

## CHAPTER 2

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# EHC assessments and making plans

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### **2.1 EHC needs assessments**

2.1 Definitions

2.5 Initiating an assessment

2.9 Initial determination

2.12 Decision whether to conduct an EHC needs assessment

2.21 Conducting an EHC needs assessment: information and advice to be obtained by the local authority

2.28 Outcome of the EHC needs assessment: deciding whether to issue an EHC plan

2.35 Notification of the decision on whether to issue an EHC plan

### **2.38 EHC plans**

2.38 Introduction

2.39 Contents of an EHC plan: an overview

2.41 Preparing the EHC plan

2.47 Finalising the EHC plan

2.50 Maintaining an EHC plan

2.54 Duty on schools to admit where named in section I of an EHC plan

### **2.55 Review and reassessment**

2.55 Reviews

*Introduction • Timing • Conduct • Amending an EHC plan following a review*

---

*continued*

- 2.72 Reassessments  
*When are reassessments required? • The process • Amending or replacing an EHC plan following a reassessment*
  - 2.79 Amendment without a review or reassessment
  - 2.80 Transfers from statements of SEN and LDAs to EHC plans**
  - 2.80 Introduction
  - 2.85 Transition plans
  - 2.88 Transfer reviews
  - 2.96 Transfer reviews for children and young people in youth custody
  - 2.99 Ceasing to maintain an EHC plan and transfer to another local authority**
  - 2.99 Ceasing to maintain an EHC plan  
*No longer responsible • No longer necessary: children and young people under the age of 18 • No longer necessary: young people over the age of 18 • Ceasing to maintain: the procedure*
  - 2.111 Transfer of EHC plans between local authorities  
*Generally • Change of responsible commissioning body*
  - 2.120 Personal budgets (including direct payments)**
  - 2.120 Introduction
  - 2.123 Information, advice and support
  - 2.126 Right to a personal budget
  - 2.129 When requests for a personal budget (including direct payments) can be made
  - 2.131 Settling and agreeing a personal budget
  - 2.136 Persons to whom direct payments may be made
  - 2.138 Deciding whether to make direct payments (SEN)
  - 2.141 Direct payments: the conditions
  - 2.144 Deciding not to make a direct payment
  - 2.145 Consequences of the local authority making a direct payment
  - 2.146 Monitor and review of direct payments
  - 2.152 Transition: when a child becomes a young person
  - 2.154 Disputes
-

## Key points

### **EHC needs assessments**

- The child's parent, the young person or the school (or anyone else) may request an education, health and care (EHC) needs assessment for a child or young person.
- A local authority is responsible for a child or young person while he or she (a) is in the authority's area and (b) has been identified as someone who has or may have special educational needs (SEN), or has been brought to the authority's attention as someone who has or may have SEN.
- The local authority must determine whether or not to undertake an EHC needs assessment; it must make that decision as soon as practicable, but in any event within six weeks.
- If the local authority refuses to undertake an EHC needs assessment, the child's parent or the young person must be notified. They have a right of appeal to the First-tier Tribunal (FTT).
- If the local authority undertakes an EHC needs assessment, it must seek advice and information from specified professionals, as well as the child's parent or the young person.
- Having undertaken an EHC assessment, the local authority must determine whether or not to issue an EHC plan. This decision must be made and notified to the child's parent or young person as soon as practicable, but in any event within 16 weeks of the local authority receiving a request for an EHC needs assessment.
- Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made in accordance with an EHC plan, the local authority must prepare a plan. A finalised EHC plan must be issued within 20 weeks of the initial request for an assessment.

### **EHC plans**

- The SEND Regs and the SEN code of practice require an EHC plan to include sections A–K.
- The local authority must send the EHC plan in draft to the child's parent or young person, who have 15 days to make representations about the content and to request that a particular school be named.

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- If the child's parent or the young person requests a particular type of school or institution, the local authority must name it in section I of the EHC plan unless (a) the school or institution is unsuitable for the age, ability, aptitude or SEN of the child or young person concerned, or (b) the attendance of the child or young person at the school or institution would be incompatible with the provision of efficient education to others, or the efficient use of resources.
- The local authority must send a copy of the final EHC plan to the parent or the young person and notify them of their rights of appeal.
- The local authority must secure the special educational provision specified for the child or young person in the plan (ie that in sections F and I).
- If the EHC plan specifies healthcare provision, the responsible commissioning body must arrange the specified healthcare provision for the child or young person.
- Where particular types of schools are named in section I of a child or young person's EHC plan, the governing body or principal of the school or institution must admit the child or young person.

### **Review and reassessment**

- A local authority must review an EHC plan within 12 months of it having been made, and must review the EHC plan in at least 12 month intervals after that.
- There are particular requirements of review when the child or young person is moving from one phase of education to another.
- In respect of children under five, an EHC plan should be reviewed every three to six months (although these can be streamlined reviews).
- Local authorities have the power to undertake interim reviews when the child or young person has been (or is at risk of) being permanently excluded, or where the school or institution is struggling to meet the child's needs or where circumstances have changed such that the EHC plan is no longer meeting the child's needs.
- The SEND Regs and the SEN code require reviews to be conducted in a particular manner.

- After a review, the local authority must decide to continue to maintain the EHC plan in its current form, amend it or cease to maintain the EHC plan. The parent or young person has a right to appeal any of these decisions to the FTT.
- The local authority may (and in some circumstances, must) carry out a reassessment of the child or young person's educational, health and social care needs.

### **Transfers from statements of SEN and LDAs to EHC plans**

- Local authorities must complete transfers from statements of SEN to EHC plans by 1 April 2018.
- EHC plans must have been prepared by 1 September 2016 for all young people who had received support as a result of a Learning Difficulty Assessments (LDA) and who continue in further education or training and need SEN provision beyond that date.
- Children and young people who had statements and LDAs at the time of transfer will almost always be entitled to EHC plans.
- Transition plans published by every local authority in consultation with children and young people should set out the timetable and process for transfer.
- Children should be transferred to an EHC plan whenever there is a significant review of their statement during the transition period and at specific stages in their education.
- Transfer reviews must be carried out before a child moves from a statement to an EHC plan.
- Transfer reviews consist of EHC needs assessments under the SEND Regs. They follow the same process as a needs assessment and give rise to the same appeal rights.
- Parents will be given a minimum of two weeks' notice before a transfer review is carried out.
- The local authority must complete the transfer review process and send a final EHC plan to parents within 18 weeks of giving the parents notice of the review.

### **Ceasing to maintain an EHC plan and transfer to another local authority**

- A local authority may cease to maintain an EHC plan for a child or young person if (a) the local authority is no longer responsible for the child or young person, or (b) the local authority determines that it is no longer necessary for the plan to be maintained.

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- A parent or young person has a right of appeal against a decision to cease to maintain an EHC plan. The local authority must not implement the decision to cease to maintain the EHC plan until after the appeal has been determined.
- Where a local authority is considering ceasing to maintain a child or young person's EHC plan, it must inform the parent or young person, consult them, and consult the headteacher or equivalent at the institution named in section I of the EHC plan.
- A local authority is responsible for a child or young person while he or she (a) is in their area and (b) has been identified as someone who has or may have SEN, or has been brought to the local authority's attention as someone who has or may have SEN.
- SEND Regs and the SEN code make provision for the transfer of the responsibility for the EHC plan from one local authority to another (and for the transfer for the responsibility for securing the health care provision from one responsible commissioning body to another).

#### **Personal budgets (including direct payments)**

- Personal budgets are 'an amount of money identified by the local authority to deliver provision set out in an EHC plan where the parent or young person is involved in securing that provision'.
- Personal budgets are optional but, if the local authority maintains an EHC plan (or is preparing one), it must prepare a personal budget for the child or young person if asked to do so by the parent or young person.
- A direct payment is one way of delivering a personal budget: there is no right to a direct payment, rather the local authority must satisfy itself of certain matters prior to making a direct payment.
- The local authority has a duty to make available information and advice and support in respect of personal budgets (and this information should be provided as part of the 'local offer').
- A request for a personal budget (including a direct payment) can be made at any time during the period in which the draft EHC plan is being prepared or the plan is being reviewed or reassessed.
- A direct payment must be sufficient to secure the provision it covers.
- Section J of the EHC plan must set out the special educational provision to be secured by a direct payment, and the outcomes to be met by a direct payment.

- Before agreeing to make a direct payment, the local authority must satisfy itself (a) that the recipient is a person to whom direct payments can be made, (b) that it is satisfied of the matters set out in Special Educational Needs (Personal Budgets) Regulations 2014 SI No 1652 (SENPB Regs) reg 6(1), and (c) that the recipient will comply with the conditions imposed under SENPB Regs reg 8.
- Where a local authority makes a direct payment in respect of special educational provision, it is to be treated as having secured the special educational provision for the child or young person for the purposes of CFA 2014 s42(2).
- The local authority must monitor and review the use of direct payments.
- Direct payments can also be made in respect of healthcare and social care provision.
- Provision must cease to be made by way of direct payment if the recipient of the direct payments withdraws consent to this method of delivery.

