

**Report by the Local Government Ombudsman  
and Social Care Ombudsman**

**Investigation into a complaint against  
London Borough of Lewisham  
(reference number: 16 012 609)**

**<4 July 2018>**

## The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

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 council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

# Investigation into complaint number 16 012 609 against London Borough of Lewisham

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Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

## Key to names used

Ms X – the complainant

Mr Y – the complainant’s son

## Report summary

### **Special Educational Needs / Adult Care Services:**

A mother and carer complains about the way the Council assessed her son's eligibility for special educational provision, social care and transport when he transferred from school to college. She also complains about the Council's failure to offer a personal education budget or to mediate disagreements.

### **Finding**

Fault found causing injustice and recommendations made.

### **Recommendations**

The Council has accepted our recommendations. The Council will consider the report at its full Council or Cabinet or other appropriately delegated committee of elected members and confirm within three months the action it has taken or proposes to take. We will require evidence of this. *(Local Government Act 1974, section 31(2), as amended)*

In addition to the requirements set out above the Council has agreed to take the following action to remedy the injustice identified in this report. The Council will:

- apologise to Ms X and Mr Y;
- retake its decision about Mr Y's eligibility for transport;
- review Mr Y's care assessment and care plan to ensure it fully reflects his needs;
- provide a financial remedy to Ms X and Mr Y;
- develop and publish a transport policy for post-19 learners;
- review its policies, guidance and training in areas where we have identified fault; and
- carry out a review of other cases where young people may have been similarly affected.

## The complaint

1. Ms X complains about the way the Council assessed her son's (Mr Y's) eligibility for special educational provision, social care and transport when he transferred from school to college. She also complains about the Council's failure to offer a personal education budget or to mediate disagreements.
2. Ms X says the Council has caused injustice as:
  - she cannot look for paid employment because the Council expects her to be available to drive her adult son to and from his college and activities;
  - she has been put to unnecessary time and trouble pursuing a complaint; and
  - Mr Y had no support workers to take him to his weekly activities, so had to attend with his mother, which compromised his previous independence.

## Legal and administrative background

### The Ombudsman's role

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
4. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
5. We cannot investigate a complaint if someone has appealed to a tribunal. (*Local Government Act 1974, section 26(6)(a), as amended*)
6. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Chamber of the First Tier Tribunal ('SEND')*)
7. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)

### Decision making

8. The Ombudsman's guidance '[Good Administrative Practice](#)' (2001) sets out principles of good administration in decision making. These include:
  - ensuring adequate consideration is given to all relevant and material factors in making a decision, including any special circumstances of the case;

- ensuring irrelevant considerations are not taken into account in making a decision;
- having regard to relevant codes of practice and government guidance.

## **Transfers to Education, Health and Care (EHC) plans**

9. The Children and Families Act 2014 established a new system where EHC Plans would (by April 2018) replace statements of special educational needs (SEN). When a statement of SEN is transferred to an EHC plan the council needs to carry out an assessment of a young person's education, health and care needs. (*Section 36 (2) Children and Families Act 2014*)
10. The council must gather advice and information to inform the EHC assessment from various sources, including social care. It is the council's duty to lead the process and collect the advices. Government guidance says any social care assessment required should be combined with the EHC needs assessment. (*'Social care: guide to the 0 to 25 SEND Code of Practice. Advice for social care practitioners and commissioners'*)
11. Where, in the light of an EHC needs assessment, the council considers it is necessary for special educational provision to be made for a young person in accordance with an EHC plan, the council must ensure that a plan is prepared. The plan must specify:
  - the special educational provision the young person needs (in Part F of the plan);
  - any health care provision required by the learning difficulties or disabilities which result in the young person having special educational needs (in Part G of the plan);
  - in the case of a young person over 18 any social care provision reasonably required by the learning difficulties or disabilities which result in the young person having special educational needs (in Part H of the plan). (*S.37 The Children and Families Act 2014*)
12. Social care or health provision which 'educates or trains' a young person may be 'deemed educational provision' (*s. 21(5) Children and Families Act / East Sussex County Council v TW [2016]*) and included in Part F of the EHC plan, rather than in Part G or H. Councils have a legal duty to secure the special educational provision specified in Part F of an EHC plan (*s.42(2) The Children and Families Act 2014*). Provision specified in Part F can be appealed to SEND.
13. The Children and Families Act 2014 (Transitional and Savings Provisions) Order 2014 details the procedure for transferring statements to EHC plans.
  - Where a council maintains a Statement of SEN for a young person who is expected to transfer to a post-16 institution the council must conclude the EHC needs assessment before 31 March in the calendar year in which the transfer takes place.
  - A local authority must give notice to the young person or parent two weeks before the EHC needs assessment begins.

- A local authority must invite the young person / parent to a meeting with a relevant council officer to discuss the education, health and care needs.
- Where a local authority decides it is necessary for special educational provision to be made in accordance with an EHC plan it must send the finalised plan to the parent or young person as soon as practicable and in any event within 14 weeks of the day notice was given.

## Mediation

14. Where there is disagreement with the contents of an EHC plan, the Children and Families Act 2014 sets out two pathways for mediation, depending whether the parent wants to mediate about education matters which can be appealed to SEND, or other parts of the plan. (*The Children and Families Act 2014 (sections 51-56) and Section 11 of the SEN Code of Practice 2014*)
15. The notice sent to the parent with the final EHC plan must tell the parent they can go to mediation about health and care aspects of the plan and give the details of the person at the local authority to contact if the parent wishes to mediate. The local authority must arrange mediation if the parent disagrees with the education or social care elements of the plan. Mediation about matters which can be appealed to SEND must take place within 30 days.

