



INDOAMERICAN
REFUGEE AND
MIGRANT
ORGANISATION

Legal Briefing on the Right to Education for Migrant Children and Young People in England

JEN ANG | LAWMANITY
June 2024



TABLE OF CONTENTS

1. Introduction	1
1.1 About IRMO and the Thrive Project	1
1.2 Purpose and aims	1
1.3 Scope and methodology	2
1.4 Literature review	2
2. Legal Framework: Right to Education for Migrant Children and Young People	6
2.1 General legal right to education: International and UK Law	6
2.2 The legal right to education in England	11
2.3 General duties of parents	13
2.4 Migration status and access to education	14
2.5 Closing the gap between rights and practice: Who is responsible and how can you hold them to account?	18
3. Barriers to Accessing Education	24
3.1 Guidance on the general process of school enrolment	24
3.2 Challenges to enrolment	24
3.3 Other challenges: Asylum accommodation or temporary accommodation for asylum seeking children	28
4. Barriers to Equal Treatment in Education	31
4.1 Statutory duty to ensure non-discrimination and equal treatment in education	31
4.2 Language barriers in supporting participation by families	31
4.3 Barriers to accessing an Education, Health and Care Needs Assessment (EHCNA)	32
4.4 Special Educational Needs (SEN) challenges and barriers to accessing support for Education, Health and Care Plans (ECHP)	34
4.5 English as an Additional Language (EAL)	35
4.6 Fair Access Protocols (FAP) and delays in placement	36
5. Summary of recommendations	39
6. Further resources	42

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.

We do this by offering high-quality information and advice services, opportunities for development and training, and a platform to seek social and systemic change.

The Latin American community is one of the fastest-growing, yet least visible, migrant communities in London. With almost 40 years of experience, we support over 4,000 people every year.

Acknowledgments

This brief was written for IRMO by Jen Ang, Founding Director of Lawmanity, a human rights lawyer with over 20 years' experience, qualified to practise in NY State, England & Wales and Scotland. Lawmanity is a legal and strategic consultancy that aims to tackle inequalities in the law by working with people-led movements to secure positive change.

We extend our heartfelt thanks to the families who generously shared their stories, providing invaluable insights into the barriers migrant children face in accessing education in the UK. Your experiences have been instrumental in shaping this report and highlighting the critical work ahead of us.

1. INTRODUCTION

1.1 About IRMO and Thrive

Every child has a fundamental right to education, regardless of their immigration status, nationality, or citizenship. However, the increasingly hostile migration environment in the UK has created significant barriers for many children to access this right. In response, IRMO developed Thrive, an education advocacy strategy aimed at ensuring Latin American migrant children have equal access to education and can thrive in the UK, regardless of their immigration status, language barriers, ability, cultural differences, ethnic background or social class.

This briefing, commissioned by IRMO and funded by the Paul Hamlyn Foundation through the Migration Fund, critically evaluates the legal framework governing the education rights of migrant children in the UK. We draw on eleven years of experience of providing advice and support to Latin American families in London.

Our goal is to reduce structural barriers to education for Latin American and broader migrant communities, to improve understanding, among schools and local authorities, of the challenges these children face, and to inform policymakers and the public about the urgent need for reform.

We are grateful to the Paul Hamlyn Foundation for their support, which allows us to pursue this critical work and advocate for systemic change.

1.2 Purpose and aims

The purpose of this legal briefing is to set out the legal rights of migrant children and young people and to explore the legal and policy advocacy strategies to challenge existing structural inequalities and to widen access to education for these children.

The briefing will also focus on the rights of children and young people enrolled in secondary education and further education, highlighting areas in which families supported by IRMO have experienced discrimination and other barriers to equal access to those rights - including access to support for children with special educational needs and disabilities (SEND).

1.3 Scope and methodology

Whilst IRMO is a UK-wide organisation, this briefing will mainly focus on the legal framework for children resident in England, the key focus of IRMO's day-to-day advocacy and casework.

The report will also highlight examples of good practice, where relevant, from across the devolved authorities of Wales, Scotland and Northern Ireland, to broaden understanding as well as point the way to alternative advocacy strategies for casework in England.

The briefing will cover entitlement to state-funded schools only, excluding more complex rules that can apply where families seek to enrol children in private secondary and further education.

Finally, the briefing will aim to provide guidance and tools for migrant children, young people and families with different forms of immigration status – focusing again on the most common profiles, drawn from IRMO's casework and advocacy. This will include advice for those with limited leave to remain (including NRPF families), asylum seeking families and those with insecure status.

The key methodology for this report is desk-based legal research, starting with a literature review of existing resources.

This briefing aims to accurately summarise the legal and policy framework as of 30 June 2024. If you have any doubts about how the guidance applies in your specific circumstances, please seek further advice from a specialist advocacy worker or a solicitor.

1.4 Literature review

The topic of access to education for migrant children and young people in the UK is a relatively specialist area, and there has been limited research and guidance published over the past few decades on this subject.

Delays in accessing education

Unfortunately, there is limited data on how many migrant and refugee children and young people struggle to enrol in education. A joint report by UNICEF UK and Refugee Support Network (RSN)¹ from 2018 found that not a single local authority met the target to provide unaccompanied asylum-seeking children with access to education within 20 days of their arrival, and that a quarter of children who are of secondary education age or older often wait over three months for a school place.

However, this research does not include refugee or migrant children who arrive with an adult, for which the numbers might look slightly different.

Gaps in attainment

A 2021 report by the Education Policy Institute, “The educational outcomes of refugee and asylum-seeking children in England,” found:

“...an average attainment gap between unaccompanied asylum seeking pupils and non-migrant children of 37.4 months (over 3 years). This is similar in size to the gap for pupils with special needs and disabilities who have the most severe needs.

In contrast to unaccompanied children, resettled refugee children and asylum-seeking children living with family members in receipt of financial support from the government, are estimated to experience a much smaller school attainment gap on average, but one that is still substantial – trailing their non-migrant peers by around a year² and a half (17.3 months) at GCSE.”

A follow up report by the Education Policy Institute, with the Paul Hamlyn Foundation, “What impact will the Nationality and Borders Act have on the educational outcomes of refugee and migrant pupils?” published in Spring 2023, continued to highlight the persistent barriers faced by refugee and migrant pupils, some of which are also echoed in the case studies later in this briefing.³



² Education Policy Institute, “The educational outcomes of refugee and asylum-seeking children in England,” 2 December 2021, <https://epi.org.uk/publications-and-research/the-educational-outcomes-of-refugee-and-asylum-seeking-children-in-england/>

³ Education Policy Institute and Paul Hamlyn Foundation, “What impact will the Nationality and Borders Act have on the educational outcomes of refugee and migrant pupils?” Spring 2023, https://epi.org.uk/wp-content/uploads/2023/05/EPI_PHF_Impact-of-the-NABA_summarypaper_Apr23_-1.pdf

Educational provision for migrant children

The following are selected reports that have reviewed the recent experience of migrant children and pupils in schools in England and Wales, which highlight some common challenges as well as containing recommendations on improvements and good guidance:

- Department for Education, Research into how Local Authorities are Ensuring Sufficient Places and Supporting Vulnerable Children (March 2022)
https://assets.publishing.service.gov.uk/media/623c9414d3bf7f32b2e524af/Research_into_how_local_authorities_are_ensuring_sufficient_places_and_supporting_vulnerable_children.pdf
- Hughes, Vanessa, "Child migrants' right to education in a London academy: tensions between policy, language provision and international standards," Human Rights Education Review, Vol 4, No 1 (2021),
<https://journals.oslomet.no/index.php/human/article/view/4010>
- University of Birmingham, School of Education, "Supporting Migrant Children with Special Educational Needs: What information do schools need and how can it be collected?" February 2021,
<https://www.birmingham.ac.uk/documents/college-social-sciences/education/publications/migrant-children.pdf>



EAL provision for migrant children

The Bell Foundation has commissioned a number of reports over the years on the experience of EAL pupils in schools⁴ and has also produced useful guidance and key principles for schools on support EAL learners who are:

- New arrivals⁵
- Refugees and asylum seekers⁶
- Learners with special educational needs and disabilities (SEND)

Legal briefings on access to education

Finally, there have been limited resources produced publicly on the right of access to education for migrant children and young people in the UK. The following consists of a legal factsheet on access to education for migrant children in England and Wales, as well as a set of presentation slides from a leading chamber of barriers:

- Coram Children's Legal Centre, Factsheet: Access to compulsory education for migrant children (2017)
- Garden Court Chambers, "Access to education for migrant children," Ollie Persey and Connor Johnston, 8 September 2021

To this extent, the present briefing aims to update these resources and fill some gaps in this area, and also to bring this information to a wider audience in a simpler and more accessible manner.



