

# Education, Health and Care Plans: our first 100 investigations



Focus Report: learning lessons from complaints

October 2017

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# Ombudsman's Foreword



All children are entitled to an education that meets their needs and supports their aspirations – it should not matter whether the child has needs that are different to most.

The new Education, Health and Care (EHC) plan system is designed to be a more holistic way of providing special educational needs (SEN) support than the previous approach. It aims to be less confrontational, more efficient and involve families better while reducing the administrative burden on them.

The Local Government and Social Care Ombudsman has now carried out more than 100 detailed investigations on EHC plans. In these initial cases, however, we have seen some families having to push, persist, and go well beyond the call of duty just to confirm the type of support they should receive, and to get it provided.

It can be tough enough for these families, without the disproportionate burden of having to fight the educational system just to get the support to which they are entitled.

In some instances, our investigations have shown the new system to have the opposite of its intended effect. We see poor planning by some councils requiring extra meetings to be hastily arranged to meet the statutory obligations;

failures to share draft assessments causing delays later in the process; and authorities deferring responsibility to families for getting professional input, among other issues.

Our experience shows some councils are struggling to plan and cope with the changes to the SEN system, at a time when all authorities are having to rethink how they deliver services. And some investigations are characterised by councils' lack of understanding of the process.

*“ We have seen some families having to push, persist, and go well beyond the call of duty just to confirm the type of support they should receive ”*

The end result can be long delays, leaving children and young people missing out on provision and ultimately failing to reach their potential. The frustration, stress and sense of injustice for the families involved is understandable. When councils then fail to recognise and acknowledge fault, further damage is caused to relationships and trust.

While the number of investigations we've completed on EHC plans has just made triple figures, the time is right to publish our observations so far. By helping councils to understand the common issues, I hope to avoid a further number of issues upstream.

Without this intervention, the statistics point to us seeing increasingly more complaints and people suffering. The number of people coming to us, while relatively small, is rapidly increasing – our complaints and enquiries doubled between 2014/15 and 2015/16. We are also upholding

nearly 80% of investigations – far in excess of our 53% average.

And statistics from other organisations point towards a situation where problems are being stored up. By January 2017, just under a third of the pupils with statements of SEN in place 12 months earlier were transferred to EHC plans. It seems likely many councils will miss the impending cut-off date of April 2018 to transfer all of their pupils.

In addition many EHC plans are not being completed on time: 58.6% of new EHC plans were issued within the 20 week timescale in 2016.

These factors sit within a context that this year more pupils have been identified as needing SEN support and more have a statement or EHC plan, although the proportion of the total school population remains the same.

The Local Government and Social Care Ombudsman can put things right for individuals

who have suffered. But to get the most value from our investigations, we need others to learn from what has gone wrong.

I encourage councils to reflect on this report, and its good practice guide, to help improve services for all families of children with SEN and disabilities. The remainder of the transition period offers an opportunity to continue to review and enhance their SEN arrangements. For local councillors, with the democratic mandate to scrutinise their authorities, we've provided a set of questions to help with that process.

For local and national decision makers, I call on them to use this report to inform their evaluation of the EHC plan system to ensure that all children, young people and families are properly supported to meet their potential.

The report will also help children and young people with SEN, and their families, to understand what they should expect when needs are being assessed under the new arrangements.



**Michael King**

**Local Government and  
Social Care Ombudsman**

**October 2017**

# Introduction

On 1 September 2014, the law for special educational needs (SEN) changed. The Children and Families Act ('The Act') introduced a more holistic approach to meeting the needs of a child or young person with SEN, with a mandate for councils to replace Statements of SEN with Education, Health and Care (EHC) plans.

It aimed to place the views, wishes and aspirations of children, parents and young people at the heart of the system. It envisioned a culture change in the way professionals work with families, and with each other, so the experience for families and children in getting the right support was less confrontational, more responsive to their views and more efficient than the system it replaced.

Transition arrangements have been clearly set out. All children and young people are due to transfer from their existing Statements to EHC plans by April 2018. However, Department for Education figures indicate councils are struggling to meet these timescales. By January 2017 only 33% of statements in place at the start of 2016 had been transferred across.

Research by the Centre for Educational Development, Appraisal and Research (CEDAR) indicates of 13,000 families contacted, 66% of parents and young people reported as being satisfied with the new procedures.

On the other hand, complaints to us are increasing, and we are upholding a large proportion of investigations. We warned about the need for councils to implement robust procedures to avoid common failings being carried into the new system. Unfortunately, some of issues highlighted in our Focus Report of March 2014 – *SEN: Preparing for the Future* – remain common features in complaints about EHC plans. These include long delays; poor transition planning; loss of education; and failures to provide specialist support.

## Complaints to the Ombudsman

Unsurprisingly, the volume of people coming to us with concerns has increased over time as more Statements are transferred to EHC plans. We received 109 complaints and enquiries in 2015/16, and 217 in 2016/17 – practically double. In many of these early cases, we did not carry out an investigation because the person had not fully completed the council's complaints procedure.