## **EHC needs assessments**

### **Definitions**

- 2.1 The first stage in the process of obtaining an education, health and care (EHC) plan is an EHC needs assessment. An 'EHC needs assessment' is an assessment of the educational, health care and social care needs of a child or young person.<sup>1</sup>
- 2.2 An EHC needs assessment may (but will not always) lead to the preparation of an EHC plan. An EHC plan is a plan specifying:<sup>2</sup>
- (a) the child or young person's special educational needs (SEN);
  - (b) the outcomes sought for him or her;
  - (c) the special educational provision required by him or her;
  - (d) any healthcare provision reasonably required by the learning difficulties and disabilities which result in him or her having SEN;

1 CFA 2014 s36(2). This can be contrasted with the position under EA 1996 s323, in which the local authority was to make an assessment of the 'child's educational needs' only. CFA 2014 s83(2) defines a 'young person' as being aged between 16 and 25.

2 CFA 2014 s37(2).

## 32 SEN and disability discrimination in schools / chapter 2

- (e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of CSDPA 1970 s2;
- (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having SEN, to the extent that the provision is not already specified in the plan under paragraph (e) above.

2.3 An EHC plan may also specify other health and social care provision reasonably required by the child or young person.<sup>3</sup>

2.4 A local authority is responsible for a child or young person if (a) he or she is in the local authority's area, and (b) has been identified by the local authority as someone who has or may have SEN, or has been brought to the local authority's attention by any person as someone who may have SEN.<sup>4</sup>

### Initiating an assessment

2.5 The child's parent, the young person or a person acting on behalf of a school or other educational institution may request a local authority to secure an EHC needs assessment for a child or young person.<sup>5</sup> If a person acting on behalf of a school or other educational institution requests an EHC needs assessment, this should ideally be with the knowledge and agreement of the child's parent or the young person where possible.<sup>6</sup>

2.6 The Code emphasises, however, that anyone else can bring a child or young person who has (or may have) SEN to the attention of the local authority, particularly where they think an EHC needs assessment may be necessary.<sup>7</sup>

2.7 The local authority's decision whether to undertake an EHC needs assessment is a two-stage determination:

3 CFA 2014 s37(3).

4 CFA 2014 s24(1).

5 CFA 2014 s36(1).

6 Code, para 9.8.

7 Code, para 9.9 (reflecting CFA 2014 s24(1)(b)). The Code gives the examples of foster carers, health and social care professionals, early years practitioners, youth offending teams or probation services, those responsible for education in custody, school or college staff or a family friend. The Code notes that this should be done with the knowledge, and where possible, agreement of the child's parent or the young person.

- **Stage one:** An initial determination of whether or not special educational provision may be necessary (this is best understood as a screening decision).
  - **Stage two:** A decision whether or not to conduct an EHC needs assessment.<sup>8</sup>
- 2.8 Both decisions must, however, be taken within six weeks of the initial request for an EHC needs assessment.<sup>9</sup>

## Initial determination

- 2.9 When the local authority receives a request for an EHC assessment, it must first take the screening decision to determine whether it *may* be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.<sup>10</sup> In reaching this initial determination, the local authority must consult the child's parent or young person<sup>11</sup> as soon as practicable after receiving the request (or becoming responsible for the child or young person pursuant to section 24 of the CFA 2014).<sup>12</sup> As the Code notes, this is particularly important where the request was not made by the child's parent or the young person, so they have sufficient time to provide their views.<sup>13</sup> The local authority must also notify:
- (a) the responsible commissioning body;
  - (b) the local authority officers responsible for social care for children or young people with SEN;
  - (c) where a child attends an early years setting, the manager of that setting;
  - (d) where a child or young person is registered at a school, the headteacher (or equivalent); and
  - (e) where the young person attends a post-16 institution, the principal (or equivalent).<sup>14</sup>

8 The two-stage process is apparent from the structure of the legislation: see in particular CFA 2014 s36(3) and (4), as compared to CFA 2014 s36(6) and (7), and SEND Regs reg 4 as compared to reg 5 (and see also *Cambridgeshire CC v FL-J* [2016] UKUT 225 (AAC) per UT Judge Jacobs at para 3). The Code, however, does not properly reflect the fact that the legislation contemplates two separate decisions by the local authority.

9 SEND Regs regs 4(1) and 5(1).

10 CFA 2014 s36(3).

11 CFA 2014 s36(4).

12 SEND Regs reg 3.

13 Code, para 9.12.

14 SEND Regs reg 4(2).

## 34 SEN and disability discrimination in schools / chapter 2

- 2.10 If an EHC plan is maintained already for the child or young person, or the child or young person has been assessed during the previous six months, the local authority does not need to go on to consider stage two (although it may do so) (see below at paras 2.12–2.20).<sup>15</sup>
- 2.11 Where the local authority determines that it is not necessary for special educational provision to be made in accordance with an EHC plan, it must notify the child's parent or the young person of that determination, and of the reasons for that determination.<sup>16</sup> The notification should be as soon as practicable, but in any event within six weeks of receiving a request for an EHC needs assessment (or becoming responsible for the child or young person in accordance with CFA 2014 s24).<sup>17</sup>

### Decision whether to conduct an EHC needs assessment

- 2.12 Having determined that it *may* be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan, the local authority must notify the child's parent or the young person:
- that it is considering securing an EHC needs assessment for the child or young person; and
  - that the child or young person has the right to express views to the local authority (orally or in writing), and submit evidence to the local authority.<sup>18</sup>
- 2.13 The local authority must secure an EHC needs assessment for the child or young person if, after considering any views expressed and/or evidence provided, the local authority is of the opinion that the child or young person has or may have SEN, and that it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.<sup>19</sup>
- 2.14 The Code states that, in considering whether an EHC needs assessment is necessary, the local authority 'should consider whether there is evidence that despite the [educational institution] having

15 CFA 2014 s36(6).

16 CFA 2014 s36(5).

17 SEND Regs reg 4(1). Regulation 4 does not require notification of a right of appeal, but there can be no doubt that a right of appeal arises from a negative screening decision as it is a decision that the local authority 'has decided not to secure an EHC needs assessment for the child or young person' (CFA 2014 s36(5)(b)) which triggers a right of appeal to the FTT under CFA 2014 s51(2)(a).

18 CFA 2014 s36(6) and (7).

19 CFA 2014 s36(8).

taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress'.<sup>20</sup> The Code directs the local authority to consider specific evidence as follows:<sup>21</sup>

- evidence of the child or young person's academic attainment (or developmental milestones in younger children) and rate of progress;
- information about the nature, extent and context of the child or young person's SEN;
- evidence of the action already being taken by the early years provider, school or post-16 institution to meet the child or young person's SEN;
- evidence that, where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided;
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies, and
- where the young person is over the age of 18 a local authority must, in making a determination or forming an opinion in respect of an EHC assessment, consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.<sup>22</sup>

2.15 The UT has considered the test to be applied by the local authority in determining whether to undertake a statutory assessment on two occasions (in both cases in the context of the predecessor legislation: EA 1996 s323).<sup>23</sup>

20 Code, para 9.14.

21 Code, para 9.14.

22 CFA 2014 s36(10); Code, para 9.14.

23 The test in CFA 2014 s36(3) and (6) ('whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan') is different to that previously applied in EA 1996 s323(1) which provided that the local authority had to conduct an assessment where they are 'of the opinion ... that the child falls, or probably falls, within subsection (2)'. A child fell within subsection (2) if: '(a) he has special educational needs; and (b) it is necessary for the authority to determine the special educational provision which any learning difficulty he may have calls for'.

- 2.16 In *NM v Lambeth LBC*<sup>24</sup> UT Judge Mark emphasised that the question of whether a child had made progress was not the only criterion to be applied in considering whether or not an EHC assessment was necessary. He emphasised that a local authority (and the FTT on appeal) also had to ask whether such progress had been achieved as a result of effort and instruction above what would normally be provided. Further, the local authority and FTT ought to consider that a statement of SEN would ‘provide some protection to a child where additional funding ceased to be available in the absence of a statement. It could also assist a child if he moved school or if there was a change in relevant teaching staff’.<sup>25</sup>
- 2.17 In *MC v Somerset CC*<sup>26</sup> UT Judge Ward posed the question of when it might be necessary ‘for the authority to determine the special educational provision which any learning difficulty he may have calls for’. He gave two examples (while accepting that there were other possibilities): (a) where there was insufficient awareness of the special educational provision which a child requires, and (b) where the child needed to have a statement of SEN to access the relevant provision.<sup>27</sup>
- 2.18 Further, UT Judge Ward accepted that the amount of money delegated by the local authority to the school may be a material factor: the more money a local authority delegated to schools, the more a school may be reasonably be able to provide without the need for an EHC plan.<sup>28</sup>
- 2.19 The local authority may develop criteria as guidelines to help them decide when it is necessary to carry out an EHC needs assessment (and following assessment, whether it is necessary to issue an EHC plan).<sup>29</sup> The criteria must be capable of being departed from, however, and must not be applied as a blanket policy to certain groups of children or certain types of need.<sup>30</sup>

24 [2011] UKUT 499 (AAC), [2012] ELR 224.

25 [2011] UKUT 499 (AAC), [2012] ELR 224 at paras 16–17. UT Judge Ward made the same point in *MC v Somerset CC* [2015] UKUT 461 (AAC), [2016] ELR 53 at para 22.

26 [2015] UKUT 461 (AAC), [2016] ELR 53.

27 [2015] UKUT 461 (AAC), [2016] ELR 53 at para 19.

28 [2015] UKUT 461 (AAC), [2016] ELR 53 at para 23 (and see the case-law at para 2.29 below).

