

Not going to plan?

- Education, Health and Care plans two years on



Focus report: learning lessons from complaints
October 2019
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Ombudsman's foreword



This report highlights the experiences of many of the children and young people that have special educational needs or disabilities (SEND), and their families, who have recently brought their complaints to us.

It gives a fresh picture of our casework, since we last published a [report about Education, Health and Care \(EHC\) plans](#) two years ago in October 2017. Back then we found, six months before the deadline to transfer all statements of SEN into EHC plans, there was significant confusion in local authorities and their health partners about their new responsibilities. We upheld nearly 80% of our first 100 investigations.

That 2017 report was itself a follow-up to [one we launched shortly before the new SEND laws came into force](#) in 2014, highlighting concerns about the old system in the hope they could be avoided in the new one.

Our latest casework statistics have driven us to report on this topic for a third time.

In 2018-19, we received 45% more complaints than in 2016-17 (315 cases up from 217) and we carried out 80% more detailed investigations (126 up from 70). But most concerning of all, is that we upheld nearly nine out of 10 investigations (87%) last year. This is exceptional and unprecedented in our work. It compares with an average uphold rate of 57% for all investigations discounting SEND cases.

“ We upheld nearly 9 out of 10 of investigations last year. This is exceptional and unprecedented. ”



The problems we saw in 2017 may have been explained by a new system bedding in, which could be expected to improve. But our latest investigations, and the case studies we present here, suggest a system in crisis.

They paint a picture of a system beset with serious problems, including:

- > **Severe delays** – of up to 90 weeks but regularly more than a year
- > **Poor planning and anticipation of needs** – such as council areas simply without any specialist provision available to them
- > **Poor communication and preparation for meetings** – including regular stories of non-attendance and no, or insufficient, paperwork submitted
- > **Inadequate partnership working** – with EHC plans regularly issued without advice from health or social care services
- > **Lack of oversight from senior managers** – cases ‘drifting’ needlessly and attempts to farm out responsibilities to parents

One particularly concerning development over the last two years has been examples we’ve seen of councils putting up additional barriers to services in efforts to ration scarce resources. While sympathetic to the severe financial constraints which councils tell us they are working under, we can never accept this as an excuse for failing to meet the statutory rights of children.

Always on the receiving end of these problems are children missing out on the support to which they are entitled, and families left to pick up the pieces. With inevitable delays, frustration and distress, we often see parents having to fight the

system that was established to support them. It is not uncommon to hear the SEND process described as a battleground.

While I recognise we investigate a relatively small number of complaints compared to the number of children and young people with EHC plans, these stories give a barometer of how the system is working for those people. It paints a worrying picture when compared with levels of fault we find elsewhere.

I hope this report helps to throw more of a spotlight on the problems with the SEND system, and places more urgency on the need to improve, before we hear more heartbreaking stories of children failing to meet their potential.



Michael King

**Local Government and
Social Care Ombudsman**

October 2019

Background to the report

Legal background

A child or young person has special educational needs (SEN) if they have a learning difficulty or disability which calls for special educational provision to be made for them. Most children have these needs met within local early years, mainstream school or college settings. Support at this level is called SEN support.

Some may require an Education, Health and Care (EHC) assessment for the local authority to decide whether it is necessary to make provision in accordance with an EHC plan¹.

The purpose of an EHC plan is to make special educational provision to meet the child or young person's SEND needs, to secure the best possible outcomes for them across education, health and social care and, as they get older, prepare them for adulthood².

The *Children and Families Act 2014* ('the Act'), the *Special Educational Needs Code of Practice 2015* ('the Code') and the *Special Educational Needs and Disabilities Regulations 2014* ('the Regulations') provide detailed guidance to councils about how they should manage the process of:

- > assessing children and young people for an EHC plan
- > how to decide whether to issue a plan
- > the content of the plan
- > how to implement, monitor or cease a plan

If parents or a young person disagrees with the content of an EHC plan or the proposed placement, they can appeal the First Tier Tribunal (Special Educational Needs and Disabilities) Tribunal.

The Ombudsman's role in complaints

We look at the actions of councils in delivering the EHC plan process. For example, complaints about delay in assessing a child or issuing a plan, failing to provide support and carrying out reviews.

Our powers do not allow us to investigate issues where there is a route to appeal to the Tribunal. For example, a council's decision not to assess a child, or the specific content of an EHC plan.

The complaints we receive about SEND often involve more than one statutory duty by the council.

We can look at most areas. For example: social care; school and college transport; school exclusion independent review panels (where the school is not a free school or academy); children missing from education; and alternative provision when a child is unable to attend school.

We do not have powers to look at what happens inside an educational setting in relation to special educational needs provision.