## Preparation for adulthood

16. Transition planning for learners with SEN who have a Statement or EHC plan should start in Year 9 (*SEN Code of Practice 2001 and 2015*). Preparation for adulthood involves not only assessing how the needs of the young person change, but also how carers needs might change.
17. For young people transitioning to adulthood, the Care Act introduced a specific duty to carry out a 'Child Needs Assessment' where there is '*likely to be a need for care and support*' after they reach 18. Councils must also assess the needs of an adult carer where there is a likely need for support after the child turns 18 and it is of significant benefit to the carer to do so. This includes considering whether additional support is required to support a carer's employment. (*Care and Support Statutory Guidance issued under the Care Act 2014 ('the Care Act Guidance'), paragraph 16.21*)
18. The SEN Code of Practice 2015 ('The Code') sets out the importance of providing a full package of provision and support across education, health and care for young people with an EHC plan that covers five days a week, where that is appropriate to meet the young person's needs. (*paragraph 8.39*) The Care Act guidance (*paragraph 16.22*) states the importance of full-time programmes for young people aged 16 and over to '*allow parents to remain in employment full time*'.
19. Parents and carers are responsible for ensuring children of compulsory school age attend school (*S.7 Education Act 1996*). There is no similar duty for dependent adult children with an EHC plan. Parental responsibility ends when a young person reaches age 18.

## **Mental capacity**

20. The Mental Capacity Act 2005 applies to young people from age 16 onwards. It is essential the capacity of disabled young people to make each individual decision is properly assessed and decisions taken on their behalf are made in their *'best interests'*.
21. Where a young person lacks mental capacity (and does not have an appointed representative) then decisions relating to EHC assessments and plans can be taken by the young person's parent. (*SEN Code of Practice 2014, Annex 1*)

## **Social care assessments**

22. Under the Care Act 2014 and Care Act Guidance councils have a duty to carry out an assessment where *'an adult may have needs for care and support'* and, also consider carrying out a carer's assessment if it appears a carer may have need for support.
23. Under the Care Act 2014 councils must support a person's involvement in assessments and support planning, which may include identifying an *'appropriate individual'* to enable their involvement or arranging independent advocacy.
24. The Care Act Guidance says an assessment *'should be carried out over an appropriate and reasonable timescale taking into account the urgency of needs and a consideration of any fluctuation in those needs. Local authorities should inform the individual of an indicative timescale over which their assessment will be conducted and keep the person informed throughout the assessment process'*.
25. The care assessment must identify the total extent of needs before a council considers the person's eligibility for care and support. Any eligible needs met by a carer are not required to be met by the local authority, for as long as the carer continues to do so. The council must consider whether the carer is, and will continue to be, *'able and willing'* to care for the adult needing care. This must include consideration of the carer's activities beyond their caring responsibilities, for example employment or a desire to work.
26. Where a council has determined a person has eligible needs that are not being met by a carer, it must meet those needs (subject to the applicant meeting the financial criteria).
27. Where an individual lacks capacity the local authority must carry out a mental capacity assessment and take decisions in their *'best interests'*.
28. Individuals should be able to make a complaint and challenge decisions made under the Care Act.

## **Personal budgets**

29. Parents and young people can request a local authority provide a personal budget for special educational provision in an EHC plan and request direct payments. The request must be made when the draft EHC plan is being prepared, reviewed or re-assessed. (*The Special Educational Needs (Personal Budget) Regulations 2014 Section 4(1)*)



30. The Care Act 2014 required local authorities to give all eligible social care users a personal budget from April 2015.

### **Transport to education setting**

31. Section 508F of the Education Act 1996 requires local authorities to make transport arrangements they consider '*necessary*' (or that the Secretary of State directs) to facilitate the attendance of relevant young adults at institutions where the local authority has secured the provision of education for the adult concerned. Relevant young adult means an adult who is under 25 for whom an EHC plan is maintained. (*The Children and Families Act 2014, s.82*)
32. When a council finds it is '*necessary*' to provide transport for the young adult under s.508F then the transport must be free of charge (*s.508F(4)*).
33. If a local authority does not consider it '*necessary*' to provide transport under 508F it may still choose to pay some or all of the reasonable travel costs under s.508F(8) or as social care provision under the Care Act.
34. Under s.508G of the Education Act 1996 local authorities are required to set out information about the travel provision they have in place for relevant young learners so they and their families can make informed choices between institutions. The SEN Code of Practice 2014 requires councils to have clear policies about transport in their Local Offer.
35. Councils can make payments to parents and carers of pupils with SEN to act as an escort or use the family car to transport them. Government guidance '*Home to School Travel for Pupils Requiring Special Arrangements*' (2004) says councils should set out in their policy when they will do this and the amounts parents or carers are entitled to.
36. The application of a transport policy in relation to a disabled young person engages the Equality Act 2010. Councils are required to have regard to the need to advance equality of opportunity to access education between persons with a disability and those without.
37. The Secretary of State for Education can consider complaints about how a local authority had carried out its transport function (*s.508 Education Act 1996*). The Secretary of State can direct a local authority to make transport arrangements or provide financial assistance for individuals or groups of learners (*s.509A(9)*) but expects the local authority to have been notified of the issue and had an opportunity to investigate and respond to the matter first. This means councils should provide information about how to complain about a transport decision under the Education Act.
38. The Department of Education's Statutory Guidance for Post-16 Transport (*2014/ 2017*) says any complaint or appeal procedure about a transport decision should be published alongside the local authority travel policy statement.
39. The Upper Tribunal (Administrative Appeals Chamber) has considered transport for post-19 learners with an EHC plan (*s.508F*). The Tribunal commented that: '*the local authority has a duty to make transport arrangements for [a post 19 learner] if they consider that to be 'necessary' having regard to all the relevant circumstances. This is not*