29 Code, para 9.16.

30 Code, para 9.16.

- 2.20 The local authority must notify the child's parent or the young person as soon as practicable and in any event within six weeks<sup>31</sup> of receiving a request for an assessment (or becoming responsible for the child or young person in accordance with CFA 2014 s24) of its decision whether or not it is necessary to secure an EHC needs assessment for a child or young person.<sup>32</sup> The local authority must also notify the responsible commissioning body, the local authority officers responsible for social care for children or young people with SEN, the manager of any early years setting attended by a child, the headteacher (or equivalent) of any school at which a child or young person is registered and the principal (or equivalent) of any post-16 institution which a young person attends.<sup>33</sup>

### Conducting an EHC needs assessment: information and advice to be obtained by the local authority

- 2.21 When it undertakes an EHC needs assessment, the local authority must seek the following advice and information<sup>34</sup> on the needs of the

- 31 There are circumstances in which the local authority does not have to comply with the time limit, see SEND Regs reg 5(4). The child's parent or young person should be informed if exemptions apply so that he or she is aware of, and understands, the reasons for the delays. Local authorities should aim to keep delays to a minimum and as soon as the conditions that lead to an exemption no longer apply, the local authority should endeavour to complete the process as quickly as possible. All remaining elements of the process must be completed within their prescribed periods, regardless of whether exemptions have delayed earlier elements. See Code, para 9.43.
- 32 SEND Regs reg 5(1). The local authority must also notify the parent or the young person about his or her right to appeal the decision, the time limits for doing so, provide information concerning mediation and the availability of disagreement resolution services and information and advice about matters relating to the special educational needs of children and young people: see SEND Regs reg 5(3).
- 33 SEND Regs reg 5(2).
- 34 Where a local authority requests the co-operation of the bodies specified in CFA 2014 s31 (namely another local authority, a youth offending team, the person in charge of any relevant youth accommodation, the National Health Service Commissioning Board, a Clinical Commissioning Group (CCG), a Local Health Board, or an NHS trust or NHS foundation trust) in securing an EHC needs assessment, the body must comply with such a request within six weeks of receiving it, SEND Regs reg 8(1) (there are exemptions to this time limit in reg 8(2)). The child's parent or young person should be informed if exemptions apply so that they are aware of, and understand, the reasons for the delays. local authority should aim to keep delays to a minimum and as soon as the conditions that lead to an exemption no longer apply, the local authority should endeavour to complete the process as quickly as possible. All remaining elements of

## 38 SEN and disability discrimination in schools / chapter 2

child or young person, on what provision may be required to meet such needs, and on the outcomes that are intended to be achieved by the child or young person receiving that provision:<sup>35</sup>

- advice and information from the child's parent or young person;
- educational advice and information from the headteacher or principal of the school or post-16 institution that the child or young person is attending;<sup>36</sup>
- medical advice and information from a health care profession identified by the responsible commissioning body;
- psychological advice and information from an educational psychologist;<sup>37</sup>
- advice and information in relation to social care;<sup>38</sup>
- advice and information from any other person the local authority thinks is appropriate;<sup>39</sup>
- advice and information in relation to provision to assist any child or young person in or beyond year 9 in preparation for adulthood and independent living;<sup>40</sup>

the process must be completed within their prescribed periods, regardless of whether exemptions have delayed earlier elements. See Code, para 9.43.

- 35 SEND Regs reg 6(1). The local authority is not required to seek the advice above (except for advice from the child's parent or the young person) if such advice has previously been produced for any purpose and the person providing the advice, the local authority and the child's parent or the young person are satisfied that it is sufficient for the purposes of an EHC needs assessment: SEND Regs reg 6(4).
- 36 SEND Regs reg 6(1)(b) contemplates alternative sources of advice and information where this is not available. Further, where it appears to the local authority that the child or young person in question is either or both hearing impaired or visually impaired, if the teacher from whom advice is sought is not qualified to teach hearing or visually impaired pupils, the advice sought shall be given after consultation with a person who is so qualified: SEND Regs reg 6(2).
- 37 The Code notes that the educational psychologist should normally be employed or commissioned by the local authority. The educational psychologist should consult any other educational psychologists known to be involved with the child or young person: see Code, para 9.49.
- 38 The Code notes that in some cases, a child or young person may already have a statutory child in need or child protection plan, or an adult social care plan, from which information should be drawn for the EHC needs assessment. See Code, para 9.49.
- 39 The Code suggests Early Help Assessments; in the case of children of members of the Armed Forces advice from the Children's Education Advisory Service; and in the case of a looked after child, advice from the Virtual School Head in the local authority that looks after the child and the child's Designated Teacher and the Designated Doctor and Nurse for looked after children: Code, para 9.49.
- 40 SEND Regs reg 2 defines 'year 9' as 'the year of compulsory schooling in which the majority of pupils in the class attain the age of 14'.

- advice and information from any person the child's parent or young person reasonably requests the local authority seek advice from.<sup>41</sup>
- 2.22 The Code also adds that in certain circumstances the local authority should seek advice from a youth offending team.<sup>42</sup>
- 2.23 The local authority must provide the person from whom advice is being sought with copies of any representations made by the child's parent or the young person and any evidence submitted by or at the request of the child's parent or the young person.<sup>43</sup>
- 2.24 Advice and information must be provided within six weeks of the request, or more quickly if possible to enable a timely process.<sup>44</sup>
- 2.25 When conducting an EHC needs assessment, the local authority must:<sup>45</sup>
- consult the child and the child's parent, or the young person, and take into account their views, wishes and feelings;<sup>46</sup>
  - consider any information provided to the local authority by or at the request of the child, the child's parent or the young person;
  - consider the information and advice obtained from the persons listed in para 2.21 above;
  - engage the child and the child's parent, or the young person and ensure they are able to participate in decisions: the Code states that local authorities should support and encourage the involvement of children, young people and parents or carers by providing them with access to the relevant material in accessible format,

41 The Code notes that parents might suggest consulting a GP or other health professional: Code, para 9.49.

42 The Code notes that where the child or young person is detained in a Young Offender Institution, the local authority should seek advice from his or her youth offending team. Where the young person is serving his or her sentence in the community, the local authority should seek such advice where it considers it appropriate. Code, para 9.49.

43 SEND Regs reg 6(3).

44 SEND Regs reg 8(1) and Code, para 9.52. There are exemptions to this time limit in reg 8(2)). The child's parent or young person should be informed if exemptions apply so that they are aware of, and understand, the reasons for the delays. Local authorities should aim to keep delays to a minimum, and as soon as the conditions that lead to an exemption no longer apply, the local authority should endeavour to complete the process as quickly as possible. All remaining elements of the process must be completed within their prescribed periods, regardless of whether exemptions have delayed earlier elements. See Code, para 9.43.

45 SEND Regs reg 7.

46 Code, paras 9.21–9.23 and 9.49.

## 40 SEN and disability discrimination in schools / chapter 2

giving them time to prepare for discussions and meetings and dedicating time in discussions and meetings to hear their views.<sup>47</sup>

The Code also acknowledges that some children or young people will require support from an advocate where necessary (which could be a family member or a professional) to ensure that their views are heard and acknowledged;<sup>48</sup>

- minimise disruption for the child, the child's parent, the young person and their family: the Code provides that local authorities must work with parents and children and young people to understand how best to minimise disruption for them and family life. The Code notes that multiple appointments should be coordinated or combined where possible and appropriate.<sup>49</sup>

2.26 The Code notes that information-sharing is vital to support an effective assessment and planning process, but that local authorities must discuss with the child and young person and his or her parents what information they are happy for the local authority to share with other agencies. A record should be made of what information can be shared and with whom.<sup>50</sup>

2.27 Importantly, the Code emphasises that where particular services are assessed as being needed (eg under the Children Act (CA) 1989), their provision should not be delayed pending the completion of an EHC plan. Rather, help and support should be given to the child and family as soon as a need is identified.<sup>51</sup>

### Outcome of the EHC needs assessment: deciding whether to issue an EHC plan

2.28 Having carried out an EHC needs assessment, a local authority must determine whether or not to issue an EHC plan. The statutory test, contained in CFA 2014 s37(1), is that the preparation of an EHC plan should be secured where 'in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan'. The wording

47 Code, paras 9.24; and see also paras 9.27–9.29.

48 Code, para 9.25.

49 Code, para 9.28, and see also paras 9.30–9.31.

50 Code, paras 9.32–9.34.

51 Code, para 9.35.

is similar, although not identical, to the wording used in EA 1996 s324,<sup>52</sup> which stated:

If, in the light of an assessment ... of any child's educational needs and of any representations made by the child's parent ... it is necessary for the local authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.

2.29 There is no statutory definition of 'necessary'.<sup>53</sup> In *NC and DH v Leicestershire CC*, UT Judge Pearl held that a local authority (and the FTT on appeal) must ask two questions when determining whether it was 'necessary' to issue a statement of SEN: (a) whether the special educational provision identified as necessary for the child in the assessment is in fact available within the resources normally available to a mainstream school; and (b) if so, can the school reasonably be expected to make such provision from within its resources.<sup>54</sup> UT Judge Pearl accepted that the resources 'normally available' will differ from case to case and from local authority to local authority, but that it was proper for a local authority to take account of the money and personnel provided to a school by a delegated budget.<sup>55</sup> In *SC and MS v Worcestershire CC*,<sup>56</sup> UT Judge Mitchell agreed with this

52 The Code provides, however, that the 'legal test of when a child or young person requires an EHC plan remains the same as that for a statement under the Education Act 1996' (p15, para (xi)).

