



geldards

# The impact of VAT on independent school fees for children with SEN

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Securing legal support and protection for a child or young person with SEN

5th September 2024

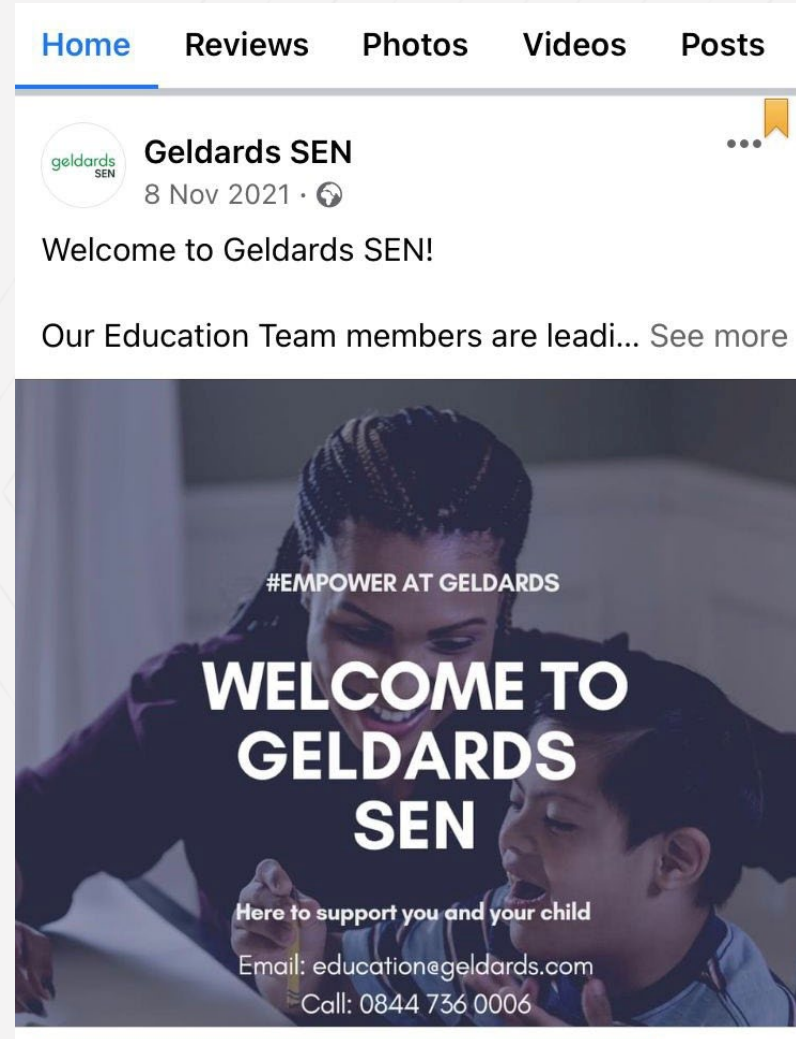
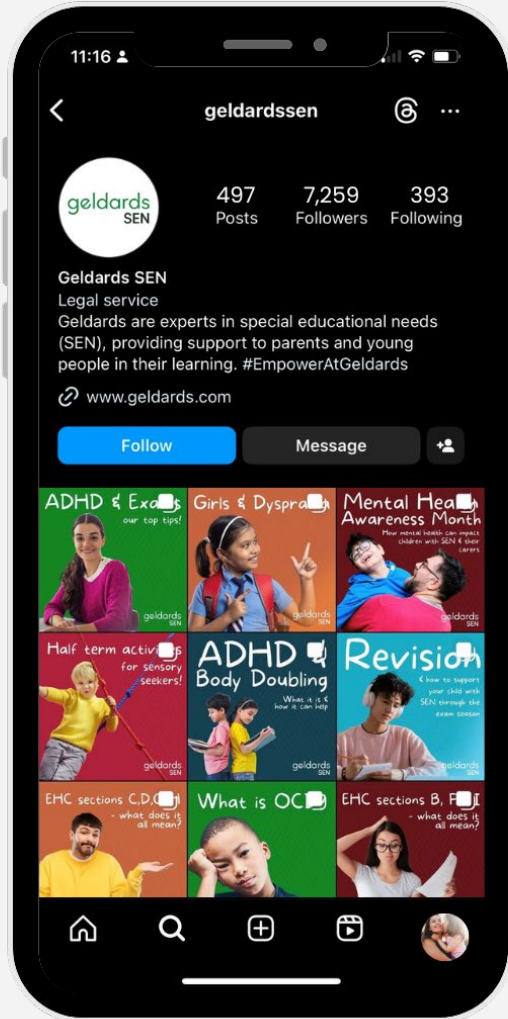
# Who we are