Because a large number of Statements are still to be transferred, and it can take around nine months for someone to go through the council's complaints before approaching us, we are likely to see the number of complaints and enquiries continue to increase.

We have now completed more than 100 investigations about EHC plans and upheld 79% of them. This proportion is exceptionally high, and far in excess of our average uphold rate of 53% for all investigations last year.

## Dispute Resolution Arrangements

When the Act was implemented the Secretary of State for Education and the Lord Chancellor committed to review the effectiveness of a range of disagreement resolution services. We were an active member of the working party which helped inform the review. The outcome and Government response to the findings were published on 29 March 2017<sup>2</sup>.

We welcome the Government's conclusions and proposals including reference to the unique role we play in ensuring complainants have appropriate redress when things do go wrong and improving services for everyone.

<sup>2</sup>[www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-england-review](http://www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-england-review)



## Legal context

An EHC plan is a legal document that describes a child or young person's special educational, health and social care needs. It explains the extra help that will be given to meet those needs and how that help will support the child or young person to achieve what they want to in their life. The plan is drawn up by the local authority after an EHC needs assessment involving, where appropriate, health and social care professionals.

If parents or a young person disagrees with the content of an EHC plan or the proposed placement, they can appeal the Special Educational Needs (SEND) Tribunal<sup>3</sup>.

The Act is supported by the SEN Code of Practice ('the Code'). The Act introduced a number of other changes designed to improve on the previous system including:

- > extending the availability of plans from 0 to 25 years of age
- > reducing the timescale for issuing the plan from 26 to 20 weeks
- > ensuring children, young people and their families are involved in decision making
- > introducing the option of personal budgets
- > publishing a 'local offer' detailing support available
- > ensuring a greater focus on outcomes and successful transition to adult life

The new system was both a challenge, and an opportunity, for councils to do things differently with many local authorities developing new teams, structures and policies to implement the new system.



<sup>3</sup>[www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability](http://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability)

# Common Issues

## Delay

Delay remains an overriding feature in most complaints about SEN that we investigate. This reflects the fact that less than 59% of new EHC plans were issued within the 20 week limit last year. In a few cases families have waited over a year for their plan to be issued.

Delay is often accompanied, or caused by, other faults. It can lead to problems like failing to provide suitable education; less choice of placements; and a slower appeal to the Tribunal when there is a dispute.

To transfer a child or young person from a Statement of SEN (or Learning Disability Assessment) to an EHC plan, a local authority must undertake a transfer review within a maximum of 18 weeks (with a minimum two weeks notice before this). Where the transfer started before 1 September 2015 the timescale was 14 weeks.

### Anil's story

Anil is 18 and has been attending an independent special school. His statement was last amended some 18 months ago. Anil's dad asked for him to transfer to an EHC plan because he was keen that Anil moved to another placement to help with his transition to adulthood. The council agreed to start the transfer process. The council had still not issued a final plan 65 weeks after the request was made. Anil's dad complained to us.

We found there was a completely unacceptable delay in progressing the transfer to the plan. While Anil had not lost out on provision because he remained at the special school throughout, his dad was concerned that suitable arrangements were not in place for Anil's next stage of education as he transitioned to adulthood.

### How we put things right

The council agreed to apologise and issue the EHC plan without any further delay. The council agreed to the family's preferred placement and Anil could attend the college of his choice.

### Tom's story

Tom was due to start secondary school and was being assessed for an EHC plan. The council completed the assessment and issued the plan three months after the 20 week deadline. Tom and his parents considered the plan was inadequate in a number of ways. In particular there was no reference to his diagnosis of dyslexia. They also considered the level of support was inadequate. They appealed to the SEND Tribunal.

The Tribunal upheld the appeal. The plan ordered by the Tribunal was significantly different to the plan issued by the council. It included 20 hours a week direct support from a teaching assistant; two hours support per week from a specialist teacher; and an initial four hours of occupational therapy followed by one hour per month.

Our investigation found the three month delay in issuing the plan prevented Tom and his parents being able to lodge a timely appeal and challenge its content. They were unable to do this until they had received the final plan. Had the plan been issued within the statutory timescales, the appeal would have been lodged three months earlier and Tom would have received the additional support set out in the revised plan sooner.

### How we put things right

The council agreed to:

- > apologise to Tom and his parents for the delay
- > pay £450 to recognise the loss of support



# Common Issues

## Gathering evidence to inform the EHC assessment

One of the fundamental principles of the Act is to provide a holistic approach to assessment and support planning, with all professionals working together with the family. Any new request, or a transfer to an EHC Plan, requires an 'EHC needs assessment'<sup>4</sup>. The local authority is the lead agency in this process. Councils must assess the education, health and social care needs of the child and consider whether updated evidence or new assessments are required in any area.