53 In *Buckinghamshire CC v HW* [2013] ELR 519, UT Judge Jacobs stated that it meant somewhere between indispensable and useful, but that he would not define it more precisely (at para 16). He added that it is a word in common usage and it is that usage that a local authority or the FTT must apply. In *Manchester City Council v JW* [2014] UKUT 168 (AAC) UT Judge Mark observed that 'if a thing is needed it is necessary' and that the need 'may be clear or it may involve a value judgment' (at para 14). In *Hertfordshire CC v MC* [2016] UKUT 385 (AAC) UT Judge Lane stated that what was 'necessary' is 'a matter to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment' (at para 36).

54 [2012] UKUT 85 (AAC), [2012] ELR 365 at para 32. Similarly, in *Islington LBC v LAO* [2008] EWHC 2297 (Admin), HHJ Waksman QC, sitting as a Deputy Judge of the High Court, derived from the code of practice then in force three stages to a decision whether to issue a statement of SEN: the first was to ascertain the degree of the child's learning difficulties and the SEN that resulted; the second was to determine what provision was required; and the third was to determine whether that provision was available in the normal resources available to the local authority (at paras 6–7).

55 [2012] UKUT 85 (AAC), [2012] ELR 365 at paras 35–38. See also *LS v Oxfordshire CC* [2013] UKUT 135 (AAC), [2013] ELR 429 per UT Judge Wikeley (at paras 23–27).

56 [2016] UKUT 267 (AAC), [2016] ELR 537.

42 SEN and disability discrimination in schools / chapter 2

test, but suggested that it could be more practically stated by asking whether ‘without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered’.<sup>57</sup>

2.30 The Code reflects the decision in *NC and DH v Leicestershire CC*. The Code suggests the local authority should consider whether, in the light of the EHC needs assessment, the existing special educational provision is well matched to the SEN of the young person.<sup>58</sup> Further, where despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account:

- whether the special educational provision required to meet the child or young person’s needs can reasonably be provided from within the resources normally available to mainstream educational institutions; or
- whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan.<sup>59</sup>

2.31 In *Manchester City Council v JW*,<sup>60</sup> UT Judge Mark commented (in respect of EA 1996 s324, but the comments apply with equal force to CFA 2014 s36) that the Code, being guidance only, does not affect the generality of the statutory test so as to exclude the possibility that a statement may be necessary for some other reason, for example, where a school or local authority, despite having the necessary resources, simply refused to use their best endeavours to provide the requisite special educational provision.<sup>61</sup>

2.32 One relevant factor in considering the meaning of ‘necessary’ is that the local authority must provide the provision in an EHC plan, while in respect of children and young people without EHC plans the governing body of the school (or other appropriate authority in respect of the institution) must only use its best endeavours to secure the special educational provision called for by the child or young

57 [2016] UKUT 267 (AAC), [2016] ELR 537 per UT Judge Mitchell at para 49. This test had the advantage, stated the judge at para 50, of reducing the likelihood of the FTT having to spend time dealing with local school financing arrangements. It also simplified matters where the child did not attend a maintained school.

58 Code, para 9.54.

59 Code, para 9.55.

60 [2014] UKUT 168 (AAC), [2014] ELR 304.

61 [2014] UKUT 168 (AAC), [2014] ELR 304 at para 17.

person's SEN is made.<sup>62</sup> So if there is a realistic doubt that the operation of the 'best endeavours duty' would result in the required provision, that favours a conclusion that the duty to make and maintain a statement of SEN arises because it is a case where it is 'necessary' to determine special educational provision.<sup>63</sup>

2.33 A further relevant factor is the status of the school. In *LS v Oxfordshire CC*,<sup>64</sup> the local authority determined not to issue a statement of SEN after carrying out an assessment. The FTT dismissed the parent's appeal. One week after the FTT's hearing, the school attended by the child converted to become an academy. The UT held, first, that the FTT needed to know that the school was about to become an academy as the local authority relied on the delegated funding available to the school to say that a statement was unnecessary to meet the child's needs. That the system of funding was about to alter was a material consideration for the FTT.<sup>65</sup> Second, the change in status to an academy *could* have made a difference to the FTT's decision.<sup>66</sup> The UT quashed the FTT's decision and remitted it back for reconsideration.

2.34 Finally, in both deciding whether an assessment is necessary and in the process of carrying out an assessment, the local authority must look to the future (even if that would require assessment of what special educational provision will be required in a different school).<sup>67</sup>

## Notification of the decision on whether to issue an EHC plan

2.35 After the EHC needs assessment has been carried out, the local authority must notify the child's parent, or the young person, of the outcome of the assessment, whether it proposes to secure that an EHC

62 See paras 1.54–1.55 above. Compare CFA 2014 ss42(2) and 66(2). The UT held this to be relevant in *SC and MS v Worcestershire CC* [2016] UKUT 267 (AAC), [2016] ELR 537 per UT Judge Mitchell at paras 41–42, and *MC v Somerset CC* [2015] UKUT 461 (AAC), [2016] ELR 53 per UT Judge Ward at para 22.

63 *SC and MS v Worcestershire CC* [2016] UKUT 267 (AAC), [2016] ELR 537 per UT Judge Mitchell at para 42. See also *Manchester City Council v JW* [2014] UKUT 168 (AAC), [2014] ELR 304 per UT Judge Marks at para 17.

64 [2013] UKUT 135 (AAC), [2013] ELR 429.

65 [2013] UKUT 135 (AAC), [2013] ELR 429 per UT Judge Wikeley at paras 47–49.

66 [2013] UKUT 135 (AAC), [2013] ELR 429 per UT Judge Wikeley at paras 53–58.

67 See paras 3.33–3.34 below. In particular, see *Wilkin v Goldthorpe and Coventry City Council* [1998] ELR 345; *Buckinghamshire CC v HW* [2013] UKUT 470 (AAC), [2013] ELR 519 per UT Judge Jacobs at paras 19–22; and *OR v Ealing LBC* [2012] UKUT 211 (AAC), [2012] ELR 436 per UT Judge Williams at paras 31–34.

## 44 SEN and disability discrimination in schools / chapter 2

plan is prepared for the child or young person, and the reasons for that decision.<sup>68</sup> The local authority must also notify the headteacher of the school at which the child is a registered pupil (or the person identified as having responsibility for SEN at a provider of relevant early years education, or the principal of a post-16 institution).<sup>69</sup>

2.36 If the local authority decides that it is not necessary for special educational provision to be made for a child or young person in accordance with an EHC plan, the notification to the child's parent or the young person must be given as soon as practicable, and in any event within 16 weeks<sup>70</sup> of the local authority receiving a request for an EHC needs assessment (or becoming responsible for the child or young person in accordance with CFA 2014 s24).<sup>71</sup> The local authority must also notify the child's parent or the young person of their right to appeal the decision.<sup>72</sup>

2.37 The local authority should also provide feedback collected during the process of considering whether an EHC needs assessment is necessary, including advice from professionals, which the parent, young person or educational institution may find useful.<sup>73</sup>

## EHC plans

### Introduction

2.38 The Code describes the purpose of an EHC plan as being 'to make special educational provision to meet the special educational needs

68 CFA 2014 s36(9).

69 SEND Regs reg 10(2).

70 SEND Regs reg 10(4) contains exemptions to the time limit. The child's parent or the young person should be informed if exemptions apply so that he or she is aware of, and understands, the reasons for the delays. Local authorities should aim to keep delays to a minimum and as soon as the conditions that lead to an exemption no longer apply, the local authority should endeavour to complete the process as quickly as possible. All remaining elements of the process must be completed within their prescribed periods, regardless of whether exemptions have delayed earlier elements. See Code, para 9.43.

71 SEND Regs reg 10(1).

72 SEND Regs reg 10(3). The notification must also include the following information: (a) the time limits for an appeal; (b) the requirement to consider mediation should the parent or young person wish to appeal; (c) the availability of information, advice and support and disagreement resolution services; and (d) the FTT's power to make social care recommendations under a pilot scheme (on which, see paras 4.25–4.29 below).

73 Code, paras 9.19, 9.59.

of the child or young person, to secure the best possible outcomes for them across education, health and social care and, as they get older, prepare them for adulthood'.<sup>74</sup> This section describes the process by which an EHC plan is made. An overview of what is expected by way of content is set out at paras 2.39–2.40 below. Chapter 3 contains a more detailed analysis of the content of EHC plans.

## Contents of an EHC plan: an overview

2.39 The plan must, at the least,<sup>75</sup> set out the following:<sup>76</sup>

- Section A: The views, interests and aspirations of the child and his or her parents or the young person.
- Section B: The child or young person's SEN (equivalent to Part 2 in statements of SEN).
- Section C: The child or young person's healthcare needs which relate to his or her SEN.
- Section D: The child or young person's social care needs which relate to his or her SEN or disability.
- Section E: The outcomes sought for the child or young person.
- Section F: The special educational provision required by the child or young person (equivalent to Part 3 in statements of SEN).
- Section G: Any healthcare provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN. The healthcare provision specified must be agreed by the responsible commissioning body.<sup>77</sup>
- Section H1: Any special care provision which must be made for the child or young person as a result of CSDPA 1970 s2.
- Section H2: Any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN.
- Section I: The name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person, and the type of that institution or, where the name of the school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (the equivalent of Part 4 in statements of SEN).

<sup>74</sup> Code, para 9.2.