While councils may choose to organise their functions into different departments, we consider the council to be one corporate body and departments should work together in the best interests of the child and young person and to jointly answer complaints where possible.

We are increasingly seeing multi-faceted delivery arrangements. Some council services or functions are delegated or outsourced to third parties, and sometimes independent trusts are asked to take over council services deemed to be failing.

1. *The Code, par 9.1*

2 *The Code, par 9.2*



The law states that the actions of third parties should be investigated as if they were the actions of the council. Councils can outsource their statutory duties but they remain responsible for actions of third parties, including complaint handling.

Where we receive complaints that cover the actions of both a council and a health body we can, with the complainant's consent, consider them through our joint working team with the Parliamentary and Health Service Ombudsman. This gives a single decision made against both or multiple bodies.

Where we find fault in an individual complaint, we will consider whether others may have been similarly affected and make recommendations for service improvements when appropriate.

We share our upheld SEND decisions with Ofsted at the time of issue to provide invaluable intelligence to its inspectors. The cases we share also help to inform decisions Ofsted makes about the focus of future inspections and which councils will be inspected.

Latest developments

In September, the National Audit Office (NAO) published a report about support for children with SEND. It found some children are receiving high quality support that meets their needs, but raised significant concerns that many other children are not being supported effectively. It also concluded that, on current trends, the system for funding SEND support is not financially viable, as well as highlighting substantial unexplained variations in the support available in different geographic areas.

Shortly before, the Department for Education announced a major review into this area, aiming to improve the services available to families, and an additional £700 million of funding for pupils with the most complex needs.



Common issues

Delay

The whole process from first request for an EHC plan assessment, to issuing a final plan, must take no longer than 20 weeks. Within that, councils must:

- > decide whether to carry out an assessment within six weeks
- > if assessing, collect evidence from education, health and care professionals within a further six weeks
- > consider the evidence and decide whether it is necessary to issue a plan. If so, share a draft plan, consider representations or school preference of the parent or young person, and consult with schools

Delay is a factor in most SEND complaints we investigate. Sometimes, councils have attributed this to staff shortages or absence, decisions needing to be signed off by managers or panels, or delays by other bodies in providing evidence and advice.

We expect councils, as the lead agency in the EHC process, to have appropriate commissioning and partnership arrangements in place to allow SEND officers to obtain advice for EHC plans in a timely way and to have mechanisms to address problems that arise.



Nishanth's story

Case reference: [18 007 520](#)

Nishanth has medical conditions, including behavioural issues caused by complex developmental trauma. His parents asked the council to complete an assessment of his needs. The council took three months, rather than six weeks, to decide to carry out an assessment because a manager's decision was needed.

When the council sent Nishanth and his parents a draft EHC plan, which was some nine months after the initial request, it did not include any educational psychology advice. The council said it would provide an amended draft when this advice was received. It said the delay was due to a shortage of educational psychologists and an unprecedented increase in the number of requests for assessment.

The following month, which was now June, Nishanth's parents asked the council to name a particular school in the plan for him to start at in September. They also complained about the delay. The family wanted the current school and new school to work together on a smooth transition before term ended. This did not happen, however, because the council had not responded to the request. The council said this decision would be made by a funding panel at the end of July.

The council issued the final EHC plan in September, naming a different school than the family's preference. Nishanth's parents said when they visited the school named by the council, the school said it could not meet Nishanth's needs.

An individual remedy

The council agreed to:

- > apologise to the family
- > pay £1,400 for the impact of its delay on Nishanth's education
- > pay £300 to his parents for the distress, time and trouble they suffered

Nishanth's parents successfully appealed to the Tribunal about the contents of the EHC plan, and their preferred school was eventually named. But because Nishanth struggled to cope with change, he had to be educated at home by his parents in the intervening period.

Our investigation found an unreasonable delay of seven months in the EHC process. This delayed the family's right to appeal, and Nishanth being able to access a specialist school placement sooner.



Mia's story

Case reference: [18 003 453](#)

The council received a referral for an EHC plan assessment for Mia. The council had no information about Mia from her primary school, and had to request this three times. Once it received the information, the council agreed to carry out an assessment.

Some months later Mia was excluded from school because of her behaviour. Around two months later, the council started to provide one hour per week home tuition because it could not find an alternative school place. The council told Mia's mother to look at schools and let it know when she had found one, so it could apply for a place.

Next month the council issued a draft EHC plan. During this period Mia's mother contacted 11 schools, all of which either didn't respond to her or said they could not meet Mia's needs. The council didn't contact any schools until late March, when it asked the local short stay school for a place. The school confirmed it was full.