*a pure discretion. Although the question of what is necessary is a matter for them, in deciding that question they must exercise their judgment judiciously and in good faith. If they come to the conclusion that it is necessary, they must make the necessary arrangement and the transportation must be free of charge'. (Staffordshire County Council v JM 2016)*

## **Disability living allowance, mobility cars and transport eligibility**

40. In March 2017 we issued a Focus Report [‘All on board? Navigating school transport issues – learning lessons from complaints’](#). We advised councils that:
- it is the conditions set out in the Education Act 1996 that are relevant to transport eligibility not whether a person receives disability living allowance (DLA). (The same principle would apply to Personal Independence Payment (PIP) which has replaced DLA for adults);
  - Motability is the body that runs the mobility car scheme for those in receipt of DLA and PIP. Unless the council in question is the legal appointee for the disabled person, it is not in charge of the Motability agreement and cannot specify how a mobility vehicle can be used.

## **How we considered this complaint**

41. We have produced this report after examining relevant files and documents, speaking to Ms X by telephone and considering information on the Council’s website.
42. We gave Ms X and the Council a confidential draft of this report and invited them to comment. We took their comments into account before finalising the report.

## **What we found**

### **Key facts - education**

43. Ms X brings the complaint on her own behalf and on behalf of her son, Mr Y. Mr Y is a young adult with Down’s Syndrome who has had a Statement of SEN since 2009. From 2011 to July 2016 Mr Y attended a local authority special school to which the Council provided free transport.
44. In September 2016, at age 19, Mr Y transferred to a specialist college. The college is four and a half miles from his home across London.
45. Under the Government’s transition timetable and the Council’s own transfer plan, Mr Y’s Statement should have been transferred to an EHC plan by 31 March 2016. (*The Children and Families Act 2014 (Transitional and Savings Provisions) Order 2014*)
46. On 13 April 2015, the Council asked Mr Y’s school to hold an EHC meeting in May or June. It asked the School to complete a ‘*This is My World*’ form with Ms X and Mr Y and provide it with recent therapy reports. The Council told the School it would use the form to provide a pre-populated EHC plan for the conversion meeting.

47. Ms X's understanding is the 13 April letter was the start of the EHC transfer. In April 2015, the statutory timescale was 14 weeks and the final EHC plan was due by July 2015.
48. The School collected evidence from the occupational therapist (OT) speech and language therapist (SLT) and the educational psychologist and arranged a meeting for 15 July 2015. Ms X understood this to be both the EHC conversion and annual review meeting.
49. Ms X completed and returned the '*This is My World*' form in October 2015 and asked for a specialist college placement for Mr Y to attend from September 2016.
50. Ms X received a draft EHC plan from the Council on 10 November 2015 ahead of a meeting with the SEN officer on 11 November.
51. On 26 November, the SEN officer asked the Council's conversion panel to consider the placement request, social care involvement and physiotherapy funding.
52. On 27 November, the SEN Officer told Ms X she would be seeking further OT and physiotherapy advice. Once these reports were received the Council would issue '*a draft plan*'. The Officer said the EHC plan would be finalised naming the current school placement and then updated later naming Mr Y's next provision. Ms X was advised to look at local colleges. The Officer did not mention a social care assessment, although this possibility had been discussed on 11 November.
53. Mr Y was assessed by therapists on 25 February 2016. Ms X had to postpone one appointment due to a hospital admission, but she told us there was no other delay on her part.
54. The Council issued a draft EHC plan on 29 March 2016. Ms X again asked for the specialist college to be named. On 22 April Ms X complained the Council had not returned her telephone messages about Mr Y's next placement.
55. The Council responded on 25 May that delay in issuing the EHC plan was because Ms X had asked for OT and physiotherapy assessments to be put on hold. Ms X denies this and says the delay was due to the Council still consulting local colleges. The Council recognised delay in issuing the EHC plan meant Ms X could not appeal, but said it was continuing to negotiate with Ms X to agree the Plan and avoid an appeal.
56. On 25 June 2016 Ms X complained to us about delay issuing the final EHC plan. The Council then issued the final EHC plan on 30 June 2016 naming Ms X's preferred college from September 2016.
57. On 9 August 2016 Ms X wrote to the Council expressing her disagreement with the Plan due to:
  - lack of transport;
  - lack of social care provision; and
  - level of OT and physiotherapy input (as deemed educational provision).

Ms X requested a personal budget for the provision and for the Council to mediate.

58. On 15 September Ms X complained the Council had failed to respond to her mediation request within 30 days.
59. The SEN team replied on 16 September that it could not mediate therapy provision and transport and social care was not its remit.
60. Mr Y's representative appealed Part F of the EHC plan to the SEND Tribunal about OT and physiotherapy provision only. The appeal was heard in January 2017. SEND ordered therapy input be added to Part F of the EHC plan.
  - OT input was increased from half termly to two hours a fortnight.
  - Physiotherapy advice was increased from termly to one hour a fortnight.
61. Ms X made a costs application against the Council. This was not successful. The Judge found no duty on the Council to take part in mediation once an appeal had been made and the refusal by the Council to mediate therapy provision was reasonable.