- Our Education Team are leading experts in special educational needs (SEN) and disability law. We are ranked in both the Legal 500 and Chambers and Partners.
- Our specialist team has over 19 years experience in the field.
- We aim to help parents and their children, as well as young people, to achieve the support necessary to meet their special educational needs, so that they are able to achieve the best possible outcome in their education and life.
- We have supported thousands of parents and young people to achieve these outcomes, we aim to do this as quickly as possible and aim to make the process as stress free as we can.

# Who we are

- The Education Team at Geldards are passionate about empowering parents and young people in understanding their rights, so they can have access to the provision and support necessary to meet their needs.
- With that in mind, we have designed a new Instagram and Facebook page, with the aim of providing parents with the information they need in an easy, accessible and jargon-free way.
- You can find us on Facebook and Instagram by searching for 'Geldards SEN'.

# Social Media



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In particular, no liability can be accepted where a person acts in reliance on these notes or views expressed by the authors.

# Outline of the talk

- Section 1 – Government proposals to charge VAT on private school fees
- Section 2 – Implications of Government proposals on children and young people with SEN
- Section 3 – Legal Entitlement for those children and young people with SEN
- Section 4 – Structure of the EHC plan
- Section 5 – Personal budgets
- Section 6 – Rights of appeal to the SEND Tribunal

# Section 1

Government proposals to charge VAT on private school fees

# Government proposals to charge VAT on private school fees

- As of 1st of January 2025, all vocational training supplied by a private school, or a "connected person", for a charge will be subject to VAT, at the standard rate of 20%. Boarding services closely related to such a supply will also be subject to VAT at 20%.
- Any fees paid from 29th of July 2024, pertaining to the term starting in January 2025 onwards, will be subject to VAT.
- This change will affect private schools across the UK.
- The changes apply to children of compulsory school age up to 19 years of age.
- Closely related goods and services other than boarding e.g., school meals, transport, and books and stationery (that are provided for the direct use of pupils and that are necessary for delivering their education) will remain exempt from VAT. Para 12.13 of the Technical note.



# Government proposals to charge VAT on private school fees Cont...

- Private schools will need to charge VAT on any additional supply of education that they charge a fee for, after school hours or during holidays. E.g., extra-curricular performing arts and sports lessons. Para 12.14 of the Technical note.
- The government will legislate to remove eligibility of private schools in England to business rates charitable rates relief.
- Government proposals are contained within the draft Finance Bill Measures. Also see the governments technical note: Applying VAT to Private School Fees and Removing the Business Rates Charitable Rates Relief.

# Government proposals to charge VAT on private school fees Cont...

- Part 3, clause (1) defines "private schools".
- A school is not a private school for the purposes of the Bill if it
  - I. is a nursery school, or
  - II. it is approved under 342 of the Education Act 1996 (approval of non-maintained special schools).
- There is currently a consultation open which will last for seven weeks and will end on the 15th of September 2024.
- Any comments or queries should be made to [independentschools@HMtreasury.gov.uk](mailto:independentschools@HMtreasury.gov.uk) by the 15th of September 2024.

# Section 2

Implications of Government proposals on children and young people with SEN

# Implications of Government proposals on children and young people with SEN

- Where a pupil's place in a private school is funded by the LA (rather than parents and carer) because the pupil's needs cannot be fully met in the state sector, or are best met elsewhere, LA's will be able to reclaim the VAT, they are charged on the fees of these pupils via the section 33 VAT Refund Scheme. Para 2.23 of the Technical note.
- LA's will be able to recover any VAT, they are charged on education and boarding fees of pupils in private schools, regardless of why the LA is funding that place. For instance, if an LA is funding a child's place in a private boarding school as an alternative to foster care, they will be able to reclaim the VAT incurred on those fees too. Para 2.24 of the Technical note.