Councils can use existing evidence to do this but only where the person who provided the advice, the local authority and the child's parent or the young person are satisfied it is sufficient for the purposes of the EHC assessment.

The new SEN Code of Practice says local authorities should consider with the parent or young person, the range of advice required to enable a full EHC assessment to take place. We sometimes find the council has not had this discussion with the family early enough, or at all. This can lead to delays later, when parents challenge the absence of up-to-date evidence, or the draft EHC plan does not reflect the child's current needs. Where errors are not resolved before a final EHC plan is issued, it can lead to unnecessary complaints or appeals.

In the cases we have investigated, we have seen examples of councils not obtaining professional advice within the six week timeframe, and not giving professionals clear instructions, meaning the advice obtained is then not detailed and specific enough to write a clear EHC plan.

Sometimes councils need to seek clarification from a professional several times, which leads to unnecessary delay.

In some cases councils seem to be unaware it is their duty to gather evidence. We have investigated complaints where this role has been wrongly delegated to the school or family.

The EHC assessment must include a consideration of care needs. Where a child or young person already receives social care support, this should be straightforward because the needs and provision will be set out in the care plan. Where the person is not previously known to social care services, the council has to identify whether they have social care needs. In some cases it may be necessary to proceed to a formal assessment. Any new social care assessment should be combined with the EHC assessment<sup>5</sup>.

We have also seen confusion about how social care should be recorded in an EHC plan:

- > provision made under section 2 of the Chronically Sick and Disabled Persons Act 1970 needs to go in the section referred to as H1 of the EHC plan. This must specify all the services assessed as being needed for a disabled child or young person under the age of 18.
- > provision under the Children Act 1989 or the Care Act 2014 needs to go in the section referred to as H2 of the EHC plan. This includes any other social care provision reasonably required by the child or young person's learning difficulties or disabilities which result in SEN.

In some cases we see social workers not specifying which legislation applies to the provision identified for the child or young person. It is also not often clear in a carer's assessment, whether the provision is being made for the carer or for the child.

<sup>4</sup>Regulation 6 of the *Special Educational Needs and Disability Regulations*, 2014

<sup>5</sup>*Social Care: Guide to the 0 to 25 SEND code of practice* September 2014

## Alfie's story

Alfie has had a Statement of SEN for nearly a decade. He attends an independent special school as directed by a SEND Tribunal. Following a formal diagnosis of obsessive compulsive disorder (OCD), Alfie's parents asked the council to review his statement. The statement was not amended and the council did not issue a decision letter. This prevented them from appealing to the SEND Tribunal.

Over time Alfie became increasingly anxious about attending school. The council felt Alfie would benefit from an EHC plan so his health and education needs could be considered holistically and provision for his OCD could be included. Alfie's parents agreed but stressed this should not simply be a re-write of his Statement. Alfie was being supported by the Children and Adolescent Mental Health Services (CAMHS), who had explained to the school he required a specific behavioural treatment for his OCD. CAMHS stressed the importance of this being delivered consistently at school and home. It was able to support Alfie's family but it did not have the resources to provide this support to the school. CAMHS said mental health specialists delivering Alfie's package in school must be appropriately supported and supervised, and the council would need to fund this as special educational provision.

At the next review it quickly became clear that the council had not obtained advice from either Alfie's psychiatrist or from the clinical psychologist advising the school. The review meeting only lasted 10 minutes. Alfie's parents complained about the lack of progress in transferring to the EHC plan. The council responded suggesting Alfie's parents appeared to be requesting a reassessment (rather than an EHC assessment) and this would take a further 14 weeks to complete. It amended the Statement and issued a final version but neither the school nor Alfie's parents received a copy, so they were not aware of their appeal rights. A conversion meeting was arranged the following month but the council still had not obtained information from CAMHS, and suggested Alfie's parents seek this information themselves.

The council eventually issued a final EHC plan some 20 months after this option was first agreed. The plan confirmed Alfie needs OCD support provision to access learning, so it is an educational as well as a health need.

The family complained to us when they received no response from the council to their complaint. Our investigation found the council should have sought clarification about what support Alfie needed once it was aware of his OCD diagnosis. CAMHS had provided advice and the council failed to act on it. It also did not give formal notice to Alfie's school or parents about the start of the EHC process or use the annual review meeting as a transfer/EHC assessment meeting. Council staff were confused about the EHC assessment process and sought to delegate obtaining medical advice to Alfie's parents, despite the duty resting with the council. As a result, Alfie was left without appropriate support for four school terms.

## How we put things right

The council agreed to:

- > pay Alfie £2,400 for educational or social benefit
- > pay his parents £600 for the time and trouble they were put to
- > learn the lessons to avoid similar mistakes affecting other families. This includes ensuring:
  - > it plans ahead to use annual reviews for EHC transfers
  - > there are robust processes for requesting and receiving medical advice
  - > staff know the duty to carry out an EHC assessment cannot be delegated

## Sam's story

Sam has Aspergers Syndrome and attended a mainstream secondary with a Statement of SEN up to year 11. He was due to transfer to post-16 education in September. The council sent notice to transfer Sam's Statement to an EHC plan in the previous December and held a transfer meeting in January. The council did not seek up-to-date evidence. The council explored placements between January and May, but didn't communicate well with the family about these.

