

Responsibility for providing advice and information to children and young people with SEND in the secure estate

Briefing note for the Information Advice and Support Network

May 2023

This briefing note considers the question of which local authority has responsibility for providing advice and information to children and young people with SEND in the secure estate.

The duty on local authorities to provide advice and information to children and young people with SEND is established by section 32 of the Children and Families Act 2014:

32 Advice and information

(1) A local authority in England must arrange for children and young people for whom it is responsible, and the parents of children for whom it is responsible, to be provided with advice and information about matters relating to the special educational needs of the children or young people concerned.

(2) A local authority in England must arrange for children and young people in its area with a disability, and the parents of children in its area with a disability, to be provided with advice and information about matters relating to the disabilities of the children or young people concerned.

...

As such, under section 32 the duty to provide advice and information in relation to special educational needs arises if the local authority is 'responsible' for the child or young person. The duty to provide advice and information in relation to disability arises if the child or young person is in the local authority's area.

Which local authority is 'responsible' for a child or young person with SEN is addressed in section 24 of the Children and Families Act 2014 (emphasis added):

24 When a local authority is responsible for a child or young person

(1) A local authority in England is responsible for a child or young person if he or she is in the authority's area and has been—

(a) identified by the authority as someone who has or may have special educational needs, or

(b) brought to the authority's attention by any person as someone who has or may have special educational needs.

(2) This section applies for the purposes of this Part.

So the general position is that the responsibility for providing advice and information to a child or young person with SEND will rest with the local authority in whose area the child is physically present at the relevant time. In effect then, the duty in relation to SEN and disability is the same – advice and information must be provided to children and young people who are in the local authority's area.

Children and young people in detention

However this general position is then subject to section 70 in relation to 'detained persons'. Section 70 provides that:

- '(1) Subject to this section and sections 71 to 75, nothing in or made under this Part applies to, or in relation to, a child or young person detained in pursuance of—
 - (a) an order made by a court, or
 - (b) an order of recall made by the Secretary of State.'

Section 32 is not in the list of provisions in section 70(2), to which this exception does not apply. As such, the general position as to provision of advice and information does not apply to 'detained persons'.

Section 71 then creates a right to an 'Assessment of post-detention education, health and care needs of detained persons'. The duty bites on the 'home authority', and roughly mirrors the EHC needs assessment duty. Importantly, the Code of Practice states at para 10.111 that:

- 'Where a detained person is part way through an assessment of special educational needs or the development of an EHC plan on entry to custody, the local authority must continue and complete the process following the guidance set out in this section.'

However under section 70(5), a 'detained person' can only be a person under the age of 18, ie a child or a young person (under the Children and Families Act 2014) aged 16 or 17:

- ""detained person" means a child or young person who is—
 - (a) 18 or under,
 - (b) subject to a detention order (within the meaning of section 562(1A)(a) of EA 1996), and
 - (c) detained in relevant youth accommodation...'

In this regard, the Code states at para 10.146 that 'The SEN duties in the Children and Families Act 2014 no longer apply once a young person is transferred to the adult secure estate.' However, per the Code at 10.147:

'If a detained person¹ in an adult custodial establishment had an EHC plan immediately before custody, or if they were issued with a plan while in relevant youth accommodation, and if they are still under the age of 25 when they are released from custody, the local authority must maintain and review the EHC plan if the young person plans to stay in education. When reviewing the plan local authorities must follow the processes set out in Chapter 9, in particular the section on 19- to 25-year olds.'

Under section 70(6), 'home authority' has the same meaning as in s 562J of the Education Act 1996 –

"the home authority" —

(a) in relation to a child or young person who immediately before the beginning of the detention was, or at any time since then has been, a looked after child, means who are the local authority looking after, or who have most recently been looking after, the person;

(b) in relation to any other child or young person, means the local authority in whose area the person is ordinarily resident'

Section 72(1) provides that '(1) Where, in the light of a detained person's EHC needs assessment it is necessary for special education provision to be made for the detained person in accordance with an EHC plan on release from detention, the home authority must secure that an EHC plan is prepared for him or her.'