### **Key facts – social care and transport**

62. Ms X did not complete the part of the '*This is My World*' form that dealt with social care needs other than to state Mr Y did not have a social worker. Social care involvement was supposed to be discussed at the November 2015 panel but the Council did not carry out an assessment.
63. Ms X then requested a social care assessment for Mr Y in February 2016 and a social worker met Ms X and Mr Y on 8 June 2016. Ms X said this was a brief meeting which did not include discussion of her needs as a carer or Mr Y's transport to college. Ms X told us she had assumed Mr Y would continue to receive free transport. At the time of this meeting Ms X did not know which college Mr Y would attend as she says the Council was still consulting placements.
64. Mr Y's EHC Plan of 30 June 2016 said only that Mr Y was having a social care assessment. No care provision was identified or advice attached. In August 2016, Ms X asked the Council to attend mediation about the lack of social care and transport provision in the EHC plan.
65. On 15 September Ms X complained about the Council's failure to provide transport and to arrange the mediation. Ms X told the Council her son was now 19, it was no longer her responsibility to transport him and she was not prepared to continue to do this as it had a detrimental effect on her ability to return to work. Ms X complained the Council had breached its statutory duty in issuing an EHC plan without a social care assessment.
66. On 18 October 2016 the Council's Adult Social Care team replied to Ms X's complaint. It did not uphold the complaint because it said Mr Y's travel needs were met in the following ways:

- Mr Y attends a local college and has a mobility car.
  - While Mr Y could not drive the car himself, it was not unreasonable for the Council to expect his vehicle be used to travel to college.
  - A significant amount of Mr Y's mobility benefit was used to pay for the car.
  - Ms X did not currently work and had support from her partner to care for Mr Y.
  - The social worker had explained in June that Mr Y's travel to and from college would need to be met by use of his mobility car.
  - With regard to affecting Ms X's ability to work, the car is chiefly for Mr Y's use and six other drivers can be added to the insurance, Ms X could consider adding another driver or contacting other parents to journey share if she could not drive her son herself.
67. The Council said the SEN team could not mediate because, as Mr Y was an adult, his transport was not a consideration for that team. The Council agreed to send Ms X a copy of the social care assessment and advised her to complain to us.
68. Ms X received the social care assessment on 30 November 2016. It said:
- *'Special factors: Transition with EHCP – Transition 2016';*
  - Mr Y could not manage his own care and daily living needs and these had to be undertaken by another person;
  - Mr Y needed someone to be constantly present day and night;
  - Mr Y had received no support from children's services, only a travel assistant (since 3 February 2016);
  - morning, daytime and evening support would be provided by *'family, friends, volunteers';*
  - Mr Y would attend college daily from 9.30am to 3pm except on Fridays: *'On Friday afternoons...A carer will collect [Mr Y] from [College] at 11.30a.m.and return home with him having had lunch and taken him to an agreed activity';*
  - under *'Summary of Needs'* the social worker has written *'Day to day activities – Mr Y need support to participate in various community activities...Eligible – Yes'.*
69. There was no provision for college holidays. The assessment makes no reference to a discussion about future transport to college or to Mr Y having a mobility car.
70. The assessment has one paragraph about Ms X's own needs which said she was not currently working, her partner supported her caring role and Mr Y attended college. The social worker concluded caring had a *'minor restriction'* on Ms X's activities.

71. On 9 December 2016 Ms X disagreed with the assessment because:
- Mr Y's care needs were not met;
  - support identified as required for Friday afternoons was not being provided;
  - the assessment document was not dated or signed;
  - the document referred to travel support starting on 3 February 2016 when Mr Y had received travel support from October 2011 to July 2016, but this had stopped since his move to college;
  - Ms X was no longer with her partner;
  - '*Family, friends and volunteers*' had not agreed to provide support seven mornings and evenings;
  - Mr Y needed round the clock care and had no-one other than Ms X to support him; this was not a '*minor restriction*' on Ms X's activities;
  - there were no contingency care arrangements in place if Ms X became ill.
72. The social worker agreed to amend the assessment to remove reference to Ms X's partner. The amended version (shared in February 2017) included the following changes:
- The social worker added that college transport had been discussed at the meeting at Mr Y's school in June 2016.
  - Ms X's comments that she no longer had a partner were noted.
  - Ms X's comments about the level of care she provided and restrictions on her working were added. The social worker changed the assessment of impact to the main carer from '*minor restriction*' on activities to '*significant restriction*'.
73. Ms X told us the Council's funding panel met in December 2016 and approved twelve and a half hours a week of one to one support for Mr Y's social / leisure activities, but she did not find out about this decision until February 2017. Support was then put in place from March, but payment for the carer was not made until July 2017. Ms X told us the Council accepted fault in setting up direct payments and agreed not to charge Mr Y his financial contribution for the period March to July 2017 as a remedy.
74. Ms X told us she did not work when Mr Y was at school because Mr Y had many medical problems and needed several operations. When Mr Y left school Ms X says she wanted to have a choice about how she spent her time and intended to go back to work but was not able to do so when Mr Y was not awarded transport support.
75. On Fridays Mr Y finishes college at 11.30am. As no support worker was provided to collect him, Ms X had to do so. As it was not worth Ms X returning home for a short period she would wait near college to collect him.