⁴ Anglia Ruskin University & University of Cambridge (Bell Foundation), "School approaches to the education of EAL students" April 2014, <https://www.educ.cam.ac.uk/research/programmes/ealead/Fullreport.pdf>

⁵ <https://www.bell-foundation.org.uk/resources/guidance/schools-and-leaders/new-arrivals/>

⁶ <https://www.bell-foundation.org.uk/resources/guidance/schools-and-leaders/refugees-and-asylum-seekers/>

2. LEGAL FRAMEWORK: RIGHT TO EDUCATION FOR MIGRANT CHILDREN AND YOUNG PEOPLE

2.1 General legal right to education: International and UK Law

Education as a human right in international law and in the UK

The right to education is globally recognised as a human right for all children and young people, and is protected in international law in a number of different international legal treaties, starting with the Universal Declaration of Human Rights 1948.

In the UK, the right to equal access to education is derived from two key international human rights treaties:

- The European Convention on Human Rights
- The UN Convention on the Rights of the Child

The European Convention on Human Rights (ECHR), Article 2 of Protocol No. 1 states “*No person shall be denied the right to education*”⁷ This right is often also raised in conjunction with **Article 14** of the ECHR which guarantees enjoyment of all rights for all people **free from discrimination**.

The UK has incorporated the ECHR through the Human Rights Act 1998. This means that someone who is denied access to education in the UK may be able to use the Human Rights Act to challenge that decision in a UK court or tribunal.

The European Court of Human Rights (ECtHR) is the highest court for hearing cases regarding interpretation of the ECHR. The ECtHR states that the right to education is a public service by the state that is important because it benefits not only children in education but also wider society, as well as playing an important role in supporting democracy and the integration of minorities.

For this reason, the ECtHR declares that “only very strong considerations” will allow the court to agree that it is fair to exclude people from education based on their nationality or migration status.⁸



⁷ European Court of Human Rights, “Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to Education” (last updated 29 February 2024), https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_protocol_1_eng#:~:text=

⁸ Ponomaryovi v. Bulgaria, No. 355/05, ECtHR, 28 November 2011, <https://hudoc.echr.coe.int/eng?i=001-105295>

The following case is an example of how the ECtHR has protected the right of migrant children to access education under the ECHR:



In the case of Timishev v. Russia, the applicant had handed in his migrant's card and was no longer legally registered as a resident in the town where the family lived. The school refused to register the applicant's children even though they had been attending for the past two years. However, Russian law did not allow the exercise of the right to education by children to be made conditional on the registration of their parents' place of residence. The Court found that the applicant's children had been denied the right to education provided for by domestic law.⁹



Recent cases in the UK courts have also used this particular ECHR right to access education in order to widen access to education for migrant children and young people. This recent Scottish case is an example of how the Court of Session protected the equal right of migrant children and young people to access funding for further and higher education:



In the Jasim v Scottish Ministers case,¹⁰ the Court of Session in Scotland held that there had been unlawful discrimination affecting the right to education where a medical student who was just 58 days short of the required period of residence to receive support from the Student Awards Agency of Scotland (SAAS) was denied funding on the basis of her immigration status.

As a consequence of this case, the Scottish Government had to make new regulations to extend student financial support to those living in Scotland with leave to remain who had been living in Scotland for more than three years. They also extended eligibility for financial support to asylum-seeking children – both unaccompanied asylum-seeking children and the children of asylum seekers.



⁹ European Court of Human Rights, "Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to Education" (last updated 29 February 2024), https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_protocol_1_eng#:~:text=

¹⁰ *Ola Jasim v Scottish Ministers* [2022] CSOH 64, https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh64.pdf?sfvrsn=3412ebe0_1

The UN Convention on the Rights of the Child (UNCRC) also upholds the right of all children to access free primary education, and emphasises the importance of making secondary and higher education accessible to all. These requirements are set out in Articles 28 and 29 of the UNCRC.

Article 28 of the UNCRC upholds the right of every child to education.

Primary education must be compulsory and available free to all. Secondary education must be available in different forms and accessible to every child – and states must take steps to introduce free education and offer financial assistance in case of need. Higher education must also be accessible to all on the basis of capacity.

Article 29 of the UNCRC focuses on the aims of education. These include ensuring that education develops a child's personality, talents and mental and physical abilities to their fullest potential.¹¹

The UK Government ratified the UNCRC in 1991. Consequently, it has a legal obligation to implement the treaty. However, it has not incorporated the UNCRC into UK law, which, in practice, means that even if someone is denied access to education by the UK Government, they cannot use the UNCRC to challenge that decision in a UK court or tribunal.

Education as a devolved matter in the UK

The UK Parliament (Westminster) created a system of devolved powers in the 1990s. The effect of this was to devolve (or share out) powers to make laws and deliver public services in some policy areas, to the Scottish Parliament, the Senedd Cymru (the Welsh Parliament) and the Northern Ireland Assembly.

Whereas some areas are reserved for the UK Parliament (for example defence and foreign affairs), other policy areas are devolved (for example, health and social care, and local government).¹²

Education is a devolved matter, meaning that the UK Parliament has given powers to the Senedd (Welsh Parliament), the Scottish Parliament and to the Northern Ireland Assembly to make law and policy on access to education, and rights in education, in each of these nations.

As a result, the laws that govern access to education for migrant children and young people do differ – sometimes significantly – across these four nations. Both Wales and Scotland have taken further steps to embed the rights of children in the UNCRC into their national laws.



¹¹ UNICEF, "The Right to Education: Articles 28 and 29 UNCRC, Rights Respecting Schools," <https://www.unicef.org.uk/rights-respecting-schools/the-rsa/the-right-to-education/>

¹² UK House of Commons, "Research Briefing: Introduction to devolution in the United Kingdom," (last updated 21 May 2024), <https://commonslibrary.parliament.uk/research-briefings/cbp-8599/>

In 2011, the Senedd partially incorporated the UNCRC by passing the Rights of Children and Young Persons (Wales) Measure 2011¹³ which places a legal obligation on all Welsh Government Ministers to have due regard to the UNCRC in all their functions. This means that they must consider whether or not their decisions further children's rights, including the right to education, when they make decisions about law, policy and government funding.

In January 2024, the Scottish Parliament passed the UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024¹⁴ which places legal obligations on Scottish Government Ministers and will give children and young people in Scotland legal rights to bring a legal case on denial of access to education in Scottish courts – from July 2024 onwards.

Education and the Equality Act

The Equality Act 2010 protects people across the UK against discrimination on the basis of nine protected characteristics. Those most relevant to migrant children accessing education include:

- Sex (gender)
- Race
- Disability
- Religion or belief
- Sexual orientation
- Gender reassignment (trans and non-binary identity)
- Pregnancy or maternity

Schools and further and higher education institutions must take steps to ensure that students do not suffer direct discrimination, indirect discrimination, harassment or victimisation on account of these protected characteristics when accessing education.¹⁵

The Act makes it unlawful for schools to discriminate against, harass or victimise a pupil or a potential pupil:

- In relation to admissions
- In the way it provides education for pupils
- In the way it provides access to any benefit, facility or service, or
- By excluding a pupil or subjecting them to any other detriment.¹⁶

The Equality Act does apply to all pupils or potential pupils in schools across the UK and protects them against discrimination regardless of their migration status. However, the Equality Act does not offer protection against discrimination on the basis of migration status.

Therefore, the Equality Act would protect an asylum seeking or undocumented student against discrimination on the basis of sex, race or sexual orientation, but will not offer protection against discrimination in access to education on the basis of their status as an asylum seeker or undocumented person.