It did not issue a draft EHC plan until early June. This was outside the EHC transfer timescale and more importantly missed the deadline for post-16 transfers of 31 May. Following a complaint from Sam's mum the council held a further meeting with her in July. It was at this point the council realised it needed more evidence to inform the health and social care content of the EHC plan. The council asked Sam's mum to obtain this evidence herself from health professionals. The council issued a second EHC plan in September but Sam and his parents disagreed with the school named, and appealed. In the meantime they paid privately for Sam to start at an

independent school until the appeal was heard. Sam's mum went on to win her appeal for him to attend the independent school.

Our investigation found the council had failed to consider at the start of the process if updated evidence was needed or to get agreement from the family that none further would be sought. The council had not kept the family informed about possible placements. We found the delay in issuing the final EHC plan had delayed the right of appeal. This meant the issue of placement was not resolved before Sam needed to start school, and led to the family making private arrangements.

## How we put things right

The council agreed to:

- > reimburse the family for the school fees and transport costs it would have met, had the final EHC plan had been issued on time
- > review its procedures to learn the lessons from the investigation



# Common Issues

## Meetings and transfer reviews

The Code explains the need to involve children, young people and parents in decision making throughout the process of assessing and producing an EHC plan. Specifically, as part of the EHC needs assessment, the local authority must invite the parent of the child, or the young person, to attend a meeting with a relevant officer of the authority to discuss the educational, health care and social care needs of the child or young person<sup>6</sup>.

The meeting can be held at the start of the process or once a draft EHC plan has been prepared, but parents must be offered a face-to-face meeting.

To transfer a child or young person to an EHC plan, a local authority must do a 'transfer review' and must ensure the child's parents or the young person are invited to a meeting to contribute before the EHC plan is finalised. Councils must:

- > give notice of the transfer review
- > always undertake an 'EHC needs assessment' as part of the transfer
- > time the transfer to minimise disruption to the family and, in the academic year within which the local authority intends to transfer the child or young person, the transfer review should usually replace the annual review.

### Common faults we see are councils:

- > intending to use the annual review meeting as the transfer meeting but failing to issue the notice so a further meeting has to be held in order to comply with the rules
- > asking the school to hold the annual review and using this as the transfer meeting even though no relevant local authority officer attends arranging the meeting too late to meet key transfer deadlines or the timescale for issuing a final EHC plan
- > telling families at the start of the academic year their next annual review meeting will be used for EHC transfer but then causing confusion by not going ahead with the transfer when the annual review comes round
- > realising at the end of the EHC process no meeting has been held and pressuring parents to hold it at short notice (in one case 24 hours) or by telephone so the council meets its statutory deadlines for issuing the EHC plan
- > failing to consider whether an annual review format with a range of professionals attending is the best one to allow the child or young person to participate fully in the assessment and planning process

When councils don't use the annual review meeting as the transfer review it is usually down to poor planning or confusion about the new process. Often this adds to the administrative burden on families (and councils) rather than reducing it – because two meetings need to be held, sometimes in quick succession.

<sup>6</sup>Section 20 of *The Children and Families Act 2014* (Transitional and Savings Provisions) (No.2) Order 2014



## Vicky's story

The council first issued Vicky with a Statement of SEN when she was at primary school. Soon after her school said it could not meet her needs. The council offered Vicky a place at a new independent school whose remit was to support vulnerable pupils with behavioural and emotional difficulties. The council amended Vicky's statement to name the school. The provision included a daily personalised literacy programme; a structured behavioural programme designed in consultation with an Educational Psychologist and Speech and Language Therapist; weekly therapy sessions with an Occupational Therapist; and a sensory diet.

Vicky's dad started to have concerns about the occupational and speech and language therapies being delivered at the new school. Both the council and school accept Vicky did not receive the provision she was entitled to, but each sought to blame the other. The council failed to hold Vicky's annual review on time, check how she was progressing at the school or confirm her parents were happy with her placement. This was particularly poor given it was a new school with no previous track record.

Vicky's family became increasingly concerned that she was no longer safe at the school. They requested a change of placement, which was due to be discussed at a review meeting. The council told Vicky's dad at the last minute the meeting would now be a transfer meeting to an EHC plan, but the council had not given the formal notice to start the EHC process and did not attend. Not enough time was allowed to discuss all the issues so a second meeting had to be arranged two weeks later.

Following further complaints from Vicky's dad about incidents, the school advised the council it was withdrawing the placement. The council said it was unable to prevent the school doing this because it was an independent school. Vicky was then out of school and the council provided just 90 minutes of home tuition a week.

