

CSN POLICY BRIEFING

Special Educational Needs: preparing for the future – LGO report

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Summary

The Local Government Ombudsman (LGO) has published a [focus](#) report [Special Educational Needs: preparing for the future](#) (March 2014) to assist local government on implementing the SEN provisions (Part 3) of the Children and Families Act (see [Related Briefings](#)) by highlighting some of the problems that have occurred under current arrangements. The report focuses on parent complaints about SEN provision. As one of the aims of the new legislation is to give a greater voice to parents and young people, the points raised are relevant.

This briefing will be of interest to council members and officers with an interest in Special Educational Needs and Disability and the commissioning of services.

Background and Context

The Children and Families Act

Major changes in the Act include extending the responsibilities of local government for provision up to the age of 25 and replacing statements of SEN with Education, Health and Care (EHC) Plans, which will be created through a new assessment process and closer joint working between councils and NHS Trusts. The legislation aims to increase the voice of the parent or young person within the process, reduce the time taken to complete assessments, ensure a holistic plan for those with assessed SEN and improve outcomes for all. The transition to the new arrangements start in September 2014. The 'Special Educational Needs (SEN) Code of Practice: for 0-25 years' (the Draft Code) provides guidance for those working to deliver SEN support (see [Related Briefings](#)).

In order to try and ensure that council's take a greater account of family wishes the Act also introduces a new requirement to provide independent advice, information, and if they want it, mediation, prior to parents going to a Special Needs and Disabilities Tribunal. In order to proceed to an appeal parents must have a certificate showing they have considered mediation, except in cases where they simply want to challenge the provider (school, college, etc) to be named in the plan. Section 57 of the act also requires local authorities to put independent resolution procedures in place where parents disagree with the local authority or a provider. [Special Educational Needs: preparing for the future](#) looks at recent complaints to the Ombudsman and local government's performance at resolving complaints.

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Statutory Duties

Local government has a statutory responsibility to respond to requests for an assessment of a child's SEN from schools and parents. They must consider, and if agreed, complete the assessment within fixed timescales set out in the Code of Practice. Once an assessment determines the SEN provision needed, the council has a duty to secure the provision. It must also ensure the statement is reviewed annually and that any changes from the review are implemented.

Councils are not obliged to provide exactly what each parent requests, but they should be able to explain clearly why they consider a suggested provision meets the assessed needs of any individual child. They must also take steps to ensure that the views of the child or young person are properly recorded and considered when planning provision for them. The First Tier Tribunal (Special Educational Needs and Disability) provides a route to resolve differences about what is set out in a statement of SEN or an EHC plan.

Councils must also provide support services (such as education psychologists or behavioural and sensory impairment support) to enable schools to provide for all children with SEN. They have an overarching responsibility to work in partnership with other bodies, including the NHS, the voluntary sector and, above all, parents in ensuring appropriate services are available.

Schools have a duty to put in place the provision set out on a day to day basis. They also have a duty to identify and support all children with SEN appropriately. At the point at which a school or parent requests an assessment of SEN the formal involvement of the council is triggered.

It can be difficult for parents and carers to navigate their way through the separate systems for complaints about schools, local authorities and health provision. Although the Children and Families Act does not put in place a single appeal mechanism it does provide for a new mediation service prior to an appeal to the Tribunal and other redress.

Briefing in Full

The Role of the Local Government Ombudsman in relation to SEN

Whilst the courts determine what is and is not lawful, the LGO has discretion to decide what constitutes administrative fault. This means it can criticise councils for poor practice, as well as for failing to consider or take account of their legal duties. The LGO also has a duty to pursue recurring issues in order to promote improvements.

The role of the LGO is, however, limited. It cannot review the actions of schools (although it may look at the actions of councils where they relate to those of schools). It cannot consider complaints about School Action and School Action Plus provision (as local government has no direct statutory involvement at that stage), and it cannot consider the work of the NHS or other non-council providers' actions (although LGO does work jointly with the Parliamentary and Health Service Ombudsman on NHS issues). The contents of statements and EHC plans do not come within its remit, however, it is empowered to comment on the administrative efficiency of local authority actions in developing and delivering those plans.