¹³ Rights of Children and Young Persons (Wales) Measure 2011, <https://www.legislation.gov.uk/mwa/2011/2/contents>

¹⁴ UN Convention on the Rights of the Child (Scotland) Act 2024, <https://www.legislation.gov.uk/asp/2024/1/contents/enacted>

¹⁵ Department for Education, "Equality Act 2010: Advice for Schools," (last updated 28 June 2018), <https://www.gov.uk/government/publications/equality-act-2010-advice-for-schools>

¹⁶ Ibid.

Remember, however, that does not mean that exclusion of an asylum seeking or undocumented student on the basis of their status would necessarily be lawful – this could be challenged, for example, on other grounds (such as the Human Rights Act 1998 – see above), just not through the Equality Act.

Education and disability

In international law, as in the Equality Act 2010, there are enhanced protections for children with disabilities in recognition of the additional barriers they can face in gaining equal access to universal services.

For example, the UNCRC provides:

UNCRC Article 23: A child with a disability has the right to live a full and decent life with dignity and, as far as possible, independence and to play an active part in the community. Governments must do all they can to provide support to disabled children and their families.

Under the Equality Act, schools and educational institutions must also ensure that they do not discriminate against disabled students or fail to offer reasonable adjustments for disabled students to guarantee that they can fully participate in their education and enjoy the other benefits, facilities and services provided.¹⁷

A child is considered to be “disabled” under the Equality Act 2010 if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

This includes physical disability such as visual or hearing impairments, as well as mental impairment and neurodiversity, including learning difficulties, autism, dyslexia, speech and language difficulties, and ADHD.

Schools must avoid:

- Direct discrimination - For example, refusing admission to a student or excluding them because of disability.
- Indirect discrimination - For example, only providing application forms in one format that may not be accessible.
- Discrimination arising from a disability - For example, a disabled pupil is prevented from going outside at break time because it takes too long to get there.
- Harassment - For example, a teacher shouts at a disabled student for not paying attention when the student’s disability stops them from easily concentrating.
- Victimisation - For example, suspending a disabled student because they’ve complained about harassment.

2.2 The legal right to education in England

Who is responsible for access to education in England?

There is no separate devolved authority for England, and therefore, the right to education in England is largely set out in UK legislation: laws passed by the Westminster Parliament.

These laws are supplemented and interpreted through secondary legislation, and guidance is also issued by the Department for Education (DfE) as the relevant government department for supervising and regulating education in England.

Local education authorities (LEA) are defined as the local councils who are responsible for education within their areas of responsibility.

LEA duty to provide free primary and secondary education

LEA have a general duty to provide suitable full-time education for all children of compulsory school age (between the ages of 5-16) who are resident in their area.¹⁸ They must offer free school places in accordance with their published admissions arrangements, and they must also ensure that there is no unreasonable delay in school admissions for any child.

This includes provision for children living temporarily in the area for long enough to attend school, for example, a child asylum seeker in temporary accommodation.

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.¹⁹

LEA duty to provide free school sixth form or alternative further education

A young person beyond compulsory school age is still expected to continue in education or training until their 18th birthday but cannot be forced to do so.²⁰

All LEA, on the other hand, are responsible for making sure there are suitable, free alternative forms of education to offer these young people. These include:

- A place in full-time education for young people aged 16-19 who want to stay on in school or sixth form college
- Work-based learning such as an apprenticeship
- Part-time training alongside part-time work



¹⁸ Section 14 of the Education Act 1996

¹⁹ Department for Education, "Guidance: School applications for foreign national children and children resident outside England," (last updated 28 March 2024), <https://www.gov.uk/guidance/schools-admissions-applications-from-overseas-children>

²⁰ Coram Child Law Advice, "Participation of young people in education, employment or training," <https://childlawadvice.org.uk/information-pages/participation-of-young-people-in-education-employment-or-training/>



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.

LEA duty towards children with special educational needs and disabilities (SEND)

In UK domestic legislation, all publicly funded pre-schools, nurseries, primary and secondary schools, and local authorities have an obligation to identify and help assess children with special educational needs and disabilities (SEND).

Under the Children and Families Act 2014, a child has special education needs and disabilities (SEND) if he or she “has a learning difficulty or disability which calls for special education provision to be made for him or her”.²¹

This includes where a child:

- Has a significantly greater difficulty in learning than the majority of others of the same age; or
- Has a disability which prevents or hinders them from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions

Some examples of SEND can include:

- Emotional and behavioural difficulties (EBD)
- Autism
- Attention deficit (hyperactivity) disorder (ADHD/ADD)
- Dyslexia, dyscalculia or dyspraxia
- Obsessive Compulsive Disorder (OCD)
- Communication difficulties
- Medical conditions, like epilepsy and cerebral palsy
- Mobility difficulties

Additional support for children with SEND should be available in all state-funded education settings, tailored to the needs of each child.

This can include:

- A special learning programme
- Extra help from a teacher or assistant
- Help communicating with other children
- Support with physical or personal care difficulties, for example eating, getting around the school or using the toilet

Children and young people aged up to 25 who need more support than is available through special educational needs support can request an EHCP, a tailored assessment to identify educational, health and social needs which also sets out the additional support required to meet those needs.

2.3 General duties of parents

Attendance in education

In England, parents have a duty of care to ensure that their child is educated if they are of compulsory school age, either by regular attendance at school or by alternative provision.²² Parents should be aware that they can be fined or charged with an offence if their child does not attend school, if the parent is aware of the child's absence, and there is no reasonable defence to the child not attending. The penalty can range from a fine of £60, to a fine of up to £2500 and a prison sentence of up to 3 months.

Validity of immigration status

Parents should also be aware that they have a duty to establish whether their child's immigration status will permit them to attend a state-funded school.

If a child has insecure status, for example because they are a visa overstayer, or they entered the country without a visa, or if a child has status only as a student who entered to attend a private school – that child's immigration status does not permit them to study at a state-funded school. If they attend a state-funded school when they are not permitted to, doing so will invalidate any lawful permission they have to remain in the UK. Schools are told they must not check immigration status on enrolment, and therefore, this duty lies clearly with parents (and not with schools) to check.



Although schools are told they must not check immigration status on enrolment and they “must not deny [children] a place nor remove them from the school roll” if they suspect that a child does not have the right to study, schools are also directed by the UK Government that they can also report an immigration or border crime to the Home Office if they think that someone is living illegally in the UK.²³

Therefore, families of children with insecure immigration status can theoretically enrol their children in education without having to furnish documentary proof of their children's right to study; however, they should consider in doing so that they run the risk of having their insecure status reported to the Home Office for investigation.

Thinking practically, if families with insecure or temporary immigration status are planning to submit an immigration application to regularise their status (for example, switching from a tourist visa to another status, or making a long-residence application), they may want to wait until after submitting that application, before enrolling their children in education. It is important to remember, however, that until a new immigration status is granted, the conditions of any previous status (for example, NRPF or prohibitions on study) continue to apply.



²² Section 7 of the Education Act 1996

²³ Department for Education (DfE), “Guidance, School Applications for foreign national children and children resident outside England,” (last updated 28 March 2024), <https://www.gov.uk/guidance/schools-admissions-applications-from-overseas-children#the-responsibilities-of-state-funded-schools-and-their-admission-authorities>

2.4 Migration status and access to education

We have explained that international law requires states – including the UK – to guarantee free universal access to education at primary and secondary level. We have also covered how UK legislation also imposes duties on LEAs to provide suitable full-time education for all children of compulsory school age and a place in full-time education for young people aged 16-19 who want to stay on in school or sixth form college.

However, the reality for migrant children and young people is that the UK immigration rules restrict access to state-funded education, and this restriction is linked to their immigration status.

This section will explain how rights to access to education in the UK for migrant children and young people can vary, depending on migration status. This is a complex area of law which requires explanation of several different, overlapping relevant legal frameworks.

This section will provide a brief explanation of key migration statuses that could be held by a child, young person or their family members.

It will then explain the link between migration status and access to education in England.

Finally, this section will then go on to identify some of the specific challenges observed in IRMO advocacy and casework, also explaining how some groups (asylum seeking families and undocumented families) can face greater and more severe challenges because of their migration status. These challenges extend to both accessing rights like education as well as access to justice to challenge exclusion and discrimination when it occurs.

