

# FACTSHEET: LEGAL BRIEFING ON THE RIGHT TO EDUCATION FOR MIGRANT CHILDREN AND YOUNG PEOPLE IN ENGLAND

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JUNE 2024

## About IRMO

IRMO works to enable the development, agency, and participation of Latin Americans and other Spanish and Portuguese speakers, by responding to both immediate needs and structural inequalities.

## About Thrive

Thrive is IRMO's education advocacy project aimed at eliminating structural barriers that prevent Latin American and migrant children from accessing education.

## About Jen Ang

This brief was written for IRMO by Jen Ang, Founding Director of Lawmanity and a human rights lawyer with over 20 years' experience, qualified to practise in NY State, England & Wales and Scotland.

## General Legal Right to Education

### International and UK Law

The right to education is universally acknowledged as a fundamental human right for all children and young people. This right is enshrined in international law through treaties such as the **Universal Declaration of Human Rights (1948)**. In the UK, it is protected by two key international treaties: the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child (UNCRC).



### European Convention on Human Rights (ECHR)

- **Article 2 of Protocol No. 1** states that no one shall be denied the right to education. This provision is supported by **Article 14**, which ensures all rights are enjoyed without discrimination.
- The UK incorporated these rights through the **Human Rights Act 1998**, allowing individuals to challenge violations in UK courts. The European Court of Human Rights (ECtHR) has emphasised that education serves public interests and supports democracy as well as the integration of minorities.



### Timishev v. Russia (2005)

The European Court of Human Rights ruled that denying children access to education based on their parent's lack of legal residency registration violated their right to education under **Article 2 of Protocol No. 1 of the European Convention on Human Rights**. The Court emphasised that legal residency status should not be a condition for accessing education, making this a key case in protecting migrant children's right to education.



### UN Convention on the Rights of the Child (UNCRC)

- **Article 28** upholds the right to free primary education, varied secondary education and accessible higher education for all on the basis of capacity.
- **Article 29** focuses on the aims of education, emphasising the importance of nurturing a child's personality, talents, and abilities.
- Although the UK ratified the UNCRC in 1991, it has only been directly incorporated into domestic law in Scotland, limiting its enforceability in UK courts.

## Devolution and Education

Education is a devolved matter in the UK, meaning that Scotland, Wales, and Northern Ireland have the authority to legislate on education within their regions. This results in variations in education laws and policies across the UK, with Scotland and Wales taking steps to embed the rights from the UNCRC into their national laws.

## Equality Act 2010

This UK-wide legislation protects individuals from discrimination on grounds such as sex, race, disability, and other protected characteristics. While it safeguards migrant children from discrimination based on these characteristics, it does not extend to discrimination based solely on immigration status. However, other legal frameworks, such as the Human Rights Act 1998, might still provide grounds for challenging such exclusion.

## Education and Disability

Under both international law and the Equality Act 2010, children with disabilities receive additional protections to ensure equal access to education. This includes the obligation for schools to make reasonable adjustments and avoid discrimination.

## Legal Right to Education in England

In England, the right to education is governed by UK legislation passed by the Westminster Parliament, as there is no separate devolved authority. The Department for Education (DfE) oversees and regulates education, with Local Education Authorities (LEAs)—local councils—responsible for implementing education policies within their areas.

### LEA Duties

#### Primary and Secondary Education:

LEAs must provide suitable full-time education for all children of compulsory school age (5-16) residing in their area, ensuring that admissions are timely and free of unreasonable delays. This includes children temporarily residing in the area, such as asylum seekers. This education must be appropriate to the child's age, ability and any special educational needs (SEN) they may have, regardless of their immigration status.

#### Further Education for 16-19 Year Olds:

LEAs are also responsible for providing educational options for young people beyond compulsory school age until they turn 18. These options can include:

- Full-time education in schools or Sixth Form Colleges
- Work-based learning like apprenticeships
- Part-time training alongside part-time work

However, many migrant young people do not have permission to work (for example, if they are asylum seekers or in the process of regularising their status), so they may not be eligible for work-based or part-time work opportunities, and full-time education may be their only option.

