>	<p>We do not believe that local authorities have any discretion to refuse transport for eligible children on the grounds that families are in receipt of benefits or allowances.</p> <p>We believe that the words 'further' and 'additional' should be removed as they perpetuate the mistaken belief in some local authorities that families are being 'double funded'.</p>
(57) – (62)	<p>Insert statement that local authorities must be prepared to depart from policy and exercise their powers in individual cases.</p>	<p>To prevent local authorities from fettering their discretion by adhering too strictly to any lists of 'exceptional circumstances'.</p>
(63) – (66)	<p>(i) Insert statement that local authorities should consider the suitability of all aspects of the journey to school (not just its duration), e.g. type of transport and walking routes to pick up points.</p> <p>(ii) Insert statement that any arrangements should not make a child late for school.</p>	<p>(i) More detailed guidance would be helpful, given that the Department's guidance on '<i>Home to school travel for pupils requiring special arrangements</i>' (November 2004) has been archived.</p> <p>(ii) We have been contacted by parents whose children regularly arrive late at school or have to leave school early because of the local authority's travel arrangements. Disabled children should not have to forfeit their right to a full time education in order to receive transport.</p>

Para no.	Comment / suggested amendment	Rationale
(75)	<p>Delete final sentence and reinstate paragraph 60 from the previous version:</p> <p>“It is also considered good practice for those responsible for planning and managing school transport to have undertaken appropriate equality training. Local authorities should also ensure that their home to school transport teams have undertaken appropriate training in equalities.”</p>	Given the requirements of the Equality Act 2010, those making decisions about school transport eligibility should receive equalities training as a matter of course rather than ‘good practice’.
(97)	<p>“Parents wishing to complain about the service provided by the local authority service issues falling outside the appeal process should use the local authority’s complaints procedure”</p>	To clarify the different jurisdictions of the appeal process and the complaints process.
(108)	<p>“If an appellant a parent considers the decision of the independent appeals panel to be flawed on public law grounds, they may apply for a judicial review”.</p>	To avoid unnecessary legal jargon.
Definitions	<p>Add ‘nearest suitable school’ and cross-refer to relevant sections of the guidance.</p> <p>‘disability’ is defined in section 6 of the Equality Act 2010. A person has a disability if they have (a) a physical or mental impairment and (b) that impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. A chronic health condition may constitute a disability.</p>	<p>For ease of reference.</p> <p>To reflect the wording in s6 of the Equality Act 2010</p>
Annex 1	<p>“A local authority home to school travel policy must contain a number of elements to be considered lawful and There are also a number of elements that a local authority home to school travel policy should include to ensure it is clear and easy for parents to understand. A list of the main elements is below, however, it is not an exhaustive list and authorities are free to add elements they consider necessary, provided they are lawful.</p>	For clarity.
Annex 1	<p>Add the following elements to the list:</p>	For completeness.

Para no.	Comment / suggested amendment	Rationale
	<p>The policy clearly explains the local authority's duties in deciding whether to name a parent's preferred school or the nearest suitable school in an EHCP ('the Dudley test').</p> <p>The policy clearly explains in what circumstances a passenger assistant may be provided.</p> <p>The policy clearly explains that parents can use the local authority's complaints process to make complaints about service issues which fall outside the appeals process.</p> <p>The policy clearly explains that parents can complain to the Local Government & Social Care Ombudsman if they remain dissatisfied.</p>	
Various	<p>(1) "home to school travel arrangements as they consider necessary".</p> <p>Footnote no. 6 "and the policy Police"</p> <p>(29) "the prospect of them being able to secure a place at the nearest suitable school"</p> <p>(49) Child L M example</p> <p>(76) Child M N example</p> <p>Flowchart: "Within 40 working days of receiving the parent's notification."</p> <p>'religion' means...this is set out in section 509AD(3) of the Education Act 1996"</p>	