The UK immigration system and types of migration status

The UK immigration system requires all people in the UK to prove they have a right to live here – whether that is because they are a British or Irish citizen, or because they are seeking asylum, or because they have a visa or some form of permanent residence (like settled status).

If you cannot prove that you have a right to live in the UK, you may be treated as “undocumented” or an “illegal migrant” and you may be detained by the Home Office, in order to be removed (or deported) to another country.²⁴

The right to study in the UK is linked to a person’s immigration status. Some people’s status includes the right to study, and other people’s status has a condition which prohibits study.



No Recourse to Public Funds (NRPF)

Many people with limited leave to remain (for example, who come with visas to work, study or as a family member) will have a condition of “no recourse to public funds” (NRPF) on their visa. Some people think that “no recourse to public funds” signifies that they are not permitted to attend state-funded schools. This is not correct. State-funded schools are not a “public fund” and that means that people with NRPF can attend free primary and secondary school.



Insecure Immigration Status (Undocumented) and Limited Leave to Remain Prohibiting Study

Children and young people who are undocumented, and those whose immigration status prohibits study, will be able to enrol in state-funded education, but in doing so they will be breaching a condition of living lawfully in the UK. That means that they will automatically lose any lawful permission they have to stay here, and risk being detained and removed by the Home Office. This could happen even if the school they are enrolled in, and the Home Office are not aware of their migration status.

This is a risk that children, young people, parents and families should consider carefully when thinking about whether or not to enrol a child or young person in state-funded education.

There are many different forms of immigration status. The table below sets out the most common forms of immigration status held by migrant communities in London, and the corresponding entitlement to study.



Immigration Status	Rights and Entitlements for this Status	Evidence of Status	Right to Access State-Funded Education?
British Citizen	Has the “right of abode” and cannot be removed unless citizenship is revoked	Passport or Birth Certificate plus evidence that parents are also British	Yes
Irish Citizen	Has rights arising under the Common Travel Area ²⁵ arrangements	Passport or passport card, other proof that they are an Irish citizen	Yes
Indefinite Leave to Remain	Has permanent residence with no restrictions	Biometric Residence Permit (BRP)	Yes
Settled Status	Has permanent residence under the EU Settlement Scheme (EUSS) with no restrictions	Online proof of EUSS status	Yes
Pre-Settled Status	Has limited leave to remain under the EU Settlement Scheme (EUSS)	Online proof of EUSS status	Yes
EU, EEA and Swiss citizens (who lived in the UK on 31 December 2020)	Has EU free movement rights, regardless of whether or not they have applied for EUSS status	Eligible even if they do not have EUSS status	Yes
Limited Leave to Remain as family member of worker, student, spouse	Has limited leave to remain, might be subject to restrictions like No Recourse to Public Funds	Visa, Biometric Residence Permit (BRP)	Yes, unless the visa or BRP includes a condition of no study. May not be eligible for student funding at further education level



Immigration Status	Rights and Entitlements for this Status	Evidence of Status	Right to Access State-Funded Education?
Limited Leave to Remain as a Student	Has limited leave to remain as a student – to access a private school	Visa	No, student visa holders are not entitled to access state-funded schools
Refugee or Humanitarian Protection	Has limited leave to remain, leading to settlement	Biometric Residence Permit (BRP)	Yes
Asylum seeker	Has temporary admission while asylum claim is being decided	Asylum Registration Card (ARC)	Yes
Visitor	Has limited leave to remain for up to 6 months to visit the UK	Visa	No, visitor visa holders are not permitted to access state-funded schools, but they can study at private schools
Insecure status – visa overstayer, or no permission to enter or remain in UK	Does not have leave to remain	May have no evidence of right to live in UK, or may have previously held a visa or BRP which is now expired	No, May not be eligible for student funding at further education level

2.5 Closing the gap between rights and practice: Who is responsible and how can you hold them to account?

As outlined above, and highlighted in the casework and advocacy experience from IRMO's services, there are gaps between the requirements to provide free universal educational opportunities to all children and young people up to age 19 in England, and the lived reality for migrant children and young people.

Who is responsible for guaranteeing the right to access education, and equal access to opportunity in education, for these children and young people, and how can they be held to account?

Who is responsible: UK government bodies

Different UK government bodies are responsible for different aspects of ensuring that all children in England have equal access to the right to education.

UK Westminster Parliament

The UK Westminster Parliament sets out the laws which establish rights to access education, and equal access to education, such as the Education Act 1996, which places an absolute, non-delegable duty on LEAs to provide education to children of compulsory school age.

Other important acts of the UK Parliament include the Children and Families Act 2014 which introduced EHCPs and the Equality Act 2010 which provides protection from discrimination in education on the basis of certain protected characteristics.

Department for Education

These laws are supplemented and interpreted through secondary legislation and also statutory guidance issued by the [DfE](#) as the relevant government department for supervision and regulation in England.

Statutory guidance, secondary legislation and codes of conduct (such as the school admissions code) are important to understanding the rights of migrant children in education because these set out the standards that schools and educational institutions must meet in order to comply with the law, and if they fail to meet those standards, they can be held to account for this failure.



Local Educational Authorities

LEAs are defined as the local councils who are responsible for education within their areas of responsibility. LEAs have duties to provide access to education and to do so without discrimination. They also have powers to make decisions about how they deliver those services – this indicates that processes and practices can and do differ between local authorities, and that this is lawful. It also means that transferring between local authorities can be tricky and time consuming because they may hold records in different ways or follow different processes that make it harder to work together across authority areas.

Using the law for positive change

There are many different ways to use law to achieve positive change for individuals and to hold government bodies to account. In order to identify the best way to use the law to challenge a practice you believe to be discriminatory or to make positive change, it is, first of all, necessary to analyse whether the problem you are facing is:



A gap between policy and practice

Example: The School Admissions Code issued by the DfE states that all schools **must** have admissions arrangements that clearly set out how children will be admitted, including the criteria that apply if there are more applications than places at a school.

When you ask School X to provide a copy of their written admissions policy, they tell you that they do not have such a policy.

This is an example of a **gap between policy and practice** because the School Admissions Code is clear about what is required; the problem lies in that policy not being applied correctly by the school.



The focus of your action should be: School X and the LEA responsible for School X.

Your activities should focus on actions that will draw attention to, and hold accountable School X, consequently creating behaviour change. This can include using template letters, submitting a complaint, and taking strategic litigation.



A written policy that is unlawful

Example: Local education authority (LEA) Y has a written policy that all schools in its area must request evidence of immigration status for students as part of the school enrolment process. This directly breaches the School Admissions Code issued by the DfE.

This is an example of a **written policy that is unlawful**.



The focus of your action should be: LEA Y and/or individual schools applying the LEA Y guidance.

Your activities should focus on actions that will draw attention to, and hold accountable, the LEA and individual schools. This can include using template letters, submitting a complaint, and taking strategic litigation.



A written policy that lawful but unfair

Example: The Home Office has the power to require asylum seekers who do not have accommodation of their own to live at a specified address, in accommodation provided by the Home Office. This can be residential housing such as a flat or a house, but also hotel and institutional accommodation - for example, ex-military barracks. They operate a “no choice” policy - if an asylum seeker unreasonably refuses housing that is offered, they will not be offered another option and lose any entitlement to Home Office housing.

This is an example of a **written policy that is lawful but unfair**. The Home Office has, thus far, successfully defended this blanket policy in courts, although they are required to assess the facts in individual cases, and in some individual cases, legal challenges have successfully overturned specific accommodation decisions.



The focus of your action should be:

The government agency with powers to change this policy (Home Office) and decision makers who can hold that agency accountable politically (politicians and MPs).

Your activities should focus on raising awareness with the goal of changing the policy itself. This can include campaigning activities, policy and influencing, and press work.



A law that is unlawful or unfair

Example: The Home Office has the power to place conditions on “leave to remain” for people living in the UK who are subject to immigration control. The implications of this are that they can determine that some children – because they have insecure immigration status – are not permitted (because of their migration status) to access state-funded education, even though the LEA has a duty to provide a place for all children, and all parents have a duty to ensure attendance of school age children.

This is an example of a **law that is unlawful or unfair**. The law could be unlawful as a breach of the UNCRC or the ECHR insofar as it allows a UK government agency (the Home Office) to force children and parents to choose between compliance with the UK law and exercising a right to access education. However, the law has not yet been successfully challenged, and in principle, the UK Parliament has the sovereignty (power) to make and implement laws for the UK even if they breach international law.