<sup>75</sup> The Code provides that the format of the EHC plan can be agreed locally, but as a statutory minimum sections A–K must be included, Code, para 9.62.

<sup>76</sup> SEND Regs reg 12(1).

<sup>77</sup> SEND Regs reg 12(2).

## 46 SEN and disability discrimination in schools / chapter 2

- Section J: Where any special educational provision is to be secured by a direct payment, the SEN and outcomes to be met by the direct payment.

2.40 The advice and information obtained in accordance with SEND Regs reg 6(1) must be set out in appendices to the EHC plan.<sup>78</sup> The Code describes this as ‘section K’.<sup>79</sup> Further, where the child or young person is in or beyond year 9, the EHC plan must include within the special educational provision, healthcare and social care provision specified, provision to assist the child or young person in preparation for adulthood and independent living.<sup>80</sup>

### Preparing the EHC plan

2.41 When preparing a child or young person’s EHC plan, a local authority must take into account the evidence received when securing the EHC needs assessment, and consider how best to achieve the outcomes to be sought for the child or young person.<sup>81</sup>

2.42 The local authority must first produce the EHC plan in draft. It must consult the child’s parent or the young person about the content of the plan during a preparation of a draft of the plan.<sup>82</sup> The local authority must then send the draft plan to the child’s parent or to the young person.<sup>83</sup> The draft plan must not name a school or other institution, or specify a type of school or other institution (this is to allow for the parent or young person to request a school – see paras 2.43–2.46 below).<sup>84</sup>

2.43 When the local authority sends a draft plan to the child’s parent or young person it must give them at least 15 days (beginning with the day on which the draft plan was served) in which to make representations about the content of the draft plan, to request that a particular school or other institution be named in the plan and to require the local authority to arrange a meeting between them and an officer of

78 SEND Regs reg 12(4).

79 Code, para 9.62.

80 SEND Regs reg 12(3); Code, para 9.63. The Code identifies four ‘preparing for adulthood outcomes’, namely: (i) moving into paid employment and higher education, (ii) independent living, (iii) having friends and relationships and being part of their communities, and (iv) being as healthy as possible, see Code (Introduction to Chapter 8).

81 SEND Regs reg 11.

82 CFA 2014 s38(1); Code, para 9.77.

83 CFA 2014 s38(2); Code, para 9.77.

84 CFA 2014 s38(5); Code, para 9.77.

the local authority at which the draft plan can be discussed.<sup>85</sup> The local authority must also advise the child's parent or the young person where they can find information about the schools and colleges that are available for the child or young person to attend.<sup>86</sup> Further, the local authority should seek agreement of any personal budget specified in the draft plan.<sup>87</sup> Personal budgets and direct payments are dealt with in more detail in paras 2.120–2.154 below.

2.44 A parent or young person can only request that certain types of school (described below as 'qualifying schools') be named in the plan, namely a maintained school, a maintained special school, an academy, a further education institution, a non-maintained special school or an independent special school or special post 16 institution approved by the secretary of state.<sup>88</sup> If the parent or young person names a qualifying school, the CFA 2014 contains a presumption in favour of parental preference in that the local authority must secure that the EHC plan names the requested educational institution unless the criteria in CFA 2014 s39(4) apply: (a) the school or other institution is unsuitable for the age, ability, aptitude, or SEN of the child or young person concerned; or (b) the attendance of the child or young person at the requested school or other institution would be incompatible with the provision of efficient education for others or the efficient use of resources.<sup>89</sup> The exercise of parental preference is dealt with in more detail at paras 3.35–3.65 below.

2.45 If, before the end of the 15-day period, the parent or young person requests the local authority to name a qualifying school in the EHC plan, the local authority must consult the governing body, proprietor or principal of the school or other institution requested and if the school is maintained by another local authority, that local authority.<sup>90</sup>

85 SEND Regs reg 13(1)(a); Code, para 9.77.

86 SEND Regs reg 13(1)(b); Code, para 9.77.

87 Code, para 9.77.

88 For definitions of schools, see para 1.16 above. See CFA 2014 s38(3); Code, para 9.78. CFA 2014 s83(2) defines a 'maintained school' as '(a) a community, foundation or voluntary school, or (b) a community or foundation special school not established in a hospital'. Section 83(5) further defines reference to a community, foundation or voluntary school or to a community or foundation special school to be a reference to such a school within the meaning of the School Standards and Framework Act (SSFA) 1998 (on which see SSFA 1998 ss20, 21 and 142). CFA 2014 s41 and SEND Regs regs 58–62 make provision for independent special schools and special post-16 institutions to be approved by the secretary of state.

89 CFA 2014 s39(3) and (4).

90 CFA 2014 s39(1) and (2); Code, para 9.80.

## 48 SEN and disability discrimination in schools / chapter 2

- 2.46 Where CFA 2014 s39(4) applies, or where the parent or young person makes no request to name a qualifying school to the local authority before the end of the 15-day period, the local authority must secure that the plan names a school or other institution which the local authority thinks would be appropriate for the child or young person, or specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.<sup>91</sup> If the parent or young person has requested that a non-qualifying school be named (for example, an independent mainstream school), the local authority must have regard to the preference.<sup>92</sup> Before naming any school or other institution in an EHC plan, the local authority must (if it has not done so already) consult the governing body, proprietor or principal of any school proposed to be named in the plan, and if the school is maintained by another local authority, that local authority.<sup>93</sup>

### Finalising the EHC plan

- 2.47 If, following consultation:
- a) the parent or young person proposes changes to the draft EHC plan which the local authority agrees, then the EHC plan can be amended and issued as soon as possible. The final EHC plan must differ from the draft EHC plan only as a result of the representations made; if the local authority wishes to make any further amendments, it must re-issue the draft plan to allow the parent or young person to comment;<sup>94</sup>
  - b) the parent or young person proposes changes that are not agreed, then the local authority may proceed to issue the final EHC plan without the requested changes.<sup>95</sup>
- 2.48 The local authority must send a copy of the finalised EHC plan to the child's parent or to the young person,<sup>96</sup> to the governing body, proprietor or principal of any school or other institution named in the plan<sup>97</sup> and to the responsible commissioning body<sup>98</sup> as soon as

91 CFA 2014 ss39(5), 40(1) and (2); Code, paras 9.88–9.90.

92 See EA 1996 s9, and for the correct approach see paras 3.44–3.47, 3.52–3.65 below.

93 CFA 2014 ss39(6) and 40(3).

94 Code, para 9.125.

95 Code, para 9.126.

96 CFA 2014 ss39(8), 40(5) ; SEND Regs reg 13(2).

97 CFA 2014 ss39(8), 40(5); SEND Regs reg 13(2).

98 SEND Regs reg 13(2).

practicable and in any event within 20 weeks of the local authority receiving a request for an EHC needs assessment (or becoming responsible for the child pursuant to CFA 2014 s24).<sup>99</sup>

- 2.49 When sending a copy of the finalised EHC plan to the child's parent or to the young person, the local authority must notify them of their right to appeal.<sup>100</sup>

## Maintaining an EHC plan

- 2.50 An EHC plan imposes duties on a local authority and (where relevant) on the responsible commissioning body, specifically:

- The local authority must secure the special educational provision specified for the child or young person in the EHC plan (specifically in sections F and I).<sup>101</sup> This includes a duty to pay any fees payable in respect of the provision of education at a school or institution.<sup>102</sup>
- If the EHC plan specifies healthcare provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.<sup>103</sup>

- 2.51 In the context of the EA 1996, the courts held that the requirement on the local authority to 'arrange' special educational provision is a mandatory one, and that financial or other practical difficulties in giving effect to the terms of the statement of SEN provide no excuse.<sup>104</sup> Given the materially similar wording of the CFA 2014, the courts are likely to follow the pre-existing case-law.

99 SEND Regs reg 13(2). The exemptions to the time limits set out in reg 10(4) apply, see SEND Regs reg 13(3).

100 SEND Regs reg 14(2); Code, paras 9.126–9.128. The notification must include the time limits for making an appeal, the requirement to consider mediation should the parent or young person wish to appeal, the availability of information, advice and support and disagreement resolution services and the FTT's powers to make social care recommendations under a pilot scheme, on which see paras 4.25–4.29 below.

101 CFA 2014 s42(1) and (2).

102 CFA 2014 s63(1) and (2).

103 CFA 2014 s42(3) and (4); Code, para 9.141.

104 See *R v Harrow LBC ex p M* [1997] ELR 62, per Turner J; *R (N) v North Tyneside BC* [2010] EWCA Civ 135, [2010] ELR 312, per Elias LJ (at paras 9–11). EA 1996 s324(5) stated that the local authority 'shall arrange' the special educational provision in the statement of SEN. CFA 2014 s42(2) states that the local authority 'must secure' the special educational provision; section 42(3) states that the responsible commissioning body 'must arrange' the healthcare specified in the EHC plan.