Section 73 creates appeal rights for detained persons which are broadly equivalent to the 'ordinary' appeal rights under the Children and Families Act 2014.

Section 74(2), in relation to children or young people who had an EHC Plan when they began their detention, states that '(2) The home authority must keep the EHC plan while the person is detained in relevant youth accommodation'.

Section 74(4) states that '(4) The home authority must arrange appropriate special educational provision for the detained person while he or she is detained in relevant youth accommodation.' Similarly, if the EHC plan for a detained person specifies health care provision, the health services commissioner for the relevant youth accommodation must arrange appropriate health care provision for the detained person; Code, para 10.66. 'Appropriate' provision means the provision specified in the

¹ Technically this term is inapposite, as a 'detained person' can only be under 18; see section 70(5).

Plan, or such provision which corresponds as closely as possible to that provision as it is practicable to arrange; Code, para 10.67.

There is no express statutory duty on local authorities to provide advice and information to detained children or young people who had EHC Plans at the point they were sent to detention. However, there is no doubt that local authorities have the power to provide such advice and information.²

As the functions towards children and young people with EHC Plans continue (with modifications) while the child or young person is detained, it may well be necessary or appropriate for the 'home' SENDIASS to continue to provide advice and information to any detained child or young person in the secure estate who had an EHC Plan in the community.

Chapter 10 of the Code of Practice deals with 'Children and young people with SEN who are in youth custody' from para 10.60 onwards.

Para 10.62 states:

'Unless otherwise stated a reference to 'a local authority' means the home local authority. For a detained person with an EHC plan this is the local authority which maintained their EHC plan when they were in the community. In custody a request for an assessment of post-detention EHC needs must be made to the home local authority, meaning where the detained person is 'ordinarily resident'.'

The Code specifically deals with 'Provision of information, advice and support' to 'detained persons' who are seeking a needs assessment:

'10.106 When securing a detained person's EHC needs assessment the local authority must consider whether the child or the appropriate person requires any information, advice and support in order to enable them to take part effectively in the assessment. If it considers that such information, advice or support is necessary the local authority must provide it.'

As per para 10.62, 'the local authority' here is the 'home' local authority.

This reflects regulation 9 of the Special Educational Needs and Disability (Detained Persons) Regulations 2015:

'When securing a detained person's EHC needs assessment the home authority must consider whether the detained person or, where the detained person is a child, the child's parent requires any information, advice and support in order to

² See for example section 1 of the Localism Act 2011, the 'general power of competence' for local authorities.

enable them to take part effectively in the assessment, and if it considers that such information, advice or support is necessary, it must provide it.'

As such, there is an express duty to provide advice and information in the context of a detained person's needs assessment, either to the 'detained person' (child or young person) or the child's parent (if the detained person is a child).

Regulations 10 and 14 of the 2015 Regulations both require notification of 'the availability of information and advice relating to the special educational needs of children and young people' in certain situations relating to detained persons; a decision not to secure an EHC Plan, and when a final EHC Plan is sent. However, neither regulation actually imposes a duty to provide advice or information. As above, it can however be assumed that as local authorities have ongoing functions in relation to EHC Plans for detained children and young people, they ought to continue to provide advice and information as appropriate to those children and young people whose EHC Plans they are maintaining while they are in detention.

In this regard, it is important that the Code states as follows at 10.65 (emphasis added):

'The principles underpinning the Code (see Chapter 1) are relevant when supporting detained persons to achieve the best possible educational and other outcomes and to prepare for adulthood and independent living. They support:

- the participation of the detained person and the child's parents in decisions relating to their individual support. Local authorities must have regard to their views, wishes and feelings and must provide them with information, advice and support to enable them to participate'

Ordinary residence

As set out above, other than in the case of 'looked after' children, the 'home' local authority which has responsibility for detained person's EHC needs assessments and which must continue to maintain EHC Plans for children and young people in youth detention is 'the local authority in whose area the person is ordinarily resident'; section 70(6) of the Children and Families Act 2014 and section 562J of the Education Act 1996.