The council then gave notice to start the EHC process two months after the first

meeting with the school, explaining the two previous meetings had been annual reviews, not part of the EHC process after all. The council did not hold its own meeting with Vicky's family as part of the EHC transfer. It then took the full 18 weeks to complete the EHC assessment and eventually issued a final EHC plan naming the alternative school Vicky's parents had previously requested.

Our investigation found the council failed to manage the transfer process properly. It should have consulted with Vicky and her parents about whether to transfer the statement. There was no absolute requirement to do it that year. If the family agreed to the transfer, the council should have planned to use the annual review as the transfer review meeting to minimise disruption and inconvenience. It should have attended a meeting as part of the EHC transfer. None of this happened. When Vicky's dad first asked for a change of placement, this should have been considered under the old procedure (Education Act 1996) as the EHC transfer process had not started. This would have meant an amended statement could have been issued after the annual review and appeal rights would have been engaged. Instead, the council continued with the transfer. This led to significant delay in Vicky starting her new school and insufficient alternative provision in the interim.

## How we put things right

The council agreed to:

- > pay Vicky £5,700 for the lack of educational opportunities and therapies while at the school and for failing to provide suitable alternative provision once the school had withdrawn the place
- > pay Vicky's dad £150 for the time and trouble he had been put to
- > review its policies and procedures to ensure transitions from statements to EHC plans are undertaken in accordance with the Code of Practice



# Common Issues

## Key phase transfers

When the Government published the timeframe for all pupils with Statements to transfer to EHC plans, groups at key transfer stages were given mandatory dates. Councils could also identify additional groups to prioritise, which they were to publicise in their local offer.

Key phase transfers are when a child moves between important schooling stages, such as primary to secondary education, or school to college. When children are approaching one of these, councils must identify the pupils well in advance and allow sufficient time to complete the transfer review. This allows enough time for parents to appeal the contents of an EHC plan or named placement before the start of the academic year, and to enable a smooth transition.

This forward planning is not happening in many of the complaints we see. Councils are not routinely using the annual review meeting as

the transfer meeting, are not considering early enough if further evidence is needed, and not allowing enough time to complete the process before the deadline to name placements.

While it is apparent councils are struggling to keep pace with the timetable set by the Government, in some cases councils have done transfers for non-mandatory groups even though they were not managing to complete those for mandatory groups on time. This indicates a lack of strategic planning.

We have also seen cases where inadequate or incomplete final EHC plans are issued to meet the timetable but further work is then needed to inform the EHC plan, which leads to subsequent further final EHC plans or unnecessary appeals. This undermines the intention to reduce the administrative burden on families and often causes unnecessary distress and confusion.



## David's story

David has autism. In his final years at secondary school, he became increasingly anxious and his attendance became problematic. Initially the council was unaware of the issues but following the annual review of his statement, it knew David was hardly attending school. Despite this, his statement remained unchanged and nothing was done to explore strategies to encourage and support attendance. In his final year, David stopped attending altogether. In planning for post-16 provision, the council was poorly prepared and offered to assess David for transfer to an EHC plan very late in the day. Meanwhile, David started at a local college. His learning disability assessment (LDA) was not updated to show how the college should meet his needs and what support he would require.

The EHC plan was drafted but was not shared with David, his mum or the college. Staff sickness during this period delayed matters further. The council believed David had settled well at the college and was making positive progress. But at a subsequent review meeting it became clear the college was unaware of the support David needed and his tutors had significant concerns about him.

It took the council nearly a year to issue the draft EHC plan. During this time David's mum constantly chased the council for updates, and it mostly didn't respond. He had 5 different allocated case officers.

Our investigation found David was left without the support and provision he needed because he did not have a robust LDA in place before starting college. This meant his first year was a negative and stressful time for the whole family. Once the final plan was issued and the support in place, we were pleased to see David made quick and positive progress.

## How we put things right

The council agreed to:

- > pay David £2,000 for his missed education in his final year of school and inadequate support in his first year of college
- > pay David's mum £1,000 for the severe inconvenience, frustration and distress caused by poor communication and failure to respond to her enquiries

## Ben's story

Ben was diagnosed with Autistic Spectrum Disorder at three years old. He attended a mainstream primary school with a statement including provision for one-to-one support.

When Ben was due to move to secondary school, the council began to transfer his statement to an EHC plan. Ben's parents wanted him to go to an independent specialist school. After considering alternative mainstream options, the council agreed to Ben's preferred placement and issued an amended statement. The school proposed a programme of three residential sessions during the summer term to aid Ben's transition. The cost of this was approximately £2,000. The council told the school Ben's parents would meet the cost.

Ben's dad asked the council why an amended statement had been issued when the EHC plan assessment was already being done. The council said the statement was out of date and needed to be amended to reflect Ben's current needs and name the new placement. A copy of the proposed EHC plan was sent shortly afterwards.