76. Ms X also told us she was recently diagnosed with a serious medical condition and had to find friends to drive Mr Y to college while she received treatment or was too ill to do so.

## **The Council's response to our enquiries**

### ***EHC transfer***

77. The Council told us:

- the November 2015 document was a pre-populated plan to aid discussion not a draft plan to conclude the EHC transfer;
- it sent Ms X a copy of the notice of EHC transfer and conversion meeting but, as the officer in post at the time has left the Council, copies are not now available;
- the delay in the EHC process was because Ms X asked to delay therapy assessments between November 2015 and February 2016;
- the Council did miss the transfer deadline of 31 March 2016, but this was partly at Ms X's request and many councils struggled to meet the new statutory timescales;
- the Council does not agree the EHC assessment and Care Act assessment must be combined (although acknowledges this would have been good practice).

### ***Social care provision***

78. The Council accepts there was delay in completing Mr Y's care assessment before he turned 18 but maintains a conversion to an EHC plan did not require a full Care Act assessment. The social worker kept no separate notes of the June 2016 meeting; the assessment document is the record of the social worker's involvement.

79. The Council says for most young people four days at college is considered full-time and providing leisure activities outside college is not an automatic entitlement. The Council was not clear why Ms X was *'insisting'* on activities for the half day Mr Y was not in college.

80. Mr Y's social care assessment produced an indicative budget but the Council told us Ms X did not engage with this budget. It also said the twelve and a half hours was Ms X's *'suggestion'*, not the Council's decision, and the indicative budget would not cover twelve and a half hours of support.

81. The Council does not accept it failed to consider what needs may arise during college holidays. It says it was for Ms X to plan her son's indicative budget to achieve holiday provision and leisure activities outside the four and a half days of college.

82. The Council says Ms X declined a carer's assessment due to her dissatisfaction with the first assessment, although later completed one in March 2017. The Council accepts Ms X has needs as a carer.

### **Transport**

83. The Council agrees transport should be assessed under s.508F of the Education Act and that it has discretion to provide free transport should it be '*necessary*' in line with that Act.
84. The Council told us it provided transport support to Mr Y for many years and there is no evidence Ms X looked for employment opportunities during that time. Further, Mr Y has a mobility car and the Council considers it is reasonable to expect this to be used to meet his travel / mobility needs, which it says is a condition of funding mobility cars. As several named drivers are allowed to drive the car, the Council '*feels it is unreasonable of Ms X not to make arrangements for the car to be available for her son's regular need to travel to college. If the car cannot fulfil Mr Y's needs in this way it should be relinquished and other more appropriate uses of Mr Y's higher rate Disability Living Allowance should be explored...to ensure he can attend college*'.
85. The Council has no transport policy for post-19 learners but is currently consulting to develop one and will consider whether to include a right of appeal.

### **Mediation**

86. The Council says it expected Ms X to plan the indicative budget to meet Mr Y's care needs, rather than mediate the EHC plan. As transport provision is not usually included in EHC plans, the Council says it did not mediate it.
87. The Council says it will discuss with its commissioned service mediating transport and social care disputes in future.

## **Analysis and Conclusions**

### **The EHC transfer**

88. There is disagreement between the Council and Ms X about delay in the EHC transfer. The Council says the only delay was from November 2015 until February 2016 and this was at Ms X's request. This implies the Council considers the EHC conversion started in November 2015.
89. Ms X says the EHC assessment started in April 2015 when the Council asked the School to collect EHC advices and hold a meeting to discuss the EHC plan.
90. There should be no such confusion about the timetable because councils are required to serve notice two weeks before the assessment starts. The Council says it did serve a notice but cannot tell us when or provide a copy.
91. That evidence was collected from the professionals (except social care) in June and July 2015 supports Ms X's position that the assessment process was triggered by the Council's letter to the School in April. This meant Mr Y's EHC plan was due in July 2015.
92. The Council should not have asked the School to collect EHC advices. It should have requested the evidence itself and led the process. Failure to do so is fault.



93. Ms X / Mr Y did not complete their contribution to the EHC plan (via the *'This is My World'* form) until October 2015. This may have been because Ms X was looking at suitable colleges. There is no legal requirement for parents or young people to complete a particular form before an EHC needs assessment can take place. This delay did not stop the Council considering whether further professional advice was required.
94. The SEN Officer met Ms X on 11 November 2015, having sent her a pre-populated plan the previous day. We accept the Council intended this to be a document to inform the discussion rather than a draft plan to conclude the conversion process. It told the School this, but does not appear to have informed Ms X.
95. The first draft plan issued under s.13 SEN and Disability Regulations 2014 was in March 2016.
96. The Council took far too long to complete the EHC transfer. It took fourteen months rather than the expected fourteen weeks. While this was a new process, this was excessive delay and is fault. The Council had the annual review report and expert opinions in July 2015. The Panel did not meet to discuss the case until November and only then decided more evidence was needed. While Ms X may then have postponed therapy appointments this doesn't explain why, when the Council received this extra evidence in February 2016, and issued a draft plan in March, it did not issue the final plan until the end of June 2016. We find this delay is likely to be because the Council was still consulting colleges.
97. The Council failed to meet the statutory deadline for naming Mr Y's placement by 31 March 2016. This is fault. The Council had ample time from receiving the advices in July 2015 to obtain further evidence, consult colleges and issue Mr Y's plan on time.
98. By missing the deadline, Mr Y's right of appeal was delayed. It follows that, but for the Council's fault, Mr Y's appeal would have been heard sooner and he would have received the additional therapy awarded by SEND from September 2016, not January 2017.