### Special Educational Needs and Disabilities (SEND)

Under the Children and Families Act 2014, children with SEND are defined as having learning difficulties or disabilities that require special educational provisions. LEAs, along with publicly funded schools, must identify and assess children with SEND, providing tailored support as needed. This support can include specialised learning programs, assistance from teachers or aides, and help with communication and physical needs.

For children and young people up to age 25 who require more support than what is available through general SEND provisions in schools, an Education, Health, and Care Plan (EHCP) can be requested. The EHCP provides a comprehensive assessment of educational, health, and social needs, outlining the specific support required.

## Parental Responsibility for Education

In England, parents are legally required to ensure their children, who are of compulsory school age, receive an education. This can be through regular school attendance or alternative educational provision. Failure to comply can lead to legal consequences, including fines ranging from £60 to £2,500 or even a prison sentence of up to three months if there is no reasonable excuse for the child's absence.

## Migration Status and Access to Education

While international law mandates free universal access to primary and secondary education, UK immigration rules link access to education with migration status. This section of the full brief explains how different migration statuses can affect the right to education and outlines the specific challenges faced by asylum-seeking and undocumented families.

DFE Guidance states that parents have a duty to check whether their child's immigration status allows them to attend a state-funded school. Children with insecure immigration status, such as visa overstayers, are not permitted to study at state-funded schools. Attending a state-funded school under these conditions could invalidate any lawful permission they have to remain in the UK. However, schools are instructed not to check immigration status upon enrolment, making it the parents' responsibility to ensure compliance.

This means that families with insecure immigration status can enrol their children in school without providing proof, but they risk their status being reported.

Families planning to regularise their immigration status (e.g., switching visas or applying for long residence) may want to wait until after submitting their application before enrolling their children. However, until a new status is granted, any previous immigration conditions, such as No Recourse to Public Funds (NRPF) or study prohibitions, still apply.

## Risk of Reporting to Home Office

Although schools are advised not to deny enrolment or remove students based on suspicions that the student's immigration status does not permit attendance at a state-funded school, they are also permitted to report suspected immigration violations to the Home Office.

## Closing the Gap Between Rights and Practice: Responsibilities and Accountability

There is a noticeable gap between the legal requirements to provide universal educational opportunities to all children in England and the real-life experiences of migrant children and young people. The following outlines who is responsible for ensuring access to education and how these entities can be held accountable.

### Responsibilities

**UK Westminster Parliament:** Sets the legal framework for education through legislation such as the **Education Act 1996** and the **Children and Families Act 2014**. It establishes the obligations of local education authorities and protects against discrimination via the **Equality Act 2010**.

**Department for Education (DfE):** Issues statutory guidance, secondary legislation and codes of conduct, setting standards for schools and educational institutions. The DfE ensures that these entities comply with the law, and deviations can lead to accountability measures.

**Local Education Authorities (LEAs):** Local councils are tasked with providing educational services and ensuring access to education without discrimination. While LEAs have the discretion to manage education services, they must adhere to national standards and policies.

## Accountability and Legal Avenues

To address the gaps between policy and practice, various legal avenues and actions can be taken:

- **Gap Between Policy and Practice:** If a school fails to adhere to established policies, such as not having a proper admissions policy as required by the School Admissions Code, actions can be directed at the specific school and the relevant LEA to ensure compliance (i.e. submitting a complaint).
- **Unlawful Written Policies:** If an LEA's policy, such as requiring proof of immigration status for enrollment, contradicts national laws, the LEA and individual schools can be challenged legally. You should focus on actions that will draw attention to the issue and hold schools and LEAs accountable (i.e. submitting a complaint or considering strategic litigation).
- **Unfair but Lawful Policies:** Policies like the "no choice" accommodation for asylum seekers may be lawful but perceived as unfair. To change the policy, efforts should be directed at the Home Office (the government agency responsible for the policy) and politicians and MPs who can hold the agency accountable. Activities should aim to raise awareness and push for policy change through campaigning, policy advocacy, and press work.