Ben's dad approached the council's mediation service to discuss concerns with the content of the plan, but the council felt it would not serve a useful purpose. It said it had agreed to the

preferred placement, and also that it could be residential. This was not required to meet Ben's needs but the daily travel would be excessive and costly. The council said any outstanding issues with the provision could be sorted out through finalising the EHC plan.

The final plan was sent the following month. The covering letter referred to the family agreeing to pay the transition costs. Ben's dad again requested mediation to discuss the costs, and the council declined.

Ben's dad was unhappy with the council's response to his complaints and approached us. Our investigation found the council was entitled to decline the original request for mediation because the final plan had not been issued and the process was not yet at a stage where appeal rights were being considered. However, given there was clearly a dispute about paying the transition costs once the final plan was issued, the council should have considered available options to resolve this.

## How we put things right

The council agreed to:

- > hold a disagreement resolution meeting with Ben's dad, and an independent facilitator, to look at the question of paying for the transition sessions.

# Common Issues

## Making decisions about placements and provision in a new EHC plan

Families can make:

- > a request for a personal budget at the end of the EHC needs assessment
- > a request for a specific school, college or institution once the draft EHC plan has been issued

We regularly see cases where discussions about placement happen too late in the EHC needs assessment process. Sometimes this is because councils assume, because the placement section of a draft EHC plan has to be left blank to allow parents to express their preference, they cannot discuss options before then. This can mean families are surprised by the placement the council names in the final plan, and lead to disagreements and appeals. It can also mean families don't have enough information about the costs of different options, or miss out on the opportunity to consider if a personal budget or direct payments might be suitable.

In cases we see where EHC planning works well, there is regular and open communication and discussion with families throughout the process and they are kept informed of placements being considered. While there is no obligation on parents to share their preference before draft

plan stage, early discussions about placement do not bind families to a particular option later on and may help minimise delay and disappointment.

Sometimes councils need to consult several schools before a suitable place is found and this time needs to be factored into the EHC process. We often see cases where late consultation has led to pupils missing out on the start of the school year or being out of education.

Where a family might want a personal budget, councils should be able to estimate provision costs (which would include placement, transport, health and social care) and share this at a stage when the family has time to consider and propose alternatives.

We find council officers sometimes don't have the necessary financial information to be able to properly consider parental preferences or requests for personal budgets. In particular, social care and transport costs are frequently not factored in when comparing the costs of placements. Sometimes this means councils are refusing the parent's preferred placement even when it is no more expensive in real terms, and should have been agreed.





## Solomon's story

Solomon's parents complained to us about an 18 month delay in assessing his SEN and failing to deal properly with their request for a personal budget. This meant Solomon's parents had to pay for a tutor who was teaching him at home.

Prior to the complaint being referred to us, the council acknowledged there was unacceptable delay in finalising the EHC plan. It also agreed there had been significant delay in arranging a personal budget, despite Solomon's parents requesting this in good time, following a completed needs assessment.

Solomon's parents complained to us because they didn't think the council had fully accepted the extent of the failings and the lessons to be learned.

### How we put things right

While the council had accepted its failings, it had not done enough to remedy the situation. We asked it to consider properly how it could put things right. It then proposed to:

- > backdate the personal budget
- > pay around £4,000 towards the tuition fees Solomon's parents had paid
- > pay a further £1,000 for the stress and anxiety the family had suffered
- > learn from the case by reviewing procedures to prevent the same mistakes happening again

Solomon's parents were happy this was an appropriate remedy for the injustice caused.





## Tasmia's story

Tasmia has a rare genetic disorder that affects all areas of her physical and cognitive development.

Tasmia's mum asked the council to provide support for her, so she could start nursery. The council agreed and also said it would assess her for an EHC plan. It planned to arrange specialist training for nursery staff to enable them to support Tasmia.

Unfortunately Tasmia became ill and had an extended stay in hospital. By the time she was discharged her medical needs increased and not enough members of staff completed the necessary training. This meant Tasmia's mum had to be at the nursery with Tasmia to ensure her medical needs were managed.

As a result she could not care for Tasmia's baby brother during sessions at nursery. The council agreed to pay childcare costs for him, but Tasmia's mum would have preferred to have enjoyed quality time with her son whilst her daughter was safely cared for at nursery.

The council met with Tasmia's parents to discuss the draft EHC plan. Tasmia's mum requested a

personal budget, and for music therapy to be included in the plan. There was delay of more than two months in the final plan being issued and the council failed to respond to the request for the personal budget.

Tasmia's mum complained to us. As a result of our investigation, the council accepted it was at fault.

## How we put things right

The council agreed to:

- > apologise to Tasmia and her parents
- > issue a decision on the request for a personal budget
- > pay £1,000 to Tasmia to be used for educational benefits
- > fund music therapy sessions until Tasmia goes to school
- > pay Tasmia's mum £250 for the time and trouble spent pursuing matters

# Common Issues

## Use of panels in decision making

The use of panels to make decisions about SEN placements is becoming an increasingly common practice. The Government recognises that moderating panels can be helpful to aid transparency and consistency, but families can feel excluded from the decision making process and their views ignored.