### **The social care assessment**

99. The Council has accepted fault in not assessing Mr Y's care needs before he reached 18. If it had done so then, on the balance of probability, Mr Y's care provision would have been in place in time for him to start college in September 2016 at age 19 (if not sooner).
100. The Council failed to consider care needs during the EHC needs assessment. This is fault. Every EHC assessment requires consideration of social care needs. Young people must be invited to attend a meeting with a relevant officer to discuss education, health *'and social care'* needs (*Article 20(3) of the 2014 Order*). Councils must also identify whether care provision is to be treated as *'deemed educational provision'* and within a council's statutory obligation to provide under s.42(2) Children and Families Act (with a right of appeal to SEND). The statutory scheme therefore does require councils to assess social care needs in conjunction with the EHC assessment, if only to identify any social care provision which should be treated as special educational provision. Given Mr Y's age, the only appropriate social care assessment was under the Care Act.

101. The SEN Officer and Council's panel failed to make a social care referral in June and November 2015. This is fault and demonstrates a lack of understanding of the EHC process.
102. EHC and Care Act assessments should be combined where possible to reduce the administrative burden on families. The social worker recognised this by stating the EHC transition was a '*Special Factor*'. By the time the social worker met Ms X and Mr Y on 8 June 2016, the Council was already late in issuing the EHC plan. It was too late then to combine the two assessments. As a result, Mr Y's EHC plan was issued without specifying the social care provision he was entitled to.
103. The social care assessment took too long. Ms X made the request in February 2016, but the social worker did not visit until 8 June 2016. The Council did not share the assessment with the family until November 2016 (after our involvement). The case went to the Council's funding panel in December 2016 but agreed provision was not in place until March 2017, and not funded until July 2017. This was a period of 17 months from referral. The Care and Support Statutory Guidance says an assessment should be carried out over an '*appropriate and reasonable timescale taking into account the urgency of needs*'. The Council should have set a timescale that recognised the need to inform the EHC plan and complete Mr Y's transition to adult services by the start of term in September 2016.
104. We have identified several faults in the social care assessment.
- The social worker failed to carry out a mental capacity assessment.
  - The social worker failed to consider transport needs to college.
  - The social worker failed to offer a separate carer's assessment or adequately consider Ms X's needs within Mr Y's assessment. Ms X's views about returning to work and driving Mr Y to college are not recorded in the first assessment document.
  - The social worker failed to consider transport to leisure activities.
  - The social worker failed to consider needs in college holidays. We are not persuaded it was for Ms X to address this via the indicative budget. A personal budget must be sufficient to purchase the services required by the applicant and is needs led. As the social worker did not include needs during breaks from college in the assessment, the budget allocated was based on an incomplete picture. If the assessment had correctly included the total extent of needs:
    - Mr Y's allocated budget may have been higher; or
    - Ms X may have been eligible for support as a carer during holidays.

These faults cast doubt on the decision the Council reached.

105. It was the Council, not Ms X, who identified the need for support on Friday afternoons in its assessment of Mr Y in June 2016. This made provision up to five full days, as is

considered good practice in the SEN Code of Practice and Care Act guidance. Ms X should not be criticised for *'insisting'* Mr Y's identified eligible needs be met.

106. We are not persuaded Ms X was responsible for the delay in the social care assessment between February 2016 and July 2017 because:

- There is no evidence the social worker took any action after completing the assessment in June 2016. The care assessment was not shared with Mr Y and Ms X until November 2016, after Ms X complained. Steps to agree a budget did not start until December.
- There is no evidence Ms X suggested twelve and a half hours. The Council's response to us implied twelve and a half hours of support was unrealistic, yet this was the figure approved by the Council's funding panel in December.
- Ms X clearly wanted the matter resolved as shown by her making a complaint and requesting mediation.
- Even if Ms X did not engage with support planning, Mr Y was an adult (who may lack capacity). The Council's duty to provide care and support was owed directly to Mr Y. It was not Ms X's responsibility to plan and organise Mr Y's support. If the Council genuinely believed Ms X was obstructing the process it should have considered whether she remained an *'appropriate individual'* to facilitate Mr Y's involvement and considered arranging independent advocacy. Councils should seek to act in the best interests of the young person and should move quickly to resolve difficulties and minimise delay in provision.
- The social worker has not kept any records to support that Ms X did not *'engage'*. We would expect a social worker to record such concerns on the file.
- The Council has already accepted responsibility for the delay between March and July 2017 and provided a remedy for this period.

107. Mr Y received social care funding backdated to March 2017. If proper transition planning had taken place, we find the funding would have been in place by September 2016 at the latest.

### **Transport decision**

108. There is a dispute about when Ms X was first informed the Council expected her to drive Mr Y to college in his mobility car. The Council says this was June 2016, but Ms X says she only found out in September.

109. For the following reasons we find Ms X's account more convincing and find a decision on transport was only made by the Council, and communicated to Ms X, in September / October 2016.