## Implications of Government proposals on children and young people with SEN Cont...

- There are a small number of pupil's who have an EHCP (in England) or IDP (in Wales) whose needs could be met in the state sector, but whose parents have placed them in a private school out of choice; their EHCP/IDP does not say placement at a private school is necessary to, or would be the best way to, meet the pupils needs. In these circumstances VAT will apply to their fees.

# Section 3

Legal Entitlement for those children and young people with SEN

# Definitions

- Special educational needs are defined in law as:
  - 1) a 'learning difficulty',
  - 2) which requires 'special educational provision'.
- (See sections 20 and 21 of the Children and Families Act 2014)
- A child or young person has a 'learning difficulty' if he/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/her from making use of educational facilities of a kind generally provided for others of the same age in mainstream schools or post-16 institutions.

- ‘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.

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).



# Support in school and the process leading to an EHC plan

- The SEN Code of Practice 2015 envisages a gradual approach to identifying and addressing learning needs. The starting point is in-class support: a child or young person's class teacher providing them with differentiated learning opportunities in class to help them make progress and carefully monitoring them to see if progress is being made. This includes making reasonable adjustments within the school/class to support those with special educational needs.
- Where a child or young person has failed to make 'expected progress', their case should be referred to the school's special educational needs co-ordinator (SENCo), who will place the child on a SEN programme - following the code of practice's new guidance of 'assess, plan, do, review'. The same will occur for a young person in a post-16 institution.
- If the child or young person has still failed to make expected academic progress, then an EHC needs assessment to determine their special educational needs and the provisions required to achieve progress (whether within their setting's resources or within an EHC plan) should be considered.

# Request for an EHC needs assessment

- EHC needs assessments can be requested by either (or both):
  - a) The parents of a child or a young person; or
  - b) The school/educational setting a child or young person attends.
- If the education institution supports the request, it will typically be very helpful.
- Once a parent/young person and/or school have made a request, the local authority legally have 6 weeks to consider the request before deciding whether or not to conduct the assessment.
- If the local authority refuses, the child's parent(s)/the young person have 2 months in which to appeal to the Special Educational Needs and Disability (SEND) Tribunal, also known as the First-tier Tribunal (Health, Education and Social Care).

# Local authority consideration of a needs assessment request

- In deciding whether or not to undertake a needs assessment of the child or young person, the local authority will consider whether it 'may be necessary' for special educational provision to be made for them. See **section 36(3)** of the Children and Families Act 2014.
- The local authority should look at:
  - a) the level and extent of the learning difficulties;
  - b) the provision the child or young person has received so far; and
  - c) any additional provision independently provided by the child or young person's parent(s).
- The authority should also examine whether any of the child or young person's needs may indicate other learning needs which have not yet been identified.

# Local authority consideration of a needs assessment request

- After considering this, the authority should go on to judge the child or young person's progress and determine whether it can be described as 'expected'; if independent provision is being provided, it should consider whether progress would be halted or reversed without this provision.
- If the child or young person is not in a typical mainstream environment, the local authority must consider how (if at all) his or her performance would differ if he or she were in such an environment.

# The EHC needs assessment timetable

- Local authorities are required, in law, to comply with the below timetable if they have agreed to undertake a needs assessment of a child or young person. The local authority must:
  - Within **10 weeks**, conduct the educational, medical and social care assessments it feels are required for it to form a position as to what the child or young person's special educational, health and care needs are and whether or not they require an EHC plan.
  - At the end of this 10-week period, the local authority must either issue a draft EHC plan or inform the parent(s) or the young person of its decision not to issue a plan (in which case, it will provide them with a 2-month right of appeal to the Tribunal).
  - If the local authority issues a draft plan, it must give the parent(s) or young person 15 calendar days to consider it and provide their views on its content and obtain parental preference for a particular school (including independent schools) to be named in it.

# The EHC needs assessment Cont...

- The local authority must provide parents with the option of requesting a 'personal budget', which involves providing funds directly to a parent to procure services for their child.
- Following receipt of the parental views of the draft plan and parental nominations for schools, the local authority must consider any amendments and consult with the school nominated by the parents; the school should respond within 15 calendar days.
- Following the consultation, the local authority must issue a final plan, along with a 2-month right of appeal for the parent(s) to the SEND Tribunal.