The council issued a final EHC plan eight months after the initial assessment request, which named the short stay school as an interim measure. The plan was also without an education psychology report as part of the needs assessment. The council believed an educational psychologist could only assess Mia once she was in a setting. In responding to the family's complaints, the council acknowledged it had known for two years of the shortage in short stay places in its area. In the summer Mia's mother found her a school and she started attending from the September.

Our investigation found the council did not provide Mia with a suitable education after she was excluded from school. Although she was assessed as needing an EHC plan, there was nothing to suggest she couldn't receive a full-time education at home or at another setting, or a combination of both, until a new school was confirmed. One hour a week was not appropriate, and she missed out on eight months of full-time education.

We also found the council wrongly devolved its responsibility for consulting schools to Mia's mother. While there was only a short delay in issuing the final EHC plan, it suffered from the missing education psychology advice. If Mia needed to be assessed in a setting, the council's delay in finding a setting was responsible for this.

An individual remedy

The council agreed to:

- > apologise to the family
- > pay £3,500 for Mia's lost education and the time and trouble the family were put to
- > refund cost of a dyslexia report the family commissioned
- > provide Mia with a laptop with educational software that had been recommended

Service improvements for all

The council agreed to:

- > carry out an audit to identify other children receiving less than their entitlement of alternative support
- > review its commissioning arrangements to ensure it has sufficient support in place
- > submit its findings to the relevant council scrutiny committee

The council later confirmed it was making a host of procedural changes, and the cumulative impact of the number of our investigations against it was closely linked to its decision to invest £120m in new special education provision.





Applying the right legal test for an EHC needs assessment

The law provides two triggers for when a council needs to decide whether to carry out an EHC needs assessment. Either a request is made by the parent, young person or school; or the council becomes responsible for the child or young person³. A council becomes responsible if a child or young person is in the council's area and has been identified, or brought to the council's attention, as someone who has, or may have, SEND.

The Code sets out the factors councils should take into account in deciding whether to carry out an assessment. It says councils may develop their own criteria as a guide to help officers but must be willing

to depart from their own criteria where there are compelling reasons.

Advice on accessing an EHC assessment should be set out in a council's local offer. The law and guidance does not specify how a request has to be made, or state that any specific information must be provided, to trigger a request.

In some investigations we have found councils not reacting to a request for an assessment or introducing additional requirements to trigger an assessment decision.

3.S.24(1) Children and Families Act 2014



Suzy's story

Case reference: [17 001 811](#)

Suzy was attending nursery at the time a paediatrician notified the council about her, on a 'notification of SEN' referral form. The box had been ticked indicating a statutory assessment was appropriate and said Suzy's parents supported the referral.

The council took no action when it received this form and did not consult Suzy's parents, who understood an EHC assessment had started. Shortly after, Suzy was diagnosed with autism and the report was sent to the council.

While waiting for the assessment, Suzy started private autism therapy. Some six weeks after the referral form was sent, Suzy's mother spoke to the council and found out an assessment had not started.

Council officers told Suzy's mother the nursery would have to complete three support plans before it would consider carrying out an EHC needs assessment, leading her to believe this was a legal requirement. During our investigation, the council told us it would not accept a request for an EHC assessment by telephone, and Suzy's parents should have put a formal request in writing, preferably on its standard form. However, the council did not provide Suzy's mother with the form and it was not available on its website.

It wasn't until later that Suzy's parents found out they could apply for an assessment themselves. The form was completed with three support plans provided by the nursery. These confirmed Suzy could not access activities without one-to-one support.

The council's panel rejected the application because of insufficient evidence of the nursery's interventions to support Suzy over a sustained period. There were no minutes of the panel meeting to explain this view. The council said the nursery should access early years funding and wait until Suzy had been in the setting longer.

A speech therapist wrote to the council about its decision, stating there was evidence the private therapy had led to marked progress and supported a challenge of the panel's decision. The council reversed its decision several weeks later. It said it had received new evidence, although Suzy's parents say the council had the evidence all along.

Having completed the EHC needs assessment, the council declined to issue an EHC plan. It then reversed that decision a month later when it realised it had lost a key report from a paediatrician. This was now a year after the first paediatrician's referral. Still, the council took another four months to issue a final EHC plan.

The plan agreed to fund Suzy's private therapy but the council would only backdate funding for a few months. This was because it regarded the 20 week process for completing an EHC plan to have started when the panel agreed to carry out an EHC assessment.

Our investigation found the council's requirement for three support plans was not lawful, and placed a disproportionate burden on all parents affected by this. We said the EHC process should have started when Suzy was brought to the council's attention by the first referral. However, it was likely



the council would have refused a request at that time and her parents would have had to appeal. Suzy's mother should have been advised correctly on how to apply when she spoke to the council later.

We decided the council should have completed the 20-week process much earlier, there was a 41 week delay in the final plan being issued.