Councils must ensure the use of panels does not interfere with EHC timescales and a person centred approach. General principles of good administrative practice apply equally to panels as to other decision makers; such as being fair and transparent, making timely decisions, giving reasons for an adverse decision, and recording reasons in writing.

### Common faults we see include panels:

- > not making it clear to families whether the decision maker in their case is the SEN officer or panel
- > making a placement decision which has never been discussed with the family, and does not appear to take into account their views
- > keeping no minutes of their discussions and not giving reasons for decisions. This leaves families, and in some instances SEN officers, not able to understand how decisions have been reached
- > rejecting parental preference placements without calculating if there is any unreasonable additional cost to the public purse (when taking account of the whole cost of placements, including transport)
- > suggesting placements that are not compatible with professional advice in EHC needs assessments
- > delaying in considering cases, leading to the EHC plan being issued late.



## Henry's story

Henry has learning, social and communication difficulties associated with Autism Spectrum Disorder. Throughout primary and secondary school the council arranged his education under a statement, and he transferred to a college. There he enjoyed Art and Design and hoped to gain further qualifications to work towards paid employment in the subject.

However, neither he nor his parents felt his needs were being properly met at the college and asked the council for an EHC plan assessment. They had discussions with the council and believed an EHC plan would be issued.

Henry and his family requested a placement at a residential college specialising in the education of young people with high functioning autism. A SEN panel considered his request but refused it. Henry's family asked the council to issue a final plan to enable them to appeal for Henry's preferred placement. The council then confirmed at this stage that it would not assess Henry. It said it had been gathering information, since receiving the original request, to enable a panel to decide whether or not an assessment would

be completed. The council informed Henry and his parents of this decision 30 weeks after the initial request was made. The Code says this decision should be made within six weeks.

Henry and his family complained to us, and we found the council had significantly breached the statutory timescales. It had also created and maintained an expectation that Henry would be assessed and a plan would be issued.

## How we put things right

The council agreed to:

- > pay Henry £1,000
- > pay his parents £500, both for the distress caused by the council

Henry and his family ended up appealing the council's decision not to assess him with the SEND Tribunal, and the council conceded the appeal before the hearing. The family also appealed the council's decision on placement in the EHC plan it issued. The council then agreed to fund a placement, and Henry started at the specialist college he wanted to attend.

# Common Issues

## Failing to name a school in a final EHC plan

We have seen concerning examples of councils issuing final EHC plans with no school or college named. Often this is as a result of consulting schools too late, so that all their places are filled by the time the EHC plan needs to be finalised. To comply with EHC plan timescales, some councils are issuing final plans with only a type of placement named, or no placement named at all, leaving the child without a school place. Often the child is out of school and the council may also not be making appropriate interim education provision. The council then uses the time the appeal is pending as effectively a time extension to the EHC process, issuing a second final EHC plan once it has identified a school place.

We recognise there may occasionally be cases where despite the council's best efforts a suitable special school place cannot be found by the time the final EHC plan is due. Sometimes parents also ask councils to wait for a place to become available

at a particular school. It is lawful for a council to issue a Plan with no school named or only a type of school, and there is a right of appeal against such a decision, but these occasions should be rare. Where it is necessary to issue a 'holding' EHC plan, councils should consider naming the interim provision as the placement. This ensures the council has properly considered whether appropriate alternative education is in place and that the right of appeal is not delayed.

We are reminding councils that once they have issued an EHC plan they must secure the special educational provision in the plan, unless the child's parents makes alternative arrangements. By not locating a school place, a council is not absolved of this duty. Councils should ensure they look at out of area and independent options and consider putting in place interim therapy and alternative education – children should not be left without education.





## Jenna's story

Jenna is 15 years old and has a number of special education needs. She is academically able but has difficulties with concentration, following instructions and social interaction. Following a move to secondary school, Jenna struggled to settle and was moved from mainstream lessons to a small guidance centre. She felt socially isolated and became increasingly anxious and frustrated, particularly as she was not accessing the full curriculum.

The school's Special Educational Needs Coordinator (SENCO) requested an EHC plan assessment and indicated the school could not affectively manage Jenna's needs in the long term. The council started the process.

The council produced a draft plan around four months after receiving the referral. But it had not received responses from all the professionals it had contacted, and had not involved Jenna or her mum at all.

The council sent Jenna and the school a final plan two months later. It did not name a school but confirmed it felt Jenna's needs could be met in a mainstream setting. It made no reference to the professional advice it had sought and in the main was simply a cut and paste of the information contained in the original referral form.

The school reiterated it did not feel it could meet her needs and she had been absent for a significant period before the summer break due to severe anxiety. The council said the school had been named in the plan – which was incorrect – and confirmed it must keep a place available. Jenna's mum was also unhappy with the content of the plan and fed back her views to the SEN team. But, having never previously received a draft plan, assumed this was the draft and therefore missed the deadline for lodging an appeal to the SEND Tribunal.