## 50 SEN and disability discrimination in schools / chapter 2

- 2.52 Neither the duty on the local authority, nor the duty on the responsible commissioning body, arises if the child's parent or the young person has made suitable alternative arrangements.<sup>105</sup> The Code provides that the local authority must satisfy itself that any alternative arrangements made by the parent or young person are suitable before it is relieved of its duty to secure the provision.<sup>106</sup> Suitable alternative arrangements must include arrangements which are financially secure (at least for a reasonable period of time).<sup>107</sup>
- 2.53 The CFA 2014 contains no equivalent duty on social care to secure the provision of any social care provision set out in an EHC plan. In many (but possibly not all) cases the duty to secure any services provided will arise under CSDPA 1970 s2 (in respect of children under the age of 18) or under Care Act 2014 (CA 2014) s18. The Code requires the local authority to state in section H1 of the EHC plan which services (if any) are provided under the CSDPA 1970 or under CA 2014 s18.<sup>108</sup>

### Duty on schools to admit where named in section I of an EHC plan

- 2.54 Where certain types of school<sup>109</sup> are named in an EHC plan, the governing body or principal of the school or other institution must admit the child or young person for whom the EHC plan is maintained.<sup>110</sup>

105 CFA 2014 s42(5).

106 Code, para 9.133 (and see further, paras 9.134–9.136). On an application for judicial review, the question of whether suitable alternative arrangements have been made is not a question of fact for the court to determine, but a question for the local authority, subject to *Wednesbury* unreasonableness (ie so unreasonable that no reasonable decision maker could have reached that conclusion) and other public law arguments; see *White v Ealing LBC* [1997] EWHC 651 (Admin), [1998] ELR 203 per Dyson LJ (this conclusion was not challenged in the Court of Appeal, [1998] ELR 319).

107 See *R v Hackney LBC ex p GC* [1995] ELR 144, 153B per Auld J; *R v Kent CC ex p W* [1995] ELR 362, 370F per Turner J; and *White v Ealing LBC* [1997] EWHC 651 (Admin), [1998] ELR 203 per Dyson LJ.

108 Code, para 9.137.

109 By CFA 2014 s43(1): a maintained school, a maintained nursery school, an academy, an institution within the further education sector in England, a non-maintained special school and an institution approved by the secretary of state under CFA 2014 s41.

110 CFA 2014 s43(2); Code, para 9.130.

## **Review and reassessment**

### **Reviews**

#### *Introduction*

- 2.55 The Code states that ‘EHC plans should be used to actively monitor children and young people’s progress towards their outcomes and longer term aspirations’.<sup>111</sup> Reviews are an essential part of this process.
- 2.56 The Code describes the purposes of a review to be as follows:
- gather and assess information so that it can be used by early years settings, schools or colleges to support the child or young person’s progress and their access to teaching and learning;
  - review the special educational provision made for the child or young person to ensure it is being effective in ensuring access to teaching and learning and good progress;
  - review the health and social care provision made for the child or young person and its effectiveness in ensuring good progress towards outcomes;
  - consider the continuing appropriateness of the EHC plan in the light of the child or young person’s progress during the previous year or changed circumstances and whether changes are required including any changes to outcomes, enhanced provision, change of educational establishment or whether the EHC plan should be discontinued;
  - set new interim targets for the coming year and where appropriate, agree new outcomes; and
  - review any interim targets set by the early years provider, school or college or other education provider.

#### *Timing*

- 2.57 A local authority must review an EHC plan that it maintains in the period of 12 months starting with the date on which the plan was first made, and in each subsequent period of 12 months starting with the date on which the plan was last reviewed.<sup>112</sup>

<sup>111</sup> Code, para 9.166.

<sup>112</sup> CFA 2014 s44(1).

52 SEN and disability discrimination in schools / chapter 2

- 2.58 Further, there are particular requirements of review when a child is about to transfer between phases of education.<sup>113</sup> Where a child or young person is within 12 months of a transfer between phases of education, the local authority must review and amend (where necessary) the child or young person's EHC plan before 31 March (in the calendar year of the child or young person's transfer from secondary school to a post-16 institution) or 15 February (in the calendar year of the child's transfer in all other cases). Where necessary, the local authority must amend the EHC plan so that it names the school or institution the child will attend following the transfer.<sup>114</sup> Where it is proposed that a young person transfers from one post-16 institution to another post-16 institution at any other time, the local authority must review and amend where necessary the young person's EHC plan at least five months before the transfer takes place so that it names the post-16 institution the child will attend following the transfer.<sup>115</sup>
- 2.59 In respect of children under the age of five, the Code suggests that local authorities consider reviewing an EHC plan at least every three to six months to ensure that the provision continues to be appropriate. The Code proposes that, depending on the needs of the child, these can be streamlined reviews (ie that they may not necessarily require the attendance of all of the professionals).<sup>116</sup>
- 2.60 Neither the legislation nor the Code refers to emergency (or interim) reviews. Nevertheless, where a child is at risk of being (or has been) excluded from the school named, or where a school is struggling to meet a child's needs, or where circumstances have changed significantly such that it would be appropriate to review the provision contained in the EHC plan, a child's parent or a young person, or the head teacher of a school, should consider asking the local authority to convene an emergency (or interim) review.<sup>117</sup>

113 The Code describes the phase transfers as: (i) early years provider to school; (ii) infant school to junior school; (iii) primary school to middle school; (iv) primary school to secondary school; and (v) middle school to secondary school; see Code, para 9.179.

114 SEND Regs reg 18(1).

115 SEND Regs reg 18(2).

116 Code, para 9.178.

117 The previous Code, *Special educational needs code of practice* (2001) referred to 'interim reviews' and stated that these should take place 'where a school identifies a pupil with a statement of special educational needs who is at serious risk of disaffection or exclusion, an interim or early review should be called. It will then be possible to consider the pupil's changing needs and recommend amendments to the statement, as an alternative to the pupil being

- 2.61 When the local authority is transferring a child or young person with a statement of SEN to an EHC plan, the local authority must conduct a transfer review. This will often replace the annual review of the statement of SEN in the year in which the local authority intends to transfer the child or young person. Transfer reviews, and the transfer of children and young people from statements of SEN to EHC plans, are dealt with in para 2.80–2.98 below.

### *Conduct*

- 2.62 When undertaking a review of an EHC plan, a local authority must:<sup>118</sup>

- consult the child and the child’s parents or the young person, and take account of their views, wishes and feelings;
- consider the child or young person’s progress towards achieving the outcomes specified in the EHC plan and whether these outcomes remain appropriate for the child or young person;
- consult the school or other institution attended by the child or young person.

- 2.63 SEND Regs reg 20 sets down the process to be followed where the child or young person attends a school or institution.<sup>119</sup>

- 2.64 There must be a meeting held to conduct the review.<sup>120</sup> The following must be invited:

- (a) the child’s parent or the young person;
- (b) the headteacher or principal of the school or institution attended;
- (c) an officer from the local authority’s SEN department;
- (d) a healthcare professional identified by the responsible commissioning body to provide advice about healthcare provision in relation to the child or young person; and
- (e) an officer from the local authority’s social services department.<sup>121</sup>

At least two weeks’ notice of the date of the meeting must be given.<sup>122</sup> The person arranging the review meeting must obtain advice or

excluded’ (at para 9.44). It is unfortunate that reference to interim reviews is absent from the current code.

118 SEND Regs reg 19. See also CFA 2014 s44(6) which requires a local authority to consult the parent of the child or the young person during a review.

119 SEND Regs reg 21 sets out a slightly modified process where a child does not attend a school or other institution. See also the Code, at paras 9.173–9.177.

120 SEND Regs reg 20(1).

121 SEND Regs reg 20(2).

122 SEND Regs reg 20(3).

## 54 SEN and disability discrimination in schools / chapter 2

information from the invitees and circulate this to all other invitees at least two weeks in advance of the meeting.<sup>123</sup>

2.65 The meeting must consider the child or young person's progress towards meeting the outcomes specified in the EHC plan.<sup>124</sup> Further, where the child or young person is in or beyond year 9,<sup>125</sup> the review meeting must also consider what provision is required to assist the child or young person in preparation for adulthood and independent living.<sup>126</sup>

2.66 Following the meeting, the headteacher or principal of the school must prepare a written report on the child or young person, setting out the headteacher or principal's recommendations on any amendments to be made to the EHC plan, and referring to any difference between those recommendations and the recommendations of others attending the meeting.<sup>127</sup> The report must be prepared within two weeks of the meeting and circulated to all of the invitees.<sup>128</sup>

2.67 The local authority must then decide whether to:

- continue to maintain the EHC plan in its current form;
- amend it; or
- cease to maintain it;

and must notify the child's parent or the young person, and the headteacher or principal of its decision within four weeks of the review meeting.<sup>129</sup>

### *Amending an EHC plan following a review*<sup>130</sup>

2.68 Where the local authority is considering amending an EHC plan following a review, it must (in broad terms) undertake the same process as when it initially determined the content of the EHC plan (see paras 2.41–2.49 above).<sup>131</sup> Thus the local authority must:<sup>132</sup>

123 SEND Regs reg 20(4).

124 SEND Regs reg 20(5).

125 SEND Regs reg 2 defines 'year 9' as 'the year of compulsory schooling in which the majority of pupils in the class attain the age of 14'.

126 SEND Regs reg 20(6).

127 SEND Regs reg 20(7). This only applies to the types of schools specified in reg 20(12). If a child does not attend one of the listed types of schools, the local authority must write the report, see SEND Regs reg 20(8).

128 SEND Regs reg 20(9).

129 SEND Regs reg 20(10). Further, the local authority must notify the child's parent or the young person of their rights of appeal, see SEND Regs reg 20(11).