An individual remedy

The council agreed to:

- > apologise to the family
- > pay more than £20,000 for cost of therapies which the council would have paid, had it completed the EHC plan in time
- > pay £1,500 to recognise distress caused, and time and trouble complaining

Service improvements for all

The council agreed to:

- > ensure it consults with parents or carers when receiving a formal notification child may have SEND
- > ensure there is SEND Code-compliant information on its website about how to request EHC needs assessments, and the relevant forms available
- > ensure its panels keep proper records of decisions
- > train its complaint team on EHC timescales
- > be willing to consider any other similar cases that come to light, in light of these findings



Danny's story

Case reference: [17 009 505](#)

Danny has Downs syndrome and was three years old when his family moved to the council's area. He came to the council's attention when his parents requested support and his GP also wrote to the council. A multi-agency panel invited Danny to join drop-in support sessions.

Shortly afterwards, Danny began to attend a nursery, but as he required 1:1 support, the nursery applied to the council for extra funding from its supported childcare fund. The council's panel considered the request, agreed Danny did require 1:1 support, and placed him on a waiting list for funding. It said there was insufficient funding available to allocate at that time.

Our investigation found Danny had been brought to the council's attention as a child who may have SEND by his parents, his GP and the nursery. This triggered the council's duty to consider whether an EHC assessment was required. It should have done so and provided a written decision with appeal rights.

We found that, if a council identified SEND support is required, and the setting could not meet that need from their own resources or from additional funding available to it without an EHC plan, then those children must meet the test for an EHC assessment.

We also found the council's advice to Danny's nursery was wrong, which stated requests for statutory assessment should be accompanied by two terms of observations and evidence of interventions from other agencies. The law and Code do not include such a requirement and the Code emphasises the importance, particularly in the early years, of avoiding delay in providing SEND support. There was no requirement to wait a further two terms to collect more evidence when the council's panel had already accepted Danny had unmet SEND needs.

We also said the council should not have operated a waiting list instead of considering whether EHC assessments should be carried out. It was inappropriately rationing services based on available resources, and not on need. This denied families a decision which would give them a right of appeal.

Danny's parents went on to make a formal request for an EHC plan assessment. We found the council delayed the process of getting an EHC plan, with appropriate support, by 11 months. We also found the council at fault for not starting an assessment of Danny, as a child in need, once he had been brought to its attention during the EHC assessment.

An individual remedy

The council agreed to:

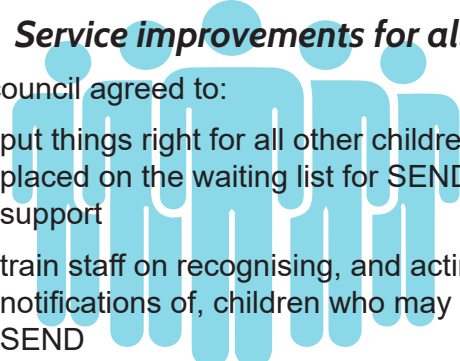
- > apologise to the family
- > pay them £4,150 for distress caused and lost SEN support



Service improvements for all

The council agreed to:

- > put things right for all other children placed on the waiting list for SEND support
- > train staff on recognising, and acting on notifications of, children who may have SEND





Legally compliant assessments

The quality of an EHC plan depends on councils collecting advice from all relevant professionals and on the advice collected being sufficiently detailed and precise. We continue to see complaints where councils are failing to obtain all the necessary advice, but we have also seen case examples where councils have restricted the scope of the advice they obtain due to resource pressures.

Section 36 of the Children and Families Act 2014 says an EHC assessment is '*an assessment of the educational, health care and social care needs of a child or young person*'. Regulation 6(1) of the Special Educational Needs and Disability Regulations 2014 sets out the list of advice the council must seek.



James' story

Case not published

James has autism and other conditions. His mother became concerned about the level of support her son's school was providing and that his Statement of SEND was now out of date. She asked the council to transfer him to an EHC plan. To inform the plan, she asked the council to obtain advice from an educational psychologist, clinical psychologist and the council's social care service, as well as James' school.

The council agreed to do the transfer but failed to obtain any of the statutory advice required under the law. The council said it would not get advice from an educational psychologist because there was a large backlog of requests and there was no prospect of getting an assessment for the foreseeable future. It said advice from an educational psychologist was only being obtained for first requests for statutory assessment or where the child's school placement was at risk.

Given the council's refusal, the mother paid privately for a report from an educational psychologist because James had not been seen by one since his mainstream placement broke down three years earlier.

The council also told her it did not agree that advice from a clinical psychologist was required because James did not meet the criteria for Children and Adolescent Mental Health Services. But it also did not get advice from any other health professionals. The council said it had no power to insist its social care team assessed James.