- The June social care assessment referred to Mr Y's (free) transport to school, it does not mention future arrangements. Information about transport to college was added to the assessment document in February 2017, following our involvement.
  - The social worker did not know which college Mr Y would attend in June 2016.
  - The social worker's June assessment did not note Mr Y had a Motability car, this was first mentioned in the Council's complaint response of October 2016.
  - If Ms X had been informed in June we believe she would have raised a complaint or requested mediation at that time, not waited until Mr Y had started college.
110. We find the Council did not provide information on transport to Ms X at the time college options were considered, at the social care assessment in June or when the EHC plan was finalised. This is fault. The Council had no policy and failed to provide sufficient information so Ms X could make an informed decision between colleges. It created a legitimate expectation transport would continue to be provided to Mr Y free of charge.
111. The social worker's assessment and Council's complaint response did not mention the Council's transport duties under s.508F Education Act. We have not seen any evidence the Council was aware of its duties under s.508F or assessed Mr Y under this Act until we raised it. We consider it likely the Council decided Mr Y's eligibility in October 2016 only under its discretionary powers under the Care Act, not under s.508F.
112. During our investigation, the Council reconsidered whether Mr Y is eligible for transport support, including under s.508F. The Council maintains that Mr Y is not eligible under either the Education Act or Care Act because he has a mobility car and it is reasonable to expect Ms X to drive it as she does not work, or for her to find someone else to do so. If this is not possible the Council says the car should be relinquished so the DLA can be used for transport to college.
113. We find the way the Council has made this decision is flawed. We are not satisfied the Council has considered all the relevant factors of this case, and find it has taken into account irrelevant considerations.
- It was a relevant consideration that Mr Y is over 19 and above statutory school age. Ms X has no parental responsibility for Mr Y or legal obligation to ensure he attends college.
  - It was a relevant consideration that Ms X clearly indicated she was not '*able and willing*' to drive Mr Y to college each day. Ms X did not need to justify this or give reasons. The care assessment had to set out the total extent of Mr Y's needs (including transport) and could only take into account support a carer was willing to provide. The Council was wrong to require Ms X to take on the role of driver without her consent. Once Ms X explained she was not prepared to drive Mr Y the Council should have accepted this and assessed Mr Y's transport needs without further reference to the availability of a carer.

- There was also no obligation on Ms X to find volunteers to drive Mr Y to college. This was not an appropriate request and an irrelevant consideration.
- It was relevant to the Care Act assessments that Ms X wanted to work. Councils must take into account a carer's activities beyond their caring responsibilities, including future plans. Ms X did not need to justify why she had not worked previously (although she has provided good reasons). Government guidance emphasises the importance of full-time programmes for post-16 learners so parent carers can work. Where a college placement is less than five days councils must look at training or volunteering opportunities, or additional care support, so carers can work full-time. The Council should have considered how it could support Ms X's return to work alongside her caring responsibilities.
- It is the Council that has the legal duty to ensure Mr Y receives the special educational provision set out in his EHC Plan. It must consider how to discharge this duty when the named placement is four and a half miles from Mr Y's home.
- The Council can take into account that Mr Y has a mobility car but also has to take into account that he cannot drive it himself and no-one else has volunteered to do so. It must also take into account costs involved in travelling to college.
- The Council has misinterpreted the conditions of the Motability Scheme.
  - The Council is not the legal appointee for the car. It may suggest ways the car could be used for college, but it cannot direct how the car is used.
  - In suggesting the car should be relinquished the Council has implied Ms X is preventing access to the car and it is being misused. Misuse of a Motability car includes *'not giving the disabled person the benefit of the car'*, but this means nominated drivers using the car for their own benefit so it is not available to the disabled person to use. It does not mean nominated drivers must be continuously available to drive the car. Motability cars do not have to be relinquished if there are times when the nominated drivers are not available. The car is available for Mr Y to use for college, Ms X is not.
- The Council cannot assume that all or most of Mr Y's DLA mobility component is available to be used towards college transport. Mr Y may have other transport needs which the Council would need to take into account.

114. The faults we have identified in the Council's decision-making casts doubt on the conclusion reached. The Council needs to reassess Mr Y under both Acts correctly.

115. The Council was wrong to have included the availability of an unwilling carer in its assessment. This is fault and has caused Ms X a significant injustice.

116. We are very concerned by the Council's negative comments about Ms X's lack of previous employment and its suggestion the mobility car and DLA are not being used

correctly. Such comments would be likely to dissuade someone from challenging a decision and put inappropriate pressure on parents to provide unpaid care.

117. The Council has no current post-19 transport policy. This is fault. The absence of a policy means:

- young people and their families in the Council's area cannot make informed decisions about post-19 placements;
- there is no transparency about how the Council decides transport eligibility; and
- post-19 learners cannot easily challenge transport decisions.

118. The Council is currently developing a policy for post-19 transport. This should include details of the right to complain about transport decisions.

### **Personal budget**

119. In August 2016 Ms X complained the Council had not considered a personal budget for deemed educational provision (therapies), transport and social care.

120. Requests for personal budgets for special educational provision must be made at the time of the draft EHC plan. We have not seen any evidence Ms X requested a personal budget for therapies at that time. It was not fault for the Council to decline a request made after the EHC plan was finalised, but it should have explained the law to Ms X at the time.

121. The Council was not in a position to consider a personal budget for social care or transport in August 2016 as it had not yet assessed Mr Y's eligibility. The Council did provide direct payments for social care later.

122. Transport costs can be provided as part of a personal budget (within or alongside an EHC plan). The Council should consider the use of personal budgets and direct payments when drafting its new post 19 transport policy and when it reviews Mr Y's transport eligibility.