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Normally the LGO would expect councils to consider a complaint through their complaints procedure before it investigates, but it can waive this requirement if a child is out of school or is not receiving the support specified in a statement or EHC plan.

Areas of Complaint

17% of all complaints (3,432 in total) in 2012/13 were in the education and children's services area with 8.6% of those complaints being about SEN issues. The volume in 2013/14 will be broadly the same. The most significant areas are detailed below.

Delay

Delay is an overriding feature in most complaints about SEN made to the LGO and can happen at various points in the process (delays in issuing final statements, processing Annual Reviews, putting in place the provision within a statement; and carrying out Learning Disability Assessments for post-16 placements). Delay is also seen as the catalyst for other faults, or as leading to other problems, like the failure to make suitable provision or the loss of education.

Councils sometimes delay naming a school due to a lack of agreement with parents, even though the Code allows a council to name a school without that agreement. The LGO points out that delaying the statement because there is no agreement denies the parent the right to appeal that decision to the Tribunal.

The report quoted an example where a child with autism in a mainstream school regressed in his self-help and independent skills to such an extent that he required constant support from his mother to carry out daily routines. This resulted in declining attendance.

The LGO found that the council had (i) delayed in taking action to ensure the child attended school; (ii) failed to ensure he was receiving the provision in his statement; (iii) failed to tell his parents it had not altered his statement after their request for a different school; (iv) delayed in holding a review of his statement, and (v) offered inadequate alternative provision while the child was not in school. The impact on the child and family was significant. The child lost out on appropriate education for more than two years as well as losing out on essential social skills development, which affected his ability to move into adult life.

In a further example, the LGO report highlighted how delay and lack of provision had reduced post-16 education choices. The council were found to have failed to provide elements of the provision in a young person's statement, and because they took 15 months from issuing a proposed Statement to publishing a final version, they were also found to have prevented the mother from appealing against the council's decision during this time.

Review and Transition Planning

The LGO refers to the existing SEN Code which says that advance planning for transition is essential. The new Draft Code also identifies that an EHC plan 'must be reviewed and amended in sufficient time prior to a child or young person moving between key phases of education, to allow for planning and, where necessary, commissioning of support and provision at the new institution'. This means a timely and holistic assessment of future needs, consideration of the young person's aspirations and abilities, and provision of suitable placements in good time.

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In a published case study, post-16 transition planning for a visually impaired student had started in year 9. It had been characterised by decisions that were changed (as a result of funding pressures) and new assessments (from a social worker in this case) that appeared uncoordinated with other elements of the transition planning. The LGO found that the council failed to involve social services early in the transition review process, meaning that the transition planning was not holistic, and one of the options was not considered early enough. The Placement Approval Panel had also failed to take into account the young person's long-term objective to attend university, and delays in the council's appeal process added to prolonged uncertainty about the future.

Loss of Education

Loss of education can occur because of an inability to find a suitable school in time and/or a failure to provide suitable interim provision to cover any delays. This has an impact on both the child's educational and social development and on parents or carers, who are left responsible for the additional care at a time when they would have normally expected a break.

In the case study quoted, the council had not provided any 'alternative education', nor had they supported the school who said they would have to exclude the child permanently because of his challenging behaviour if he returned. They had also allowed the case to become protracted, and had not discussed interim solutions with the parents.

Failure to provide specialist support or overall provision

The Draft Code says that councils must arrange the special educational provision specified in the EHC plan. Generally where the council has clear knowledge of what provision is needed and a likely start date for that to happen, delay is not acceptable. The LGO, in most cases, expect straightforward provision to be in place within no more than four weeks, and complex provision to be available within no more than half a term. Councils also have a duty to ensure there are suitable resources to provide for the overall SEN in its area. This includes providing specialist support to enable schools to provide for all children with SEN – for example speech and language therapy, Autistic Spectrum Disorder provision, teacher of the deaf, etc.

The report provides an example of a local council which withdrew the support of a speech and language therapist who carried out assessments and updated the programme of speech and language therapy delivered by school staff. The LGO deemed the continued support provided by the school as insufficient. A joint investigation by the LGO and the Health Service Ombudsman found that both the council and the then Primary Care Trust (PCT) (now a Clinical Commissioning Group), failed to tell the parents that their child was no longer getting speech and language support. Both organisations were at fault in the way they handled the parents' complaint.