Our investigation found the council at fault for not getting the advice from the educational psychologist, as this was mandatory under the law. When parents ask councils to get non-mandatory advice, they are required to seek this advice if they believe it to be a reasonable request. In this case, the council provided sound reasons why it did not think privately commissioning clinical psychology advice was reasonable. However, it was at fault for not getting any other health advice.

The law and statutory guidance are clear that EHC assessments should consider social care needs where this is relevant. Therefore, it was wrong for the council to say it could not insist its social care team assessed James. Councils are one corporate body and different departments must co-operate in discharging the council's legal duties. In James' case, the council subsequently carried out a social care assessment, but this was too late for the social care support identified to be included in his EHC plan.

An individual remedy

The council agreed to:

- > apologise to the family
- > refund the family's cost for the private educational psychologist report
- > refund half the family's cost for the clinical psychology report

Service improvements for all

The council agreed to:

- > review its approach to collecting evidence to inform EHC assessments and address any systemic issues it finds





Involvement of health and social care

The Government has issued guidance for health and social care professionals about their role in the EHC process⁴. This sets out an expectation for education and training to be integrated with health and social care provision, where this would promote wellbeing and improve the quality of support for disabled young people and those with SEND.

In their joint commissioning role with Clinical Commissioning Groups (CCGs), councils are responsible for arranging EHC needs assessments and the support specified in EHC plans. The Government expects close co-operation between education, health and social care to research,

plan, commission and review services. It has tasked Ofsted and the Care Quality Commission (CQC) to carry out joint inspections to consider the contributions of education, health and care to children and young people with SEND in each local area.

There are separate complaint routes for services provided by the NHS and those by the local authority. At the end of each route is access to the relevant Ombudsman (either LGSCO or the Parliamentary and Health Service Ombudsman) and the option for the complaints to be considered by one investigator from our joint working team.

4. The Social Care: Guide to the 0 to 25 SEND Code of Practice - advice for social care practitioners and commissioners and the 0 to 25 SEND Code of Practice - Guide for health professionals



Jaya's story

Case reference: [16 008 145](#)

Jaya has autism and now attends secondary school. Some years ago, in a joint investigation with the Parliamentary and Health Service Ombudsman, we found the NHS Trust and the council at fault for not providing Jaya with occupational therapy (OT) and physiotherapy for several months.

After this, the council drafted Jaya's EHC plan and included provision from OT and physiotherapy under the relevant section (Part F) of the plan. The OT and physiotherapy were provided privately – sourced by Jaya's mother, organised by the council and funded by the Trust.

When, some months later, Jaya's mother had to find a new physiotherapist, the council and Clinical Commissioning Group (CCG) disagreed about who should fund it. This left Jaya without any physiotherapy, and later her OT support also stopped.

After Jaya moved from primary to secondary school, the council said it needed new assessments from therapists, but did not explain to Jaya or her mother why. It was because the council's EHC panel, which contained representatives from the local NHS Trust, wanted new assessments as the therapists had changed.

The CCG said it did not know the private therapists had left and it would have expected to receive referrals from the council or the school to request new assessments. It also said it did not receive a copy of the draft EHC plan to enable it to comment on the health aspects of the provision. The CCG would not support commissioning independent contractors over using NHS staff. On the other hand, the council said it was not its role to recruit or commission therapies, because it didn't have the expertise and could not monitor the provision.

Our investigation found the council was responsible for the support in Part F of the EHC plan and had not secured this. It did not carry out timely checks of the new physiotherapist and did not pay her, leaving Jaya without support. The council did not resolve the matter of how to secure new provision through the NHS, discuss the prospect of the CCG commissioning independent therapy, or commission an alternative itself. As a result, Jaya received no physiotherapy for 18 months and no OT for just under a year.

We also found the CCG at fault for excluding the option of private therapists when it knew the relationship between the NHS Trust and Jaya's mother had previously broken down.

We said both bodies had lost sight of Jaya's needs; they had not worked together to resolve the matter and also failed to deal with the family's complaints in a timely way.



Jaya's story (continued)

An individual remedy

The council and CCG agreed to:

- > apologise
- > (the council) pay £4,100 for the impact on Jaya of being without therapies

Service improvements for all

The council agreed to:

- > review its processes to ensure EHC provision is secured and in place
- > set out how it would work jointly with health; how it would secure therapy provision in future; and ensure disputes would be resolved

The CCG agreed to:

- > co-operate with the council's review of joint working arrangements





Personal budgets

Children with EHC plans and their families have the right to request a personal budget for their support, which can include funding from education, health and social care. Councils have a duty to prepare a personal budget when requested.