The focus of your action should be:

The UK Parliament and its decision makers (politicians and MPs).

Your activities should focus on raising awareness with the goal of changing the law itself. This can include campaigning activities, policy and influencing, and press work.





Example 2: The absence of a data-sharing firewall allows schools to share personal and immigration-related information about pupils with the Home Office. Previously, in 2016, the Department for Education started collecting children's nationality and country of birth in the termly school census – this served no educational purpose but was used to create lists of migrant children whose families could then be targeted by Home Office enforcement. This practice was challenged by Against Borders for Children (ABC), supported by Liberty, and the Government agreed to stop this practice before the case was appealed further.²⁶ The Information Services Commissioner also investigated this matter and issued a formal reprimand to the Department for Education for breaching GDPR regulations in this case.²⁷

Nevertheless, DfE guidance today still encourages schools to contact the Home Office if they have a concern about the lawful migration status of pupils seeking to enrol, and the DfE at present still maintains schools will share data where there is 'evidence of illegal activity, including illegal immigration'.

Finally, the law, even where a legal exception applies, remains challengeable as unfair – an attempt to use a pupil's right to access to education as a lever for immigration enforcement.

This is an example of a law that is unlawful or unfair. The law could be unlawful as a breach of the UNCRC or the ECHR, for the reasons outlined above. In individual cases, depending on what information is shared, by who and for what reasons, sharing data without consent of the pupil or their family can also breach the UK Data Protection Act 2018.



The focus of your action should be: Individual schools, LEAs and the DfE (re DfE guidance and day-to-day data sharing with the Home Office), and the UK Parliament and its decision makers (politicians and MPs) (re the legal exceptions to the UK Data Protection Act 2018 and how they are interpreted).

How can we hold the government to account and change the law?

The following is a graphic showing different approaches you can take, depending on the situation you are facing, and the change that you seek.

There is a gap between policy and practice

Example: Although UK education policy claims to support the inclusion of migrant children, many schools lack the necessary resources and trained staff to effectively support children with English as an Additional Language.

Submit a complaint to the school, or if not resolved, to an ombudsman, review authority or complaints authority.

Research whether this is a school-specific, LEA-specific or national problem.

Encourage others affected to complain in order to increase pressure; raise awareness of the issue, consider leading a campaign.

Involve local politicians, such as councillors, and MPs.

The written policy is unfair or unlawful

Example: Schools requiring proof of a permanent address affect migrant families residing in temporary or emergency accommodation, who may not have access to conventional documentation.

Get legal advice on whether the written policy is unlawful, or just unfair.

If unlawful, get legal support to potentially challenge the policy itself.

If unfair, engage with the policy maker to understand whether there are opportunities to change or challenge the policy.

Raise awareness of the issue and gather evidence.

Identify who has the power to make that change and how they can be persuaded to do so.

The law itself is unfair or unlawful

Example: The absence of a data-sharing firewall allows schools to share personal and immigration-related information about students with the Home Office.

Get legal advice on whether the law is unlawful or just unfair.

If unlawful, get legal support to potentially challenge the law itself.

If unfair, engage with politicians to understand whether it is possible to build a campaign to change the law.

Raise awareness of the issue and gather evidence.

Identify political allies and find out how they can be persuaded to support the campaign



3. BARRIERS TO ACCESSING EDUCATION

3.1 Guidance on the general process of school enrolment

As set out above in Section 2.1, LEAs have a general duty to provide suitable full-time education for all children of compulsory school age (between the ages of 5-16) who are resident in their area.²⁸

All LEAs are also responsible for making sure there are suitable, free alternative forms of education to offer young people aged 16-19 who want to stay on in school or sixth form college.

The DfE's School Admissions Code requires all LEAs to have a written admissions policy that clearly sets out how children will be admitted, including the criteria that apply if there are more applications than places at a school.

Schools cannot legally refuse to admit a child at the beginning of the academic year unless the school is full, or they have a selective admissions criteria (for example, relating to being a member of a particular religious group).²⁹

3.2 Challenges to enrolment

Despite the clear guidance on LEA's duties and on requirements around admissions and enrolment, IRMO casework and advocacy services have identified many barriers that families and children face in trying to enrol in education.

This section will present case studies from IRMO frontline practitioners and then analyse, for each, whether the barriers encountered are lawful and – whether lawful or not – what can be done to challenge or mitigate the impact of these barriers to widen access to education for migrant families.

Immigration status enquiries



Case study: IRMO caseworkers have noticed a concerning trend of schools and local authorities asking about immigration status during the application process. For example, a local authority requested to see the boarding passes a family used to enter the country, and some schools ask for immigration status on their application forms.

Analysis and guidance

The Department for Education's Guidance makes it clear that:

"Local authorities should not require parents to provide proof of immigration status before allowing them to apply for a school or require proof as any part of the application process.

*They should instead advise foreign nationals who do not normally reside in the UK but who wish to apply for a state-funded school place, to check that their children have an immigration status which permits them to enter the UK to access a state-funded school. Checking is the parents' responsibility, not the local authority's responsibility."*³⁰



Any requirement to provide proof of immigration status as part of the enrolment process for a state-funded school is therefore potentially a **gap between policy** and practice and could be challenged by asking the school for written reasons why proof of immigration status has been requested.



Parents do have the legal right to refuse to provide proof of immigration status; however, they should be aware that there is a risk that school staff might take a refusal to provide information as a reason to report an immigration or border crime to the Home Office.³¹

No capacity in schools



Case study: A school advised a family that they were not able to enrol a child because there was no capacity in the school. The family were not given any alternatives or support to approach other schools in the local education authority.

Analysis and guidance

It is lawful for a school to refuse to enrol a child because there is no capacity in the school.

However, there are criteria about how this decision is reached, and this includes a requirement that:

- A school has an admissions policy, written in plain English and any other commonly used community languages, explaining the subscription criteria to be applied and the order in which they are applied
- A school provides information about whether a waiting list will be kept and if so for how long

The refusal to enrol a student must also include information about the reason for the refusal and the right to appeal, as well as the process for making an appeal of the decision.



LEAs are ultimately responsible for meeting the duty to enrol children in their area; therefore, if an individual school refuses to enrol a child and is not offering further guidance, the family should approach the LEA for support.

The LEA should, furthermore, provide effective support to the family to enrol the child in suitable education without unreasonable delay.

Moreover, young people must meet the requirement of three years of continuous lawful residence in England prior to the start of their course. This can be confusing for those who have been in the UK longer but have insecure status, or for those who have been here less than three years but would exceed the age limit of 19 by waiting to meet the threshold.

Challenges in post-16 education



Case study: Young people over 16 with insecure or time-limited immigration status face significant challenges enrolling in college. Colleges often require proof of immigration status, resulting in most young people aged 16-18 with insecure status being out of education. This is in addition to the limited support and educational opportunities for 16-18-year-olds who do not speak English.

This also affects those with time-limited statuses, as colleges are reluctant to enrol students whose permission to stay may expire before the end of the course, even if they plan to apply for an extension.

Analysis and guidance

Further education (FE) describes study which is not higher education (HE) and is pursued by pupils who are usually 16 or older and have finished compulsory secondary education. FE is regulated differently to primary and secondary education, by the Education and Skills Funding Agency (ESFA), which is an executive agency of the Department for Education, and not by LEAs.

As outlined above, whilst young people in England are required to continue in education or training until at least their 18th birthday, even if they work, young people with insecure or time-limited immigration status face multiple practical barriers to enrolling in colleges.

Although funded education is not a “public fund” as defined in the immigration rules, young people might face these restrictions:

- Eligibility for ESFA-funded 16-19-year-old courses requires proof of their legal right to reside in the UK
- Eligibility for apprenticeship schemes requires students to establish there is no restriction on their right to work in the UK
- Some forms of immigration bail notice might have a restriction on the right to study

Whilst colleges are permitted to admit students to study without ESFA funding, they may ask the student to pay a fee, or they may seek to meet the costs of student places from very limited alternative financial resources. Therefore, these opportunities may be limited and uneven across areas of study and different geographies.