In *R v LB Barnet ex parte Shah* [1983] 2 A.C. 309, the House of Lords considered the meaning of the term 'ordinary residence' in the context of whether foreign students should be entitled to grants. The House of Lords held that for a person to be 'ordinarily resident' in an area, the residence must be voluntary, lawful and for a settled purpose

or purposes. Full time education could be such a purpose. Temporary or occasional absences could take place without disturbing the ordinary residence.

This approach to ordinary residence was summarised as meaning 'settled presence in a particular place other than under compulsion' by the High Court in *R (M) v Hammersmith and Fulham* [2010] EWHC 562 (Admin).

Further, *R v Waltham Forest LBC ex parte Vale Times* [1985] 1 WLUK 779 establishes that an incapacitated person³ is generally deemed to have the same ordinary residence as his parents until he or she turns 18. However, in the case of an adolescent child, account should be taken of the child's own views - see *In Re LC (Children)* [2014] AC 1038. It is possible that for an older child, they would not share their parents' ordinary residence – if, for example, they were very clear that they did not want to be living at home and would be leaving imminently.

On this basis, if a child or young person is living with their family at the point they are sent to another area for a period of detention, it is very likely that the 'home' local authority will be the local authority in whose area the family home is located, because that is where they are 'ordinarily resident'. It would only be in the case of an older child or young person who considered that they would not want to return to their family home on release from detention that it may be said their 'ordinary residence' had moved to the local authority in whose area they are detained.

For a child who is living away from their parents at the point they are sent to youth detention, if they are a 'looked after' child at that point, then the local authority which has responsibility for them in that capacity is the 'home' local authority and must provide them with information and advice.

It is possible that a child might be living away from their parents at the point they are sent to youth detention and not be a 'looked after child'. For example, the child might be a pupil at a residential special school. In that context, the questions arising from *ex parte Shah* would need to be asked – in short, in which area do they have a 'settled presence'? For example, a child who attends a residential special school on a termly basis and always goes back to their parents during the school holidays may retain a 'settled presence' in the area where their family home is located.

By contrast, a child in a 52 week special school placement may not have a 'settled presence' in their family's home area. In the latter case, the child is therefore 'ordinarily resident' either in the area where their residential school is located, or in

³ Or a child who lacks 'competence', in the *Gillick* sense.

the area in which they are detained. The answer to this question will depend on factors such as how long they have been attending the residential special school, the duration of their period of detention, and whether it is anticipated that they will return to the residential special school after their period of detention ends.

For young people aged 18 or over in detention, the responsibility to provide them with advice and information will always rest with the local authority in whose area they are 'ordinarily resident' (as 'looked after' status ends on a person's 18th birthday). This question will be answered by consideration of the facts of their case at the point they went into detention. For example, a young person aged 19 who has always lived and remained living with their parents at the point they were sent to detention is very likely to be 'ordinarily resident' in the local authority in whose area the parents' home is located. By contrast, a young person at a residential college may be 'ordinarily resident' in the area of that college, depending on the duration of the placement and whether the young person regularly returns to the parental home.

The Code deals with the question of detained persons being released to new areas at para 10.139:

'If the detained person is due to be released to a new local authority the YOT must notify the local authority where the detained person is ordinarily resident (the old local authority) and the new local authority in whose area the YOT expects the detained person to live on release from the relevant youth accommodation. The old authority must send the EHC plan to the new authority within 5 working days of being informed of the move. The new authority will become responsible for maintaining the plan and for securing the special educational provision specified in it.'

It is vital that any disputes between local authorities as to who has responsibility for providing advice and information to children and young people who are detained in the secure estate do not disadvantage the child or young person concerned. In practice, in such cases whichever local authority is best placed in practice to provide advice and information to the child or young person should do so, while the dispute is resolved.