When a young person or parent is seeking an innovative or alternative way to receive their support, the planning and review process must consider these solutions. Details of an agreed personal budget must be included in Section J of an EHC plan and if provision is to take place in a setting, the consent of the setting is required.

Theo's story

Case reference: [17 008 944](#)

Theo is a teenager who has Attention Deficit Hyperactivity Disorder (ADHD). His statement of SEN noted he had difficulty focusing and seeing through challenging tasks, and he had a talent for sport.

During the process to transition to an EHC plan, Theo's father said the proposed plan wouldn't suit the way Theo preferred to learn because it relied heavily on a learning support worker. He said it wouldn't be in Theo's best interest to finalise the plan at that time, and requested a personal budget for a creative solution to help Theo progress. This would cover support workers from an ADHD group, mentoring, and sport-based learning activities.

The council said it would respond to the request after the summer holidays when it would be able to consult with Theo's school. But Theo's father had to chase the council for a response twice before it finally responded in late November.

The council agreed part of the budget but declined some provision. It did not explain arrangements for providing the part of the budget which the council did not agree to fund. He asked the council to reconsider his personal budget request.

Some months later the council issued the final EHC plan. It included a personal budget for some of the support requested by Theo's father. He complained about the delay and wanted to go to mediation to discuss the support allocated in the personal budget. It took 53 weeks in total to issue the EHC plan.

Our investigation found some of the council's delay was unavoidable but it should have made a decision about the personal budget 25 weeks sooner. The council also failed to ensure Theo received mentoring support set out in his statement of SEN during the transition phase.

An individual remedy

The council agreed to:

- > apologise
- > backdate the personal budget for 25 weeks and explain how the family can access the resources
- > make up for any missed ADHD support group sessions
- > pay a token amount for the time and trouble of having to complain

Service improvements for all

The council agreed to:

- > review the information it gives for accessing funds agreed under a personal budget





Annual Reviews

The Code says EHC plans should be used to actively monitor a child or young person's progress towards their outcomes and long-term aspirations. Councils must review plans at least every 12 months. Reviews must be undertaken in partnership with the child, young person and their parents, and must take account of their views and wishes, including the right to request a personal budget.

The first review must be held within 12 months of issuing the first EHC plan, and then within 12 months of any previous review. A council must tell the parent

or young person of a decision to amend or cease a plan. Decisions made after review carry a right of appeal to the Tribunal.

Councils must arrange annual reviews for children and young people who do not attend school. For those in school, councils can ask schools to arrange reviews. But councils must send the school notice two weeks before the start of each term of the pupils due for a review that term. It must also advise the CCG and social care services.

Polly's story

Case reference: [18 011760](#)

Polly is a young adult who receives education, but not at school, via a personal budget.

Polly's parents complained to us that the council failed to complete annual reviews of Polly's EHC plan for two years. Firstly, Polly's parents had to prompt the council to hold the review meeting. At the meeting it was agreed changes were required to the plan. However, these were not made and the review was not completed.

The following year, Polly's parents again had to prompt the council to hold the meeting. And again, they heard nothing from the council after the meeting.

It was also the fourth time Polly's parents had to complain to us on different aspects of Polly's education.

By the time we became involved, the third review meeting was imminent. We found there had been an unacceptable two-year delay in the council reaching a simple decision whether to make changes to Polly's plan. This caused Polly distress because she worried the council could withdraw her support at any time.

We also found the delay had potentially hindered Polly's progress and independence because the lack of a decision meant additional support could not be added to her plan. For example, there was an outstanding request from Polly's parents for driving lessons. We also found the council at fault for relying on parents to ensure its children's EHC plans are properly reviewed.

An individual remedy

The council agreed to:

- > apologise to Polly and her family
- > promptly issue a revised EHC plan or make a decision not to amend it
- > pay £450 to recognise the distress, uncertainty and time and trouble it caused

Service improvements for all

The council agreed to:

- > audit its EHC plans for all children educated otherwise than at school, ensuring there has been an up-to-date review; there is a system to organise the meetings; and there is sufficient time to make decisions within the required timescales
- > check a sample of cases to understand whether the issues highlighted in this case extend to SEND cases in general, and whether there is enough capacity to meet statutory duties
- > report the findings of the two audits to the relevant council scrutiny committee





Amending or ceasing a plan

When a council proposes to amend a plan it must send the parent or young person a copy of the current plan and an amendment notice detailing the proposed amendments. It must include evidence to support the proposed changes.

A council may end a plan if it is no longer responsible for the child or young person, or if it decides it is no longer necessary to maintain the plan.

A lack of resources should never be the primary factor in deciding whether to amend or cease an EHC plan. Decisions must be made on the basis of need and evidence.