- **Unlawful or Unfair Laws:** Laws that may conflict with international obligations, like the right to education under the UNCRC or ECHR, can be challenged. This includes issues like data-sharing between schools and the Home Office. Efforts should target individual schools, LEAs, and the DfE (regarding data-sharing practices with the Home Office), as well as politicians and MPs (regarding legal exceptions to the UK Data Protection Act 2018). The goal is to raise awareness and push for changes in both school/LEA/DfE practices and the law itself through campaigning, policy advocacy, and press work.

### Focus of Actions

In summary, depending on the nature of the issue, actions may target:

- **Individual Schools and LEAs:** For compliance with local and national policies.
- **Government Agencies** (e.g., Home Office): For broader policy changes.
- **UK Parliament and MPs:** For legislative reforms and challenging laws at a national level.

## Barriers to Accessing Education

### General Process of School Enrolment

LEAs are responsible for providing suitable full-time education for children aged 5-16 residing in their area. They must also offer alternative educational options for young people aged 16-19 who wish to continue their education. The DfE School Admissions Code mandates that LEAs have a clear admissions policy detailing how students are admitted, particularly when demand exceeds available places. Schools are typically required to admit children at the start of the academic year unless they are full or have specific criteria, such as religious affiliation, that apply.

### Challenges to Enrolment

Despite clear guidelines on the right to education for migrant children, IRMO's casework reveals multiple barriers that migrant families face when trying to enrol their children in schools.

### Immigration Status Enquiries

Some schools and local authorities inappropriately request immigration status information during the application process, such as boarding passes or specific immigration documentation. The DfE explicitly states that LEAs should not require proof of immigration status for school applications. Such requests are a gap between policy and practice and can be legally challenged.

## No Capacity in Schools

Families are sometimes told that schools are full without receiving guidance on alternatives or support from the LEA.

While it is lawful for a school to refuse admission due to lack of capacity, they must provide clear reasons for refusal, information on waiting lists, and appeal processes. LEAs have the ultimate responsibility to ensure all children are enrolled in suitable education promptly and should offer support to families in these circumstances.

## Challenges in Post-16 Education

Young people aged 16-18 with insecure or temporary immigration status often face difficulties in enrolling in college due to the requirement for proof of legal residency. Financial constraints further limit access, as these students may not qualify for funding and must cover tuition fees. Additionally, colleges may hesitate to enrol students whose immigration status might expire during their course.

Further education is regulated by the Education and Skills Funding Agency (ESFA), not LEAs, resulting in different funding and eligibility rules. To navigate these barriers, persistent casework and exploring alternatives like apprenticeships may be necessary, though options remain limited by requirements such as the right to work. There is a need for policy changes to expand educational access for all young people, regardless of their immigration status.

## Enrolment Delays

Young people in Year 10 and 11 face significant placement delays, resulting in them being out of education for several months. Many LEAs claim they do not apply Fair Access Protocols (FAP) for these year groups due to high demand. FAP guidance states that all refugee and asylum-seeking children are eligible for a referral, regardless of their year of study. However, schools often have fewer places available for Years 10 and 11. While LEAs can set their own processes for complying with FAP, they must still follow DfE guidance. This inconsistency between LEAs can create unfair barriers for migrant families. If an LEA refuses to make a referral, they should provide their FAP policy and explain the decision, which can then be legally reviewed to ensure it follows the correct rules and guidance.