### **Failure to mediate**

123. The Council was wrong to tell Ms X it could not mediate education aspects of the EHC plan. Councils are required to have mediation arrangements in place for all three sections of the Plan.

124. We cannot consider the Council's decision not to mediate therapy in this specific case, as SEND has already decided this matter at the costs hearing. As Ms X has exercised an alternative remedy we will not consider this part of the complaint again. (*Local Government Act 1974, section 26(6)(a), as amended*)

125. The Council was wrong to say it expected Ms X to plan the indicative budget, not mediate. At the time Ms X requested mediation the social worker had not yet assessed social care or transport and no budget had been calculated.

126. There was fault by the Council in telling Ms X it could not mediate social care provision in an EHC plan. The new law and Code of Practice provide a pathway for mediation of health and social care elements that councils must comply with. The Council says it will raise this with its mediation service.
127. While the Council gave incorrect advice about mediation, it is difficult to see how mediation in August 2016 would have been helpful given the Council had not at that stage carried out the necessary assessments. At most mediation might have highlighted at an earlier stage the faults we have identified.

## **Injustice**

128. By taking on the role of driver, Ms X has mitigated injustice caused to Mr Y (who has been able to attend college and activities), but suffered significant restriction of her own activities, inconvenience and incurred expense.
129. Mr Y's transition to adulthood was poorly handled by the Council with late decisions causing uncertainty and distress about his post 19 provision.
130. Mr Y's right of appeal to SEND was delayed so he missed one term of the additional therapy provision SEND ordered.
131. The reliance on Ms X to meet Mr Y's needs compromised the independence he previously enjoyed to travel and attend leisure activities without his parent.
132. A carer for the Friday afternoon programme of activities was not in place until the end of March 2017, a delay of seven months.
133. The Council needs to reconsider whether Mr Y (or Ms X as his carer) has additional needs during holidays. If it finds they do then Ms X and Mr Y have lost out on this provision since September 2016.
134. The failure to co-ordinate assessments put an additional administrative burden on Ms X. Ms X has also been put to additional time and trouble pursuing a complaint to us.

## **Decision**

135. There is fault in the way the Council considered Mr Y's special educational, transport and social care needs when he transferred from school to college. This has caused injustice to the young person and his parent. The complaint is upheld.

## **Recommendations**

136. The Council must consider this report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

137. In addition to the requirements set out above the Council has agreed to take the following action to remedy the injustice to Ms X and Mr Y identified in this report:

Within four weeks:

- Apologise to Ms X and Mr Y for the faults identified
- Retake its decision whether it owes a transport duty to Mr Y under s.508F(1) Education Act 1996 or is willing to make provision under s.508F(8). It will share a copy of this decision with Ms X and us.
- Review Ms X and Mr Y's care assessment to:
  - set out Mr Y's total eligible needs including consideration of:
    - (i) transport to college (if this is not to be met by the Council under s.508F)
    - (ii) transport to leisure activities
    - (iii) holidays;
  - include an assessment of Mr Y's mental capacity;
  - detail which needs a carer is '*able and willing*' to meet;
  - detail unmet eligible needs the Council will meet;
  - detail Ms X's needs as a carer; and
  - consider whether a personal budget or direct payments are suitable for any further provision identified.

It will share a copy of the updated assessments and care plan with Ms X and us.

- Make a financial payment to Ms X of £100 a week (calculated from September 2016) to recognise her time and expenses (and those of friends) providing unpaid care to transport Mr Y. This payment also recognises Ms X was not able to seek employment and later, when she became unwell, was caused additional stress finding alternative drivers. Payments will continue until new arrangements are in place so that Ms X is no longer responsible for driving Mr Y to college.
- Pay Ms X £1,500 in recognition of:
  - the seven months delay in providing social care support between September 2016 and March 2017 during which time Ms X had to support Mr Y at activities; and
  - the uncertainty whether a more thorough social care assessment may have led to a higher level of support being provided, including for Ms X's own needs.



- Pay Mr Y £300 for the loss of one term's additional therapist input due to the delayed EHC assessment and subsequent appeal.
- Pay Ms X £300 for her time and trouble pursuing the complaint.

Within three months:

- Update its Local Offer to show how it currently assesses eligibility for transport for post-19 learners. Once a formal policy on post-19 transport is approved this should be made available via the Local Offer and on the Council's website. The Council has agreed to consider complaint, mediation and appeal mechanisms when drafting the new policy.
- Consider whether, as a result of our findings, it needs to change policies, review guidance or provide refresher training to ensure:
  - EHC assessments are carried out in a timely way and always include consideration of social care needs;
  - officers across relevant departments are clear about transport duties for learners aged 0-25;
  - it has the correct mediation arrangements in place and the correct information about mediation is available to all relevant officers and families; and
  - transitioning planning is in place that considers the care needs of young people before they reach 18 and the changing needs of their carers.

The Council will prepare a report of its findings and share it with us.

138. Within six weeks the Council will review the cases of young people (19-25) who have an EHC plan naming an educational setting, but who are not currently receiving free transport, and report its findings to us. The review will consider if others have been similarly affected by errors in the application of s.508F Education Act or the way the Council has considered DLA and mobility cars.
139. We welcome the fact that the Council has now accepted our recommendations, but regret the time it has taken for the Council to reach this position, which has necessitated the issue of this report and led to Ms X and Mr Y having to wait longer for the Council to review its previous decisions.