Kuba's story

Case reference: [17 009 618](#)

Kuba has autism and had attended an independent residential special school outside of the council's area for five years. He had taken a long time to settle there and wished to remain for years 12 and 13 (post-16 education).

The council decided he should move to a mainstream placement, with a bespoke package of support, at the end of year 11. But the council did not discuss this with Kuba or his family. It claims to have shared this decision with the family at the year 11 annual review, which was also the EHC transfer meeting.

The council also took no steps to identify a new placement during year 11, so Kuba started Year 12 at his current school. The council then told the family it would only fund Kuba's place until the end of year 12, despite not presenting any evidence why he should complete only one year of the sixth form programme. Professionals did not support a move unless it was to another long-term placement where Kuba could stay until he was 25.

The council did not start looking for a mainstream placement until February of Year 12. It did not find one that could meet Kuba's needs by the time the funded place at his current school ended in the July. Eleven mainstream schools told the council they could not meet Kuba's needs with a bespoke package.

This left Kuba without suitable education from the end of Year 12 until the council secured a new independent special school placement for him in February of Year 13. In that time, he was supported by social care and received funding to do an art course and to spend two days a week on a farm. But this did not meet his assessed needs.

Our investigation found the council had made a number of errors, and its decision to change Kuba's placement was driven by a desire to reduce costs – it wasn't supported by professional evidence.

The council had started transition planning two years late in Year 11. There was a 14-month delay in issuing the EHC plan, because of problems finding a new placement. It also had insufficient awareness of the provision available locally.

When the council made the unusual decision to move Kuba half way through his two-year sixth form course, it did not start investigating bespoke mainstream packages until halfway through Year 12. It also rejected an offer from the school to allow Kuba to stay for a further term saying this was not in his best interests or a good use of public funds, even though it had no alternative school to offer.

In addition, the council had not properly assessed Kuba's social care needs or his parents' needs as carers when it decided Kuba should return home from residential school. All these faults caused huge uncertainty and distress to the whole family.



Kuba's story (continued)

An individual remedy

The council agreed to:

- > apologise to Kuba and his family
- > pay £4,700 to recognise loss of support, uncertainty, distress and time and trouble caused

Service improvements for all

The council agreed to:

- > audit all other out of area placements that were moved, to ensure decisions were based on need, not resources – and act if they were not
- > review procedures to ensure it meets its duties around EHC plan timescales and providing support
- > revise its local offer so it properly reflects provision available
- > take action to ensure transition planning work begins in Year 9





Voice of the young person

One of the main changes in the 2014 Act and Code was an emphasis on the participation of young people in discussions and decisions about their own support, and at a strategic level. Councils must consider whether some young people require support to express their views, such as an advocate, and should have arrangements in place to engage with them directly.

The rights of young people older than 16 to make decisions is subject to their capacity to do so,

which is set out in the Mental Capacity Act. The presumption is young people have capacity to make their own decisions unless proven otherwise. Young people can ask a parent to act on their behalf.

We expect councils to engage with young people directly about complaints unless they have asked their parent to be their representative or they lack the capacity to bring the complaint themselves.

Bradley's story

Case not published

Bradley was a young adult who had previously been supported by a Learning Disability Assessment (LDA).

Bradley's mother and the council had been engaged in a protracted complaint about the delivery of Bradley's social care package. She had also asked the council to transfer Bradley's LDA to an EHC plan.

The council agreed but took 60 weeks to complete the EHC process. It said this was due to SEND staff shortages. It then did not complete the process properly because it did not obtain social care advice and left the social care part of the EHC plan blank, even though Bradley had a care plan.

The council added care support to the EHC plan after an appeal to the First Tier Tribunal but put it in the wrong section. Social care services then refused to honour the provision in the EHC plan. It said this was historical and it had not been involved in writing the EHC plan.

The council withheld Bradley's social care provision because it decided his mother was not co-operating with a review that was overdue. The council acted as though Bradley and his mother were one legal entity and did not engage directly with Bradley throughout a period of two years when it was in dispute with his mother. This was despite the fact the council confirmed Bradley had capacity to make his own decisions.

Our investigation said the SEND and social care teams should have talked to each other before the EHC plan was issued: the way a council organises its internal departments should not affect its ability to meet its duties. We said the council had not done enough to resolve disputes between its internal departments and had lost sight of the young person and its responsibility to involve Bradley.

An individual remedy

The council agreed to:

- > apologise
- > pay £2,650 to recognise missed support and time and trouble complaining

Service improvements for all

The council agreed to:

- > review its training, resources and policies
- > ensure accurate records are kept, particularly where there are disputes or disagreements





Transition to adulthood

EHC plans should be reviewed and amended to give sufficient time for planning and commissioning of placements when a child or young person moves between phases of education.