Jenna remained out of school throughout the autumn term. The council did nothing to either challenge the school's position or consider what reasonable adjustments could be made to support her attendance. It did not make any arrangements for alternative provision until the following term when it finally arranged 12 hours per week home tuition.

Meanwhile, Jenna's mum identified a specialist school, and after consulting with the council a place was offered. The council issued a revised EHC plan naming that school. This was a year after the initial referral was made. Jenna started at the school, where she boards during the week, and has settled well.

Our investigation found the council exceeded the statutory timescales for producing the plan. It failed to properly consider professional advice in drawing up the plan and didn't involve Jenna and her mum. It didn't issue a draft plan; didn't consult with schools and failed to provide suitable alternative provision for Jenna.

## How we put things right

The council agreed to:

- > pay Jenna £2,800 for the loss of educational provision and her mum £500 for the distress caused
- > properly monitor the quality and timeliness of EHC plans
- > challenge schools on the right legal basis if they refuse children with an EHC Plan
- > provide interim educational provision to children out of school, within 6 weeks of being notified
- > improve its complaint handling



# Getting things right

From our investigations we have developed the following areas of good practice for councils:

- > Have a strategic plan for how the remaining transfers and new EHC requests will be managed giving priority to urgent cases and key transfer dates
- > The quality of EHC plans depends on the quality of advice obtained to inform them. Give professionals clear instructions about the advice required and that recommendations must be quantified and specified. Consider providing specific forms or guidance for professionals
- > Have a proper mechanism in place with NHS / CCG partners to address delays or problems receiving professional advice. Oversight by senior officers can free up SEN officer time chasing overdue advice, reduce delays and identify where there are pressures on services or a shortage of specialist advice
- > Plan ahead for transfers – the 20 week timescale is challenging but these families are already known to councils. Early discussion with families ahead of issuing the transfer notice can identify cases where significant changes in support are likely to be needed, or new assessments required to inform the EHC plan
- > Ensure social care needs are properly considered in every EHC assessment or transfer. Not every child or young person will need an in depth assessment but councils must be able to demonstrate how they have considered social care needs
- > Discuss possible education placements and their relative costs (including social care and transport) early, so families can make informed choices and have the opportunity to suggest alternatives
- > Consult possible education settings early and concurrently, not sequentially, to avoid unnecessary delay in reaching a decision
- > Work closely with families throughout the EHC process and let families know if the council's views about needs or placement diverge from those of the family. There should be no shocks or surprises when the draft or final EHC plan arrives
- > Ensure all those involved in SEN, including managers and panel members are properly trained in the law. Lack of training often leads to unnecessary mistakes, complaints, appeals and duplication of work
- > Where complaints about EHC plans cover the actions of the council and health, it is good practice for councils and their partners to provide a co-ordinated response to the complaint, where that is feasible and in accordance with the wishes of the complainant

# Scrutiny and the role of councillors

Councils and all other bodies providing local public services should be accountable to the people who use them. The Ombudsman was established by Parliament to support this. We recommend a number of key questions that councillors, who have a democratic mandate to scrutinise the way councils carry out their functions, can consider asking.

## How does your council:

- > Have the necessary resources in place to meet the statutory timescales involved in completing EHC assessments?
- > Consider (with the family) at the earliest opportunity the evidence that will be required to complete the assessment and/or transfer process?
- > Consider it is on target to transfer all existing Statements of SEN to EHC plans by April 2018. If not, what steps does it plan to take?
- > Properly involve children, young people and their families in decision making?
- > Understand the extent of its duty to gather evidence and have adequate procedures in place to ensure a child's social care and educational needs are properly assessed? Your council may also wish to consider guidance for Disabled Children for social care professionals: *'Identifying the social care needs of disabled children and young people and those with SEN as part of Education, Health and Care needs Assessments'* (May 2016), and *'The role of social care in implementing the Children and Families Act 2014'* which provide further guidance in this area.
- > Learn from the outcomes of complaints to improve services, and share this with the public?
- > Use our reports and decisions to develop its own policy and practice?

# The role of the Ombudsman

Local Government and Social Care Ombudsman investigates unresolved complaints about councils and other bodies providing local public services; and all adult registered adult social care providers. This includes any adult social care regardless of whether it is arranged or funded privately or through the council.

We share the learning from our complaints to help improve local public, and adult social care, services.

We are a free service. We investigate complaints in a fair and independent way - we do not take sides.

If we find something wrong, we make recommendations for the council or care provider to take action to put it right. What we ask the council to do will depend on the particular complaint, how serious the fault was and how the person was affected.

We have no legal power to force councils to follow our recommendations, but they almost always do.

Some of the things we might ask a service provider to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems do not happen again



## Local Government and Social Care Ombudsman

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