# Section 4

## Structure of the EHC plan

# What does an EHC plan look like?

- Section A – the views, interests and aspirations of the child/young person and their parents
- Section B – the child or young person’s special educational needs
- Section C – the child or young person’s health needs which relate to their SEN
- Section D – the child or young person’s social care needs which relate to their SEN



# The structure of the plan Cont.

- Section E – the outcomes sought for the child or young person
- Section F – special educational provision required by the child or the young person
- Section G – any health provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN

# The structure of the plan Cont...

- Section H1 – any social care provision which must be made for a child or young person
- Section H2 – any other social care provision which result in the child or young person having SEN
- Section I – placement
- Section J – personal budget (including arrangements for direct payments)
- Section K – appendix

# Key sections of the EHC plan

- Legally enforceable sections:
  - Section B - this element of the plan should replicate part 2 of a statement of special educational needs. It should be a 'pen portrait' of the child or young person's special educational needs, outlining their areas of difficulty in accessing learning.
  - Section F - this section should include all the special educational provision required to meet the child or young person's special educational needs. It is crucial that all therapeutic intervention and social care intervention is set out clearly and specified in terms of hours and level of expertise.
  - Section I - this section should include the name and type of the school or post-16 institution which the child or young person will attend.

# Key sections of the EHC plan Cont...

- Sections A and E: the aspirations in section A and the outcomes in section E should be looked at together. If the student is to attend a particular course at a future educational placement, the aspirations and outcomes should be related to that placement.
- For example, if a student aspires to undertake a business course at a special college placement, this aspiration should be recorded in section A and the outcomes which will allow him to realise this aspiration should be recorded in section E, i.e. improve the student's ability to carry out their recording of work and their independent learning.

# What wording can be expected/required in section F?

- A. Legally correct wording
- B. Provision which can be expected
- C. LA requirement to secure provision

# A. Legally correct wording

- A starting point: section F should be as clear as possible as to what the child or young person will receive.
- Wording such as ‘access to’, ‘benefit from’, ‘as required’ leave doubt as to what the COYP is specifically entitled to.
- Wording describing any itemised provision must be specific and quantified.  
If you receive speech and language therapy, how much, how frequently, delivered by whom, where, when in the school day?
- Take a common-sense approach to how realistic it is to expect the delivering professional to understand what is intended.

# A. Legally correct wording

- AVOID:

- 'as appropriate' / 'as required'
- 'regular' / 'periodic'
- 'subject to review' \_\_\_\_\_
- 'would benefit from' / 'access to'

NB – unless flexibility is **fundamental** to the provision required.

- AIM FOR:

- Specific duration and frequency of therapy or programmes.
- Content of therapy or teaching programmes.
- Necessary qualifications and experience of staff clearly stated.
- Certainty of wording.

# B. Provision which can be expected

- All the educational provision which the child or young person requires should be contained within section F. As covered, section 21(5) of the CFA 2014 incorporates healthcare and social care provision which *educates or trains* a child or young person.
- This includes:
  - LSA
  - Speech and language therapy
  - Occupational therapy
  - ABA
  - Specialist tuition
  - Social group sessions
  - Acoustic systems
  - Community access/independence training
  - Transport training
  - Hydrotherapy



# B. Provision which can be expected

- Placement-specific wording.
  - Class sizes: H v Leicestershire [2000] ELR 471.
  - Staff qualifications and experience: R v Wandsworth ex parte M [1998] ELR 424.
  - Specification as to small group work: L v Clarke and Somerset [1998] ELR 129.
  - Specification as to therapeutic input: R v Harrow ex parte M [1997] FCR 761.

# C. LA requirement to secure

- Section 42 Children and Families Act 2014

42(2) The local authority must secure the specified special educational provision for the child or young person.

42(6) “Specified”, in relation to an EHC plan, means specified in the plan.

- 2015 guidance section 9.131

When an EHC plan is maintained for a child or young person the local authority must secure the special educational provision specified in the plan. If a local authority names an independent school or independent college in the plan as special educational provision it must also meet the costs of the fees, including any boarding and lodging where relevant.