Transition planning for adulthood should start in Year 9. Councils have statutory duties to consider the educational needs of the young person, whether a young person is likely to need care and support after they reach 18⁵, and whether their carer's needs might change. The Code sets out the importance of a full programme of provision that covers five days

a week for young adults with an EHC plan. Parents and young people can request personal budgets for both the education and care elements of their EHC plan.

Councils need to ensure health, education and social care services work together to ensure a smooth transition post 18; that it engages with the young person directly, and provides accurate and timely advice about associated matters, like transport to college.

5. Care Act 'Child Needs Assessment'



Rikesh's story

Case reference: [16 012 609](#)

Rikesh has Downs Syndrome and attended a specialist school. His father requested his Statement of SEN be converted to an EHC plan in his penultimate year before transferring to college.

The process started in the April and the school collected advice to inform the EHC needs assessment. In the autumn, the family expressed a preference for a college placement for Rikesh to start the following September.

Soon after the council issued a draft EHC plan. It went to the council's panel to consider the college placement and whether further evidence from social care and physiotherapy was needed. Therapy advice was obtained and another draft EHC plan issued. By now it was March.

Because no social care advice had been sought, Rikesh's father requested an assessment. The council issued the final EHC plan at the end of June stating a social care assessment was being carried out, but without stating the care provision to be made. The preferred college was named in the plan.

Shortly before the placement was due to start, Rikesh's father found out the council would not provide transport. This was despite Rikesh being 19, but not able to travel independently. Rikesh's father said he wanted to return to work while his son was at college, but that was not possible if he had to take his son to college.

The social care assessment was completed in the November. It found Rikesh needed round-the-clock care, support with leisure activities, and a support worker on Friday when not in college. It did not consider any holiday time support. It concluded that providing 24 hour care had only a 'minor restriction' on Rikesh's father's activities.

As a result of our involvement, the council acknowledged that caring had a significant impact on Rikesh's father's life. A personal budget for care was provided but there was delay in providing direct payments.

Our investigation found the council was confused about when the EHC transfer had started and had wrongly delegated obtaining advice to the school. It took 14 months, rather than 14 weeks, to complete the transfer and failed to name the college placement by the statutory deadline of 31 March in the year Rikesh started college.

We found the council had not applied the correct legal test to assess Rikesh's eligibility for transport and had been wrong to insist his father or someone else did it, when he had confirmed he was not able or willing to do so.

The council did not assess the needs of Rikesh and his father before Rikesh turned 18, and did not include social care in the EHC needs assessment. The care assessment then took too long, did not assess Rikesh's capacity, consider the need for transport to leisure activities or needs in holidays when he was not in college.

Rikesh's father had won an appeal to the Tribunal for extra therapy. We found Rikesh would have received this a term earlier if it wasn't for the delay in the EHC process.



Rikesh's story (continued)

An individual remedy

The council agreed to:

- > apologise to Rikesh and his father
- > reimburse and pay future costs for transporting Rikesh until new arrangements are in place to relieve his father of the responsibility
- > pay £2,100 for lost support and time and trouble complaining

Service improvements for all

The council agreed to:

- > update published information on eligibility for post-19 transport, and include clear complaint processes in its new transport policy
- > review EHC procedures and train staff where needed, particularly on transport duties and transition planning
- > review all cases of 19-25 year olds with an EHC plan naming a setting, but not currently receiving free transport



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 resources and systems in place to meet statutory timescales for EHC assessments and annual reviews?
- > have strong partnerships at a senior level in health, education and social care to jointly commission services for EHC assessments and provision, and to address problems and complaints when they arise?
- > have processes in place to consider joint funding between services and resolve funding disagreements between health, care and education?
- > provide clear guidance to professionals who provide evidence for EHC assessments as to the level of detail and specificity required in their reports to enable SEN officers to draft thorough and legally compliant EHC plans?
- > embed complaint systems into any new delivery arrangements and provide clear advice and signposting to families who need to make a complaint?
- > obtain the consent of young people with capacity, when a complaint is raised on their behalf – or empower them to speak up in their own right?
- > provide all relevant officers with training on the law for children and young people with SEN and disabilities?
- > have systems in place to check that provision in an EHC plan has been secured and is being provided to the child or young person?
- > ensure any changes to policies or eligibility criteria are checked by legal advisers to ensure the new service standard is lawful? We advise councils to keep to the wording in law and guidance as much as possible to avoid misunderstanding of the legal tests to be applied.
- > ensure Panel decisions are transparent and properly take into account the needs and evidence presented, with clear reasoning recorded? Parents and young people should be able to understand how a decision has been reached.
- > learn lessons from complaints received, including identifying any systemic issues which may affect others?



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