In some cases, caseworkers have been successful in using exceptional criteria outlined at paragraphs 40-41 of the ESFA Funding Advice Guidance 2023/24³² to get young people without regular immigration status into college (points 40-41). However, these criteria only cover some groups of young people with insecure status (for example, those who are dependents of adults residing legally), and still leaves gaps in eligibility for many others.



When supporting young people aged 16 and above seeking to enrol in college, particularly those with insecure or time-limited immigration status, the most effective approach is likely to be persistent caseworking. College processes will vary and, unless the young person falls clearly within the ESFA Funding eligibility criteria, colleges will have the power to enrol them but access to funding could be an insurmountable barrier. If any individual college practice falls short of expected standards, or appears to be unlawful, you can take a complaint to the college, and if not adequately resolved, to the ESFA itself as regulator for FE institutions in England.³³

Alternatives to a college placement include apprenticeship and other forms of training. Again, whilst there is no prohibition on access to these programmes based on migration status, eligibility for these programmes may include having the right to work (which will exclude asylum seekers and those with insecure status). Practically, caseworkers can explore access to these programmes without taking payment for work, although programme providers may be reluctant to open this route.



³² ESFA, “Advice: funding regulations for post-16 provision 2023 to 2024,” (17 May 2024), available at: <https://www.gov.uk/government/publications/advice-funding-regulations-for-post-16-provision/advice-funding-regulations-for-post-16-provision-2023-to-2024#student-eligibility>

³³ ESFA, “Complain about a further education college or apprenticeship,” <https://www.gov.uk/complain-further-education-apprenticeship>

In terms of pursuing systemic change, this gap between the mandatory requirement for young people aged 16-18 to remain in education or training and the practical barriers to accessing the most suitable forms of education and training, should be tackled. Policy and influencing work, based on evidence drawn from the experience of IRMO clients and other young people in similar situations, could bring a powerful case to the ESFA, LEAs and the Home Office to make changes to these restrictions, opening up a wider range of options for migrant young people aged 16-18 in the future.

3.3 Other challenges: Asylum accommodation or temporary accommodation for asylum seeking children

Asylum seeking families face an additional, and separate, challenge in enrolling children in education, which is linked to how they access accommodation according to their migration status.

Families seeking asylum who are destitute or homeless are provided accommodation by the Home Office. This often takes the form of initial provision of temporary accommodation for a period that can range from a few weeks to many months or years, followed by a move to permanent asylum support accommodation.

If the family is eventually granted refugee status, they will then be eligible for mainstream benefits, including access to mainstream social housing allocation and housing benefit – however, it does also mean they will be required to move from their asylum support housing to yet another property.

The process of moving from temporary to permanent asylum support accommodation, as well as from asylum support accommodation into mainstream social housing can disrupt access to education for children in asylum-seeking families, particularly because asylum support accommodation is offered on a “no choice” basis (meaning refusal of accommodation can lead to the loss of any right to accommodation) and because these moves can be arranged quickly, with little to no notice to the asylum seeking family, and often with little to no consideration of the impact in terms of access to education for the children.



Barriers to enrolment of asylum-seeking or refugee children at Years 10 or 11



Case study: An asylum-seeking family faced significant challenges in securing education for their children upon relocating to London. Their youngest child quickly found a place in a primary school in the local area, but their older child, due to start Year 10, experienced severe delays.

The family applied to several schools in early November, but the response from the local authority was slow, and they were informed that there were no places available at any schools and that Fair Access Panel (FAP) referrals were not available for Year 10 and 11.

After months without progress, in February, the family applied directly to a school in a different borough and secured a place.



Analysis and guidance

The Fair Access Protocols guidance makes it clear that all children who are refugees and asylum seekers are eligible for a FAP referral³⁴ and the School Admissions Code does not discriminate in its application between years of study.³⁵

It is also, however, the case that schools often have fewer spaces for enrolment at Years 10 and 11 and therefore, children in this age group can experience unreasonable delays in getting an offer of a place.

LEAs do have the power to set their own processes for complying with the Fair Access Protocol requirement, but they must also comply with DfE Guidance set out above. This case study highlights the inconsistency in the application of this guidance between LEAs and also the unfairness this can create within and between families seeking to enrol migrant children in education.



In this case, the LEA should be asked to furnish a copy of: (a) its own FAP policy as well as (b) its decision not to make a referral for this individual child, so that the policy and the decision can be legally reviewed to assess whether they are lawful, and consistent with the relevant guidance and policy.

³⁴ Department for Education, "Fair Access Protocols: Guidance for school leaders, admission authorities and local authorities," (August 2021), https://assets.publishing.service.gov.uk/media/6124ab6ae90e0705410757e8/FAP_Guidance.pdf

³⁵ Department for Education (DfE), "School admissions code," (last updated 11 March 2022), <https://www.gov.uk/government/publications/school-admissions-code--2>

Failure to consider the impact of change of accommodation on access to education for children



Case study: An asylum-seeking family had spent 5 months in temporary accommodation and over that period, their two children had settled well in a local primary school. One of the children was receiving significant SEN support, and the family had a good relationship with their support workers in the school, etc.

The Home Office required that the family move to permanent asylum support accommodation, in a different borough, which meant either a long and expensive commute to school, or the children would need to change schools. The family wanted to remain in temporary accommodation or move to permanent accommodation but in the same borough.

Analysis and guidance

This is an example of the potentially lawful application of a policy that is nevertheless unfair.

The Home Office asylum support guidance does require the Home Office to take into account various factors in its decision making around the allocation of accommodation to asylum seeking families, and this includes taking into the account the best interests of any children impacted by its decision making.³⁶

However, the impact for children will be weighed against a range of other factors, including the availability of suitable accommodation (which may be limited) and the extent of the actual interference with key rights (like access to education). In this case, these factors will need to be considered on an individual basis, in view of all the relevant facts.



The family does have the right to make a request to the Home Office to change their accommodation, and in so doing, they will need to provide further information to the Home Office to evidence the impact on the right of access to education for the children. The success of this request will depend upon the strength of the evidence as well as the availability of any suitable properties in the property portfolio of the Home Office or its private contractors which provide asylum support accommodation.

The family can be assisted by a caseworker or a lawyer to do so, but may want to do this in parallel with also pursuing applications for other educational provision nearby their current accommodation, in order to maximise the chances of securing a suitable place for their children, longer-term.

4. BARRIERS TO EQUAL TREATMENT IN EDUCATION

4.1 Statutory duty to ensure non-discrimination and equal treatment in education

As presented above in Section 2, LEAs have an obligation to ensure equal treatment and non-discrimination for children accessing education, and these duties are set out in primary legislation governing the duties to provide educational opportunities, supported by the duties arising in the Equality Act and the Human Rights Act.

This section will explore commonly encountered barriers for families and children in education and will analyse what can be done to challenge or mitigate the impact of these barriers to increase participation by migrant families in their children's education.



4.2 Language barriers in supporting participation by families



Case study: A family with a child who has an EHCP encountered significant challenges when dealing with their school's Special Educational Needs Coordinator (SENCo). The relationship between the parents and the SENCo grew strained, particularly over language support issues.

During EHCP annual reviews and other important meetings, the school initially provided an Italian teacher to serve as a translator for the Spanish-speaking family, which further exacerbated their communication issues.

Subsequently, the school informed the family that they would need to arrange and pay for their own translation services. This requirement placed a financial burden on the family and added to their frustrations, as they felt the school was not supportive or accommodating of their needs.

Analysis and guidance

Schools must ensure that parents and carers are provided information in accessible formats, using clear, straightforward language so that they can participate in discussion about their child's learning and welfare. This is set out in the SEND Code of Practice (2015) and also supported by the school's obligations under the Equality Act 2010 to ensure equal opportunities for students, including preventing discrimination on grounds of race, which includes nationality and ethnicity.³⁷

Although schools may prefer to provide alternatives to professional interpreters, for example by using a member of staff or asking a family to provide their own interpreters for simple fact sharing about school process or activities, communication about a student's progress or specific needs should be confidential to that family and an independent professional interpreter should be used.³⁸



In this case, the family could challenge the school's failure to provide a professional interpreter, in writing, setting out the reasons why the parents are not able to participate effectively with monitoring implementation of the EHCP and the SEND review process, without translation of key documents, and interpretation at key meetings with the SENCo and other school staff.