130 See Code, paras 9.193–9.198.

131 SEND Regs reg 22(1); and see SEND Regs regs 11 and 12, and CFA 2014 ss33, 39 and 40.

132 SEND Regs reg 22(2).

- send the child's parent or the young person a copy of the EHC plan, together with a notice specifying the proposed amendments, together with copies of the evidence that supports the proposed amendments;
- provide the child's parent or the young person with notice of their right to request that a particular school or other institution is named in the EHC plan under CFA 2014 s38(2)(b)(ii);
- give the child's parent or the young person at least 15 days, beginning with the day on which the draft plan was served, in which to make representations about the content of the draft plan, request that a particular school or other institution be named in the draft plan, or request a meeting with an officer of the local authority if they wish to make representations orally;
- advise the child's parent or the young person where they can find information about the schools and colleges that are available for the child or young person to attend.

2.69 Where a local authority decides to amend an EHC plan following representations from the child's parent or young person, it must send the finalised EHC plan to the child's parent or young person, to the governing body (or proprietor or principal) of the school named in section I, and to the responsible commissioning body as soon as practicable but in any event within eight weeks of originally sending the EHC plan with the proposed amendments to the parent or young person.<sup>133</sup>

2.70 Conversely, where the local authority decides not to amend the EHC plan, it must notify the child's parent or the young person of its decision as soon as practicable, but in any event within eight weeks of originally sending the EHC plan with the proposed amendments to the parent or young person.<sup>134</sup>

2.71 In either case, the local authority must notify the child's parent or the young person of their rights of appeal to the FTT.<sup>135</sup>

133 SEND Regs reg 22(3).

134 SEND Regs reg 22(4).

135 SEND Regs reg 22(5). The notification must also include the following information: (a) the time limits for an appeal; (b) the information concerning mediation; (c) the availability of information, advice and support and disagreement resolution services; and (d) the FTT's power to make social care recommendations under a pilot scheme (on which, see paras 4.25–4.29 below).

## Reassessments

### *When are reassessments required?*<sup>136</sup>

- 2.72 A local authority must secure a reassessment of a child or young person's EHC plan where it receives a request to do so from the responsible commissioning body for that child or young person.<sup>137</sup>
- 2.73 Further, a local authority must secure a reassessment of the educational, health and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by the child's parent or the young person, or the governing body (or proprietor or principal) of the school of institution which the child or young person attends unless:
- it has carried out an assessment or reassessment within the period of six months prior to that request; or
  - it is not necessary for the authority to make a further assessment.<sup>138</sup>
- 2.74 A local authority may also secure a reassessment at any other time if it thinks it necessary.<sup>139</sup>

### *The process*<sup>140</sup>

- 2.75 The local authority must notify the child's parent or the young person whether or not it is necessary to reassess within 15 days of receiving the request to reassess.<sup>141</sup> Where the local authority determines that it is not necessary to reassess the child or young person it must notify the child's parent or the young person of their right to appeal to the FTT.<sup>142</sup>
- 2.76 If it is necessary to reassess, the process follows that for statutory assessment (see paras 2.21–2.27 above).<sup>143</sup>

### *Amending or replacing an EHC plan following a reassessment*<sup>144</sup>

- 2.77 Where the local authority decides to amend or replace an EHC plan following a reassessment it must comply with the same process that

136 Code, paras 9.186–9.192.

137 SEND Regs reg 23.

138 See CFA 2014 s44(2) and (3); and SEND Regs reg 24.

139 CFA 2014 s44(3).

140 See Code, paras 9.191–9.192.

141 SEND Regs reg 25(1).

142 SEND Regs reg 25(2).

143 SEND Regs reg 26: thus the process must follow SEND Regs regs 6–9.

144 See Code, paras 9.193–9.198.

applies to the issue of a draft EHC plan in the first instance (see paras 2.41–2.49 above).<sup>145</sup> The local authority must complete the whole process (ie send a copy of the finalised EHC plan to the child’s parent or the young person, the governing body or principal of the school and the relevant responsible commissioning body) as soon as practicable and in any event within 14 weeks of notifying the child’s parent or the young person that it was necessary to reassess.<sup>146</sup>

- 2.78 After having carried out a reassessment, the local authority must review the EHC plan within 12 months of the date on which a finalised plan is sent to the child’s parent or the young person, and in each subsequent period of 12 months starting with the date on which the EHC plan was last reviewed.<sup>147</sup>

### Amendment without a review or reassessment

- 2.79 If at any time the local authority proposes to amend an EHC plan, it shall proceed as if the amendment were an amendment proposed after a review (and follow the processes there applicable).<sup>148</sup>

## Transfers from statements of SEN and LDAs to EHC plans

### Introduction

- 2.80 When the CFA 2014 was introduced, the government put in place transitional arrangements to facilitate the transfer of children and young people with SEN statements and LDAs to EHC plans. The transitional arrangements are set out in the Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 (TSP Order) and explained in the guidance published by the Department for Education, *Special educational needs and disability: managing the September 2014 changes to the system. Advice for local authorities and their partners* (‘the transfer advice’).<sup>149</sup> The transfer

145 SEND Regs reg 27(1).

146 SEND Regs reg 27(2). This time limit can be extended in the circumstances set out at para 2.93 above.

147 SEND Regs reg 27(4).

148 SEND Regs reg 28.

149 The transfer advice is currently in its 4th edition and applies from 1 October 2016. Decisions taken by local authorities before that date are covered by earlier editions of the advice.

## 58 SEN and disability discrimination in schools / chapter 2

advice is non-statutory, which means that it is not binding on local authorities, but they must be able to explain any departures from it.

2.81 The transitional arrangements run from 1 September 2014 until 1 April 2018, by which point local authorities must have completed all the transfers of statements of SEN. Any new request for a statement or LDA must be processed as a request for an EHC plan in accordance with the provisions of the CFA 2014.<sup>150</sup>

2.82 Young people in further education and training who had an LDA should have been transferred to an EHC plan by 1 September 2016; any LDAs that exist after this date do not have any legal effect.<sup>151</sup>

2.83 During the transition period, local authorities must continue to comply with the relevant elements of the EA 1996 and the Learning and Skills Act 2000 (LSA 2000) in relation to those children and young people who still have statements.<sup>152</sup> The local authority should follow the annual review and amendment processes and parents continue to have the same rights of appeal under the EA 1996.<sup>153</sup>

2.84 The transfer process should not, in itself, have any effect on whether or not a child or young person is entitled to an EHC plan because there is no material difference between the legal test under the CFA 2014 and the EA 1996.<sup>154</sup> It is therefore expected in the transition guidance that children with statements should be transferred to an EHC plan. Young people with an LDA, including those in youth custody, should have been transferred to an EHC plan if they remained in education or training on 1 September 2016.<sup>155</sup>

### Transition plans

2.85 Local authorities must produce transition plans which set out the timetable and process for transferring children to EHC plans.<sup>156</sup> Transition plans should include the following information:

- the groups that were consulted in developing the plan;
- the number of children and young people with statements of SEN and the number of young people receiving support as a result of

150 Transfer advice, para 2.1.

151 TSP Order arts 28 and 29.

152 TSP Order art 11.

153 Transfer advice, para 3.11. Parents appealing under the EA 1996 will not need to consider mediation before bringing their appeal, unlike parents appealing against a decision under the CFA 2014.

154 See para 2.28 above.

155 Transfer advice, para 1.8.

156 Transfer advice, paras 4.5–4.8.

an LDA for which the local authority is responsible and plans to transfer (where appropriate) to the new system in each year of the transition period;

- the order in which children and young people with statements of SEN in the area will be transferred to the new system;
- how and when parents of children with SEN and young people with SEN, and their educational institution, will be made aware of the arrangements for the transfer of a child or young person;
- details of the transfer review (EHC needs assessment) process;
- sources of impartial SEN information and advice; and
- details of who parents and young people can contact if they have queries about transition to the new system or if their child or they have not been transferred to the new system in accordance with the local transition plan.<sup>157</sup>

2.86 The transfer advice states that local authorities ‘should aim to transfer children and young people with statements of SEN to the new SEN and disability system at points in their education at which a significant review of the statement would otherwise have taken place’.<sup>158</sup> In practice, this means that children and young people changing educational phases ought to be transferred to an EHC plan before the change occurs. The TSP Order makes specific provisions to guide local authority’s timing of the transfer process:

- Children leaving youth custody<sup>159</sup> and those transferring from school to a post-16 institution or an apprenticeship must have their statement reviewed at that point with a view to issuing an EHC plan.<sup>160</sup>
- Children with non-statutory EHC plans issued by pathfinder local authorities before the commencement of the CFA 2014<sup>161</sup> and those with direct payments under the SEN direct payments pilot scheme, should have been transferred by Local authorities in the academic year 2014/15.<sup>162</sup>
- Local authorities must consult the parents of children who are in year 6 during the academic years 2015/16 and 2016/17 on whether

157 Transfer advice, para 4.6.

158 Transfer advice, para 4.9.

159 TSP Order art 14A,

160 TSP Order art 12.

161 Transfer advice, paras 4.18–4.20.

162 Transfer advice, para 5.29.

## 60 SEN and disability discrimination in schools / chapter 2

to conduct an EHC needs assessment.<sup>163</sup> The local authority must then consider whether to carry out an assessment and, if they decide to do so, complete it by end of year 6.