## Changes in Accommodation

Families are often told to relocate with little notice. These moves are typically non-negotiable, and families risk losing their accommodation if they refuse. While Home Office policy requires consideration of children's best interests, practical issues like housing availability can lead to decisions that impact education negatively. Families can request accommodation changes by providing evidence of the educational impact. Success depends on the strength of the evidence and available housing options. Assistance from caseworkers or lawyers can help, but families should also explore nearby educational options.

## Barriers to Equal Treatment in Education

### Statutory Duty for Nondiscrimination and Equal Treatment

LEAs in England are required by law to ensure equal treatment and nondiscrimination for all children accessing education. These duties are established in primary legislation, including the Equality Act 2010 and the Human Rights Act 1998, which mandate equal opportunities and prohibit discrimination in educational settings.

### Language Barriers in Family Participation

Families of children with Education, Health, and Care Plans (EHCPs) often encounter challenges in communication with their school's Special Educational Needs (SEN) team.

For instance, during meetings or annual reviews, schools do not always offer translation or interpretation services even when parents do not speak English.

Schools are obligated to provide information in accessible formats, including using clear language and providing translation services when necessary. The SEND Code of Practice (2015) and the Equality Act 2010 mandate that schools prevent discrimination, including on grounds of race and nationality.

Families could legally challenge the school's failure to provide adequate translation support, which hinders their participation in the EHCP process.

### Barriers to Accessing an Education, Health, and Care Needs Assessment (EHCNA)

Schools and SEN teams are increasingly reluctant to support parents in pursuing Education, Health, and Care Needs Assessments (EHCNAs), even when children are lacking adequate support.

Schools are required to make reasonable adjustments and collaborate with parents to support children with SEND. If a child has or may have special educational needs, the local authority must conduct an EHCNA. The school's refusal to assist can be challenged legally, particularly if they fail to support the family in making a formal request.

### Challenges and Barriers to Special Educational Needs (SEN) Support

Children with EHCPs frequently face delays in their education due to insufficient SEND provisions, which can result in extended periods out of formal education.

This highlights a gap between policy and practice. Families can request a statutory assessment or pursue legal action to enforce the school's or LEA's obligations. If unsatisfactory, complaints can be escalated to the Local Government and Social Care Ombudsman.



## English as an Additional Language (EAL) Challenges

Some schools fail to provide adequate support for students with English as an Additional Language. In some cases, EAL needs are confused with SEND, and vice versa. In other cases, schools simply do not have enough support for EAL learners.

Under the Equality Act 2010, schools must prevent discrimination based on race or nationality and ensure equal access to education. If a school refuses support, families should approach the Local Education Authority (LEA) and consider legal action if necessary.

## Key recommendations

### Accessible Information on Education Rights

**IRMO:** Develop "know-your-rights" resources in accessible formats and languages, potentially through peer advocacy programs. Include guidance on how to access support from IRMO staff or other agencies.

**Education NGOs:** Create or adapt resources to specifically address the challenges faced by migrant children, especially those learning English as an Additional Language.

**DfE and LEAs:** Provide up-to-date, accessible resources in community languages for migrant families, and consider funding NGOs to assist in this work.

### Immigration Status Checks and Data Sharing

**IRMO:** Monitor and challenge instances where schools request immigration status information, using both individual and organisational responses. Use these cases to raise public awareness and influence policy.

**DfE and LEAs:** Clarify that immigration status checks are not required for school enrollment. Eliminate practices that create barriers, such as the "tipping off" helpline, and ensure educational data is not used for immigration enforcement.

### Barriers and Discrimination in Education

**Challenges:** Issues include delays in school enrolment, failure to progress FAP referrals, inadequate support for SEND and EAL learners, and restrictions on funding and apprenticeships for older youths.

**IRMO:** Document and challenge these barriers through legal and non-legal channels. Engage in strategic litigation and public awareness campaigns, and work with educational specialists to address systemic issues.

**DfE and LEAs:** Provide clearer guidance on compliance with education codes and protocols, and advocate for expanded eligibility for funding and vocational training for all youth, including those without the right to work.