Unlawful Exclusion

Guidance on exclusion says schools must take account of their statutory duties in relation to SEN when administering the exclusion process. The report also suggests that 'unofficial' exclusions, like being sent home to 'cool off', arise when a child's SEN is being poorly managed or inadequately provided for. Whilst the LGO remit does not stretch to the work being done within schools, they can consider an underlying responsibility that councils have to ensure a child's inclusion within the education system. It is also unlawful to exclude a pupil simply because they have additional needs or a disability that the school feels it is unable to meet. 'Informal' or 'unofficial' exclusions, such as sending

pupils home 'off the record', are illegal, regardless of whether they occur with the agreement of parents or carers.

A case study focused on a primary pupil with a diagnosis of Autistic Spectrum Disorder, associated language disorder, sleep difficulties and loco-motor difficulties who has been excluded from school often. The LGO found that the council was aware of the exclusions and did not act when it should have to provide the school with advice and support in the interests of the child concerned.

Putting Things Right

The report notes that a deterioration of the relationship between parents and councils is at the heart of many complaints. The report suggests that there is an increased likelihood of resolving disputes locally, if councils do everything possible to keep communication with parents open and constructive for as long as possible.

The report's recommendations are:

- A) Keep to the timescales for the assessment and statement process especially in issuing a final statement which gives parents their statutory right of appeal to a Tribunal.
- B) Consult concurrently rather than sequentially with several schools when considering suitable placements to avoid unnecessary delay in reaching a decision;
- C) Take timely actions following annual reviews where amendments are needed to provision, placement and the statement. Recognise the need for timely planning and provision for all phased and other transfers to new schools;
- D) Ensure the availability of suitable alternative provision when placements break down or when there are delays in providing a suitable school place.
- E) Make sure the provision set out in the statement is in place at the start of a statement, after reviews or for temporary periods.
- F) Work closely with NHS and other partners to address possible and known shortages of specialist input.
- G) Work with schools to ensure pupils with SEN do not receive 'unofficial' exclusions and remind schools of the legal position on such exclusions.

Encouraging local accountability – questions for elected members and scrutiny committees

The report also raises some key questions for councillors involved in scrutinising the way local authorities carry out their functions and hold service providers to account. These are:

1. Does the council have an SEN strategy in place that is informed by known demographic information?
2. What steps does the council take to ensure the child, young person and their parents are enabled to participate as fully as possible in decisions about them?
3. Given the significant constraints on resources, how is the council ensuring that sufficient, quality resources and expertise are available now and in the future?
4. How will the council deliver the requirements in the Children and Families Bill for enhanced partnership working, with the NHS in particular, to meet the shorter assessment timescales?

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Comment

[‘Special Educational Needs: preparing for the future’](#), in particular the case study examples of where council procedures were found to be at fault, will be of help to local authorities who will be continuously reviewing their policies and procedures in the light of the requirements in the Children and Families Bill and any further guidance, particularly on mediation and dispute resolution, that may still be issued.

The key issue remains agreeing the needs of the child or young person with them and their parents, whilst at the same time assuring or ‘commissioning’ the provision that is needed and affordable. This paper will not help directly with that task, but will help council’s ensure they have good procedures in place that can help to avoid some of the obvious pitfalls that could be encountered following an act which sets out to give a bigger voice to parents and families.

External downloads

Local Government Ombudsman, [‘Special Educational Needs: preparing for the future’](#) (March 2014)

Legislation.Gov.Uk., [Children and Families Act 2014: Section 3, Children and young people in England with special educational needs or disabilities](#)

Legislation.Gov.Uk., [Children and Families Act: Explanatory Note, Section 3](#)

Related briefings

[Children and Families Act 2014](#) (provisional) (February 2014)

[Impact Evaluation of the SEND Pathfinder Programme – DfE](#) research (December 2013)

[Draft SEN Code of Practice: processes and children in specific circumstances](#) (November 2013)

[Draft SEN Code of Practice: local authority and institution roles and functions](#) (October 2013)

For further information, please visit www.lgiu.org.uk or email john.fowler@lgiu.org.uk