4.3 Barriers to accessing an Education, Health and Care Needs Assessment (EHCNA)



Case study: In a London school, a child with ADHD and on medication struggled to access adequate support for his additional learning needs. Despite numerous meetings between the parent and the school about worsening behaviour and academic engagement, no improvements were made, and the school said they did not have enough resources to provide further support.

In view of this, the parent asked for help in applying for an EHCNA. The head teacher laughed at the suggestion, claiming there was "no chance" of getting an EHCP for an ADHD diagnosis.



³⁷ Department for Education and Department for Health and Social Care, "SEND code of practice: 0 to 25 years," (last updated 30 April 2020), <https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>

³⁸ An example of good practice here: SPA[RK] and Achieving for Children, "Using Interpreters," December 2018, <https://www.kingston.gov.uk/downloads/file/2278/using-interpreters> and Thomas Coram Research Unit, UCL and Nuffield Foundation, "Child Interpreting in School: Supporting Good Practice," March 2014, <https://www.nuffieldfoundation.org/sites/default/files/files/Child%20Language%20Brokering%20-%20Good%20Practice%20Guide%20-%20June%202014.pdf>

Analysis and guidance

As outlined above, all schools have a duty to make reasonable adjustments under the Equality Act and the SEND Code of Practice (2015). When a school identifies a child with SEN, they have an obligation to work in collaboration with parents to set up a support plan for the child.³⁹

In this case, therefore, the school should already have a support plan in place for the child and be monitoring and reporting on the child (if they are struggling with behaviour and/or attainment), and this evidence could form an important part of the basis for applying for an ECHNA.

Furthermore, a local authority must carry out an ECHNA where:

- A child or young person has or may have special education needs (SEN); and
- Where they may need special educational provision to be made through an EHCP

If the answer to the above two questions is yes, then under Section 36(8) of the Children and Families Act 2014, there are no other criteria a local authority can or should consider when determining whether or not to carry out an ECHNA.

Some decisions by the LEA can also be appealed to the First Tier Tribunal (Special Educational Needs and Disability).⁴⁰

These include:

- A decision not to assess a child for an ECHNA
- A decision following an annual review to cease an ECHNA
- Where a final ECHNA is issued but the parent disagrees with the content of the plan



In this case, the family should first establish whether or not the school has met its initial obligation to collaborate with parents on a support plan, and with regular review and monitoring of that plan, in writing.

Further, the head teacher was wrong to advise the family that there was “no chance” of an assessment because of lengthy waiting lists. They or another member of staff should have assisted the family to make the necessary request, allowing the family to make their case for the assessment and receive, in due course, a written reply to that request.



³⁹ Department for Education and Department for Health and Social Care, “SEND code of practice: 0 to 25 years,” (last updated 30 April 2020), <https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>.

⁴⁰ For further information, see GOV.UK, “First Tier Tribunal (Special Educational Needs and Disability),” <https://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability>.

4.4 Special Educational Needs (SEN) challenges and barriers to accessing support for Education, Health and Care Plans (EHCPs)



Case study 1: In a London school, a child had an EHCP that specified the need for toileting support but lacked explicit details about necessary provisions like a changing table. Consequently, when the lack of a changing table was brought to the school's attention, the school refused to install one, stating it was not specified in the EHCP.

When this issue was escalated to the LEA, they stated that an EHCP could not mandate infrastructural changes within schools, even though such changes were crucial for fulfilling the support outlined in the plan.



Case study 2: A child who had an EHCP finished primary school but was unable to progress to secondary school because his EHCP made him ineligible for mainstream school and no SEND provision was granted. He was out of school for over 2 years, during which time he received limited and inadequate home tutoring, also missing out on all the other benefits of education outside the home setting.

Analysis and guidance

These are examples of a gap between policy and practice – highlighting the frustration that families can face, where they have succeeded in documenting specific needs in an EHCP, but those needs cannot be met in practice in the educational settings available to them.



In Case 1, the family can ask the LEA to carry out a statutory assessment of the child's SEND, ideally resulting in a decision in writing. If this decision is unsatisfactory, the family can be assisted to access legal advice about pursuing legal action to enforce the LEA's obligations to the child, or to use the LEA's complaints procedure as a means of further review of the issue. If the outcome of the complaints procedure is not satisfactory, the family can also take the matter to the Local Government and Social Care Ombudsman.⁴¹



In Case 2, the obligation to provide access to secondary education, in line with the child's EHCP remains with the LEA – again, the family should seek to obtain confirmation in writing from the LEA of how they propose to meet their duties to the child. If not satisfactory, this can be used to seek legal advice about pursuing legal action or making a complaint about the decision.

Both situations underscore the need for clearer guidelines and improved communication between schools, local authorities, and families to ensure all necessary accommodations are provided to support each child's specific needs adequately. Both cases could also be used to support an awareness raising campaign with the aim of improving communication within LEAs and between schools and families.

4.5 English as an Additional Language (EAL)



Case study 1: A young person with SEND, previously supported by the equivalent to an EHCP abroad, faced difficulties when their new school was unhelpful in initiating an Education, Health, and Care Needs Assessment (EHCNA).

During a meeting to discuss additional support, the school's SEN team suggested the real issue was the young person's 'reluctance' to learn English, claiming any further support would be ineffective since it would be in English.

Additionally, when the parent asked for the school's support in initiating an EHCNA, they were told to apply themselves as the SENCo would not be able to do it as they were very busy with other cases.



Case study 2: A school explicitly rejected a child's application, after a place was offered and an initial meeting with the family held at the school, giving the reason that they couldn't accept him because he didn't speak English, saying that they weren't able to support EAL children in the school. The child really suffered from the rejection, which was a huge knock to his confidence, and it also took quite a while to find another school for him.

Analysis and guidance

The expectation regarding EAL provision in England is that all teachers should plan and resource lessons suitable for learners using EAL with the class or subject curriculum, with some funded provision available at local levels to provide training and support to teachers to do this, or to provide direct support to pupils to reduce barriers to accessing mainstream learning. The reality is that pupil funding allocation has been reduced for EAL in schools over the years, and this has had an impact on the availability of direct support in many schools.

Schools also have obligations under the Equality Act 2010 to ensure equal opportunities for students, including preventing discrimination on grounds of race, which includes nationality and ethnicity, and these duties also arise where a pupil cannot access the curriculum because of barriers in accessing EAL support.⁴²



In both cases, where an individual school has refused support or lacks the resources to offer suitable support, families should approach the LEA. Any further refusal on the part of the LEA to assist should be reviewed with a legal advisor to consider whether either a legal challenge or a complaint might be a suitable way forward.

Both cases highlight a lack of support and understanding for non-native English speakers with SEND, underscoring the need for schools to be more proactive and accommodating in their approach to education. Again, either or both cases could also be used to support an awareness raising campaign with the aim of improving communication within LEAs and between schools and families.

4.6 Fair access protocols (FAP) and delays in placement

Schools cannot legally refuse to admit a child at the beginning of the academic year unless the school is full, or they have a selective admissions criteria (for example, relating to being a member of a particular religious group).⁴³

In-year admissions can be more difficult, but if a local authority cannot place a child through its normal in-year admissions process, it must have a protocol covering fair access, developed in partnership with local schools, published on its website. The purpose of the protocol is to ensure that children who are 'hard to place', including migrant children, are admitted to a suitable school as soon as possible.⁴⁴

There are a number of criteria through which children might be eligible for a Fair Access Protocol placement, including:

- Children subject to a child in need plan or a child protection plan
- Children living in a refuge or other Relevant Accommodation
- Children with special educational needs (but without an EHCP), disabilities or medical conditions
- Children who are refugees and asylum seekers
- Children who have been out of education for 4 or more weeks and there are no places available at any school a reasonable distance from their home
- Children who have been refused a school place on grounds of their challenging behaviour
- Children for whom a place has not been sought due to exceptional circumstances.⁴⁵

Families can, however, face barriers in accessing the FAP procedures at all, and even if they are successful in obtaining an FAP panel referral, they can also face excessive delays in obtaining a place through the process.