- R. (N.) v North Tyneside [2010] confirmed the local authority’s absolute duty to arrange provision in part 3 (now section F), which is non-delegable and simply has to be delivered.
- A failure to provide the provision included in the EHC plan is remedied by way of judicial review in the High Court. *N.B. legal aid is usually available.*

# Section 5

## Personal budgets

# Request for a Personal Budget

- A parent or young person may make a request to a local authority for a personal budget, at any time during:
  - a) the EHC plan being drafted; or
  - b) the EHC plan being reviewed or re-assessed.
- Where a request for direct payments has been made, a local authority must consider that request.
- The local authority must ensure that the amount of direct payments is sufficient to secure the agreed provision.
- The local authority may increase or reduce the amount of direct payments, provided that the authority is satisfied that the new amount is sufficient to secure the agreed provision.

# Reviewing a Personal Budget

- The local authority must review a personal budget whenever any changes are made, or:
  - A. at least once within the first three months of direct payments being made;
  - B. at the end of the period of one year from which direct payments start being made; and
  - C. at appropriate intervals thereafter not exceeding twelve months.

# Challenging the personal budget

- The amount provided by way of a personal budget is set by the local authority and must be appealed internally. If the amount is still insufficient at the end of the internal appeal, parents or young people may have a right to judicial review through the High Court.
- Should parents or young people wish to challenge the level or type of provision outlined in an EHC plan, they may do so by appealing to the SEND Tribunal.

# Section 6

Rights of appeal to the SEND Tribunal

# Rights of appeal to the SEND Tribunal

- On receiving a final decision from a local authority, a parent or young person can appeal on the following bases:
  1. The authority decided not to carry out a needs assessment.
  2. A authority declined to issue an EHC plan.
  3. The content of the plan is inadequate.
  4. The authority decided not to amend an EHC plan following an annual review.
  5. The authority decided to cease to maintain the plan.



# Rights of appeal to the SEND Tribunal Cont...

- Parents and young people have a two-month right of appeal to the Tribunal following a decision by their local authority.
- In order to register an appeal, they will require a mediation certificate (this can be obtained any time during the two-month right of appeal), which should be issued either three working days following:
  - a) mediation; or
  - b) a decision by a parent/young person not to engage mediation.
- Parents or young people can lodge an appeal either within 2 months of the original decision or within one month of the mediation certificate (whichever is later).

# The tribunal process

- The tribunal process generally spans 3 months.
- If matters cannot be resolved between parties during this process, it will culminate in a hearing.
- At the hearing, the case will be adjudicated upon by a tribunal judge, who is a trained legal professional (either a barrister or a solicitor), accompanied by one to two lay members (who are experienced in the field of SEN).
- The SEND Tribunal makes decisions based on the evidence in front of it. Parents or young people must therefore ensure that they have good, current evidence to support their case.
- It is typical for appellants to instruct independent experts to determine the level and extent of the young person's SEN and the provision required.

# Extended appeals

- Formerly known as the 'National Trial.' This was a two-year scheme during which the Tribunal trialled making recommendations in relation to :
  - Health (Sections C and G)
  - Social Care (Sections D and H1/H2)
- The National Trial has now been approved to continue following successful consultation and these appeals are now referred to as Extended Appeals.

# Extended appeals Cont...

- Hearing panels will be made up of three members: a judge, one SEN expert and one health or social care expert.
- The Tribunal has recruited additional specialist health and social care members.
- There is an express recognition from the Government, in the guidance, that parties will likely require more than 3 witnesses.
- Hearings will be scheduled for two consecutive days as a starting position.
- CCGs are not additional parties to the proceedings but are represented by the Local Authority.
- The Tribunal is aware that this carries costs implications for parents in having 2-day hearings as standard. Their response in feedback has been to suggest that it is their hope parties can reduce issues in dispute, or they will intentionally schedule evidence from different experts to occur on different days so as to avoid bringing the whole 'team' to both days.

# Extended appeals Cont...

- Although any recommendations made by the Tribunal on health and social care elements of an EHC plan are non-binding and there is no requirement to follow them, they should not be ignored or rejected without careful consideration.
- Within 5 weeks of the receipt of National Trial recommendations from the Tribunal, the local authority must write to the parent(s) or young person explaining what steps the health commissioning body or social care commissioner has decided to take following consideration of the Tribunal's recommendations. If a decision has been taken not to follow all or part of the recommendations, they must give sufficiently detailed reasons for that decision. The 5-week time limit can be varied at the discretion of the Tribunal.
- It is important to be aware that, should an LA or responsible health commissioning body decide not to follow the recommendations of the Tribunal, parents and young people can complain to the ombudsman or seek to have the decision judicially reviewed.



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# Thank You

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