⁴³ Department for Education (DfE), "School admissions code," (last updated 11 March 2022), <https://www.gov.uk/government/publications/school-admissions-code--2>

⁴⁴ Department for Education, "Fair Access Protocols: Guidance for school leaders, admission authorities and local authorities," (August 2021), https://assets.publishing.service.gov.uk/media/6124ab6ae90e0705410757e8/FAP_Guidance.pdf

⁴⁵ Ibid.



Case study: In Year 9, a student suffered bullying and racism at their school, which escalated without adequate intervention from school administration. This neglect led to a significant decline in the student's mental health, compelling them to stop attending school. Despite repeated requests from the student's mother for assistance in transferring to a new school, the school did not offer the necessary support.

In response, the family sought help from IRMO, who advocated for the student's right to a safe and supportive educational environment. IRMO's initial efforts included applying for new schools, but the student was continually overlooked on waiting lists because they were still technically registered at their current school. Further, when IRMO requested the school to provide academic work for the student during this transition period, the school refused and instead suggested that the student be taken off roll and homeschooled by the mother, despite knowing very well that she did not speak English and could not support her child to prepare for GCSEs.

Persistent advocacy from IRMO involved negotiating for a managed move or a referral to a Fair Access Panel, both initially resisted by the school, as they did not view the bullying as a valid reason to justify using either of these mechanisms.

After persistent communication, and after 6 months out of education, the school finally agreed to refer the student to the Fair Access Panel. However, the referral process was fraught with communication challenges, providing the family with insufficient explanations of the steps involved.

Despite these obstacles, sustained advocacy by IRMO ultimately secured the student a place at another school through the Fair Access Protocol, after a year out of formal education.



Analysis and guidance

This is an example of the successful use by IRMO staff of the Fair Access Protocols⁴⁶ guidance to successfully make the case for the school to make an FAP referral, although there was a considerable delay in this case. As above, responsibility for ensuring that the FAP mechanisms work timely and effectively sits with the relevant LEA.

Where it has been agreed that a child will be considered under the Fair Access Protocol, a school place must be allocated for that child within 20 school days. Once a school place has been identified by the LEA, that school must respond to a request to admit a child within 7 calendar days and make arrangements for the child to start as soon as possible.



Again, families experiencing barriers at school level should approach the LEA about making a Fair Access Panel referral for an individual child. Any refusal on the part of the LEA to do so, or a delay beyond the 20 school days in allocating a place, should be reviewed with a legal advisor to consider whether either a legal challenge or a complaint might be a suitable way forward.

Although the LEA bears overall responsibility in this case, the level of resistance by the relevant school, as well as the poor communication between the school and the family throughout the process, again highlights areas where better coordination between schools and families, as well as clearer guidance to schools from LEAs on the FAP procedures, could yield better and swifter outcomes for children and young people seeking to access suitable education.



5. SUMMARY OF RECOMMENDATIONS

This legal briefing has set out the legal rights of migrant children and young people aged 16-19 and explored areas in which families supported by IRMO have experienced discrimination and other barriers to equal access to those rights - including access to support for children with special educational needs and disabilities (SEND).

The briefing has also explored some legal and policy advocacy strategies that could be used to challenge existing structural inequalities and to widen access to education for these children.

Here, we summarise some of the key areas in which further action could be taken by IRMO, the families they work with and other allies, in order to challenge and dismantle some of those structural barriers.

Barriers:

- Lack of accessible information on education rights for migrant families
- Lack of language support for migrant families and children in accessing services



Recommendations

IRMO: Produce know-your-rights resources in formats and languages accessible to the community, might include a programme of peer advocacy and education, with signposting to support from IRMO staff or other agencies.

Education NGOs: For NGOs that provide generalist know-your-rights resources with wide reach and capacity to update materials, commitment to producing resources specific to challenges faced by migrant children and EAL learners, inclusion of mention of specific considerations in their mainstream resources.

DfE and LEAs: Produce up-to-date resources in accessible formats (including in community languages) tailored to support new arrivals and migrant children and families, and/or ringfence specific funding to support NGOs to do this work.



Barrier:

- Immigration status checks and Home Office data sharing

Recommendations

IRMO:

- Monitor cases in which immigration status checks are requested by schools.
- With consent from relevant families, challenge that practice, perhaps using individual template letters or by writing a letter as an organisation or group on behalf of members.
- Use evidence to highlight the issue in public awareness and to contribute to policy/influencing with the DfE and LEAs.

DfE and LEAs:

- Produce very clear guidance on the prohibition of the requirement of proof of immigration status at enrolment stage, perhaps with a programme of training or clear guidance at school level.
- Remove reference to “tipping off” helpline for schools on the basis that this is unnecessary and creates barriers to enrolment, potentially also criminalising migrant families.
- Seek a commitment to firewall information about a child or young person’s migration status from educational records, unless the status is essential to some aspect of providing education to that young person.

Barriers:

- Delays in school enrolment
- Refusal to progress FAP referrals (including at Years 10 and 11)
- Failure to support SEND learners: Refusal to apply for an EHCNA, failure to implement an EHCP, delays in enrolment
- Failure to support EAL learners
- Restrictions in eligibility for ESFA funding and apprenticeship opportunities (ages 16-18)

Recommendations

IRMO:

- Monitor and analyse cases where these barriers arise, including where there is inconsistency between the practice of different LEAs.
- With consent from relevant families, challenge that practice at LEA level, perhaps using individual template letters or by writing a letter as an organisation or group on behalf of members.
- Use evidence from own casework as well as coordination with other educational organisations and academics to highlight the issue in public awareness and to contribute to policy/influencing with DfE and LEAs.
- Build referral pathways to education specialist lawyers and barristers to identify strategic cases that could highlight and change poor practice at LEA- or England-wide level.

- Consider using alternative routes to remedy, such as the local authority complaints procedure and the Local Government and Social Care Ombudsman as well as legal routes to remedy.

DfE and LEAs:

- Push for clearer guidance on how schools must comply with the requirements of the School Admissions Code, the SEND Code of Practice and the FAP protocols, specifically as they apply to migrant children and families.
- Push for wider eligibility for ESFA funded places for young people aged 16+ and for apprenticeship and vocational opportunities to be open to young people who do not have the right to work.
- Apply public pressure: Ask how local authorities are meeting their duties under the Children and Families Act and the Equality Act to ensure equal opportunities for migrant children and young people in education, in light of the evidence of poor practice reflected in the IRMO casework.

This legal briefing and the IRMO case studies have highlighted that there are a significant number of areas where more work can and should be done to challenge the systemic barriers that migrant children and families face in accessing education in England.

Our hope is that, in setting these recommendations, the IRMO team and the families they work with can bring constructive challenge and positive change to gaps in practice, as well as in policy widening access to education and equal treatment for migrant children and families across England, and the UK.



6. FURTHER RESOURCES

The following are resources, guidance and examples of good practice, including details of some leading organisations that also provide further advice and support – covering the key areas discussed in this legal briefing.

Access to education in England and Wales for all pupils (including SEND)

- Citizens Advice, “Education” <https://www.citizensadvice.org.uk/family/education/>
- Coram Children’s Legal Centre, “Coram Child Law Advice - Education,” <https://childlawadvice.org.uk/education/>

For EAL learners

- The Bell Foundation, “School provision for refugees and new arrivals,” <https://www.bell-foundation.org.uk/resources/guidance/schools-and-leaders/refugee-school-funding-provision/>
- The Bell Foundation, “EAL and SEND: Guidance for integrated provision in schools,” <https://www.bell-foundation.org.uk/resources/guidance/schools-and-leaders/learners-with-special-educational-needs-or-disabilities/>

For migrant children

- Coram Children’s Legal Centre, Factsheet: Access to compulsory education for migrant children (2017) https://www.childrenslegalcentre.com/wp-content/uploads/2017/07/School-Education-July.2017.final_.pdf
- Garden Court Chambers, “Access to education for migrant children,” Ollie Persey and Connor Johnston, 8 September 2021

For refugee children

- Refugee Education UK, “Young refugee site,” <https://www.reuk.org/youthsite>

For SEND learners

- IPSEA (Providers of Special Educational Advice), “Free legal guides and templates,” <https://www.ipsea.org.uk/Pages/Category/get-support>



Unit 9, Warwick House • Overton Road • SW9 7JP • Brixton • London

www.irmo.org.uk