- During 2016 and 2017, local authorities should transfer children who are changing educational phases, or who have entered year 9.<sup>164</sup> A change in educational phase is defined as a child moving from early years to infant school, infant to junior school, primary to middle school, primary to secondary school, middle to secondary school, or a change in school setting from mainstream to special school and vice versa.<sup>165</sup>

- 2.87 These provisions do not apply if there is an ongoing appeal to the FTT in relation to a statement or if there are exceptional personal circumstances affecting the child, the child's parent or a young person.<sup>166</sup>

### Transfer reviews

- 2.88 In order to transfer a child to an EHC plan, local authorities must conduct a transfer review.<sup>167</sup> This will often replace the annual review of the statement in the year in which the local authority intends to transfer the child. Like the annual review, the transfer review must be completed within 12 months of the date the statement of SEN was issued or of the previous annual review of the child's statement.<sup>168</sup> If a transfer review is carried out within 12 months of a forthcoming transfer between phases of education, it must be completed before 31 March in the year of a child's transfer from secondary school to a post-16 institution and before 15 February in all other cases.<sup>169</sup>

- 2.89 Parents of children with a statement can request a reassessment of the child's needs during the transition period. They can make the request under the EA 1996 or make a request for an EHC needs assessment. Local authorities must inform the parents whether or not they are going to carry out an assessment within six weeks of receiving the request.<sup>170</sup> Local authorities can decide to conduct an

163 TSP Order art 13. This does not apply to children who transferred from middle to secondary school in year 6.

164 TSP Order art 14.

165 TSP Order art 14(6); transfer advice, paras 4.12–4.13. This reflects the definitions in the Code, para 9.179.

166 TSP Order art 16.

167 Transfer advice, para 5.1.

168 Transfer advice, para 4.15.

169 SEND Regs reg 18.

170 SEND Regs regs 4(1) and 5(1).

EHC needs assessment instead of a reassessment under the EA 1996, but must obtain the agreement of the child's parents in order to do so.<sup>171</sup> The transfer guidance encourages local authorities to conduct transfer reviews rather than reassessments under the EA 1996 in order to speed up the process of transition.<sup>172</sup>

2.90 The child's parents and the child's headteacher must be given at least two weeks' notice of the local authority's intention to carry out a transfer review and the local authority must invite the parents to a meeting to contribute to the review before the EHC plan is finalised.<sup>173</sup> Transfer reviews must consist of an EHC needs assessment conducted in accordance with the SEND Regs.<sup>174</sup> The process for EHC needs assessments is discussed in detail in paras 2.5–2.27 above.

2.91 SEND Regs reg 6(4) provides that the local authority must not seek professional advice required for an EHC needs assessment if that advice has been previously provided and the person providing that advice, the local authority and the child's parents or the young person are satisfied that it is sufficient for the purposes of an EHC needs assessment. The transfer advice suggests that, in deciding whether existing advice is sufficient, the local authority should consider how recently advice was provided, whether and how far the needs of the child or young person have changed since it was given and whether it is sufficiently focused on the outcomes sought for the child or young person.<sup>175</sup>

2.92 While a local authority may not need to obtain additional advice for the purposes of the transfer review, the resulting EHC plan should not be a simple rebranding of the statement; it is intended to be more holistic, person-centred and outcome-focused than the statement and changes should be made to reflect the new approach.<sup>176</sup>

2.93 If the local authority decides that an EHC plan is necessary (which it should be in the vast majority of cases), the plan should be completed within 18 weeks from the day on which the needs assessment began.<sup>177</sup> This deadline was originally 14 weeks but, after local authorities complained that was too short, it was extended from September

171 TSP Order art 23(5); transfer advice, para 3.9.

172 Transfer advice, para 3.9.

173 TSP Order arts 18(1) and 20(3).

174 TSP Order art 20.

175 Transfer advice, para 5.10.

176 Transfer advice, para 5.1.

177 TSP Order art 21(3).

## 62 SEN and disability discrimination in schools / chapter 2

2015.<sup>178</sup> Local authorities do not need to comply with the deadline if they can show that they have requested advice from a school a week or less before the school is closed for a continuous period of four weeks or more (ie the summer holidays), or if there are exceptional personal circumstances affecting the child or their parents, or if the child or parents are absent for a continuous period of four weeks or more from the local authority area.<sup>179</sup>

2.94 If the local authority decides not to prepare an EHC plan following the transfer review, the local authority must cease to maintain the statement.<sup>180</sup> A child's parent can bring an appeal against the local authority's decision under CFA 2014 s51 and the statement will remain in force while any appeal against the local authority's decision is ongoing.<sup>181</sup>

2.95 If reviews cannot be carried out before the deadline of 1 April 2018, the CFA 2014 will apply to the child or young person from that date and SEN provision specified in the statement will be treated as if it were made in an EHC plan. The transfer must be concluded as soon as reasonably practicable thereafter.<sup>182</sup>

### Transfer reviews for children and young people in youth custody

2.96 The TSP Order also provides for transfer reviews to be conducted for children and young people in youth custody.<sup>183</sup> The provisions are broadly similar to those for children who are not in detention, described above.

2.97 Local authorities must not cease to maintain a statement because the child has entered custody.<sup>184</sup> If it appears to the local authority that SEN provision in the statement is no longer appropriate, or if the child, the parents or the person in charge of the youth accommodation requests it, the local authority should commence a transfer review.<sup>185</sup> The EHC needs assessment process for children in youth custody is discussed in detail in chapter 5.

178 Children and Families Act 2014 (Transitional and Saving Provisions) (Amendment) (No 2) Order 2015 SI No 1619.

179 Transfer advice, para 5.15.

180 TSP Order art 22(4).

181 TSP Order art 22(7).

182 TSP Order art 17.

183 TSP Order arts 14A, 30 and 31.

184 Transition advice, para 6.2.

185 Transition advice, para 6.2.

- 2.98 The local authority may decide that an EHC plan is required and follow the process for issuing a plan.<sup>186</sup> If the local authority decides that an EHC plan is not necessary, it must cease to maintain the statement.<sup>187</sup> However, the ability to cease to maintain a statement for children in youth custody is in contrast to the provisions of the Code relating to EHC plans, which state that local authorities cannot cease to maintain them while a child is in custody.<sup>188</sup> In the authors' view, it would only be in very exceptional circumstances than the local authority could lawfully decide not to transfer a statement to an EHC plan.

## **Ceasing to maintain an EHC plan and transfer to another local authority**

### **Ceasing to maintain an EHC plan<sup>189</sup>**

- 2.99 A local authority may cease to maintain an EHC plan for a child or young person in two circumstances:<sup>190</sup>
- (a) the local authority is no longer responsible for the child or young person; or
  - (b) the local authority determines that it is no longer necessary for the plan to be maintained.
- 2.100 A parent or young person has a right of appeal against a decision to cease to maintain an EHC plan. The decision to cease to maintain the EHC plan may not take effect until the following dates:<sup>191</sup>
- if no appeal to the FTT is brought: after the end of the period of two months (being the time limit on bringing an appeal in the FTT);<sup>192</sup> or
  - if an appeal to the FTT is brought, after the appeal has been finally determined.

186 TSP Order art 34; see paras 5.28 and following.

187 TSP Order art 35.

188 Code, para 10.122.

189 Code, paras 9.199–9.210.

190 CFA 2014 s45(1).

191 CFA 2014 s45(4).

192 FTT Rules r20(1)(c).

### *No longer responsible*

- 2.101 The circumstances in which a local authority is no longer responsible for a child or young person include:
- The young person reaching his or her 25th birthday: The Code notes that support should generally cease at the end of the academic year to allow young people to complete their course of study.<sup>193</sup> Further, CFA 2014 s46 empowers a local authority to continue to maintain an EHC plan for a young person until the end of the academic year during which the young person attains the age of 25.<sup>194</sup>
  - The young person aged 16 or over leaves education to take up paid employment (including employment with training but excluding apprenticeships).<sup>195</sup>
  - The young person enters higher education.<sup>196</sup>
  - A young person aged 18 or over leaves education and no longer wishes to engage in further learning.<sup>197</sup>
  - The child or young person has moved to another local authority area (on which see paras 2.111–2.117 below).
- 2.102 A local authority does not cease to be responsible for a child or young person because he or she has been given a custodial sentence. The details of the local authority's duties in these circumstances are set out in chapter 5 below.

### *No longer necessary: children and young people under the age of 18*

- 2.103 A local authority may not cease to maintain an EHC plan for a child or young person under the age of 18 unless it determines that it is no longer necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.<sup>198</sup>
- 2.104 Where a child or young person is not in education or training, the local authority must not cease to maintain the EHC plan, unless it decides that it is no longer necessary for special educational provision to be made for the child or young person in accordance with an

193 Code, para 9.207.

194 An 'academic year' is defined in SEND Regs reg 46(1).

195 Code, para 9.201.

196 Code, para 9.201.

197 Code, para 9.201.

198 SEND Regs reg 29(1).

EHC plan.<sup>199</sup> The Code observes that the ‘focus of support should be to re-engage the young person in education or training as soon as possible and the local authority must review the EHC plan and amend it as appropriate to ensure that the young person continues to receive education or training’.<sup>200</sup>

*No longer necessary: young people over the age of 18*

- 2.105 When deciding whether to cease to maintain an EHC plan, the same test applies to young people over the age of 18 as to children and young people under the age of 18: does the young person no longer require the special educational provision specified in the EHC plan?<sup>201</sup> A local authority considering whether to cease to maintain the EHC plan of a young person over the age of 18 must have regard to a further consideration, namely whether the educational or training outcomes specified in the plan have been achieved.<sup>202</sup>
- 2.106 Further, when a young person over the age of 18 ceases to attend the educational institution specified in his or her EHC plan, so he or she is no longer receiving education or training, the local authority may not cease to maintain the EHC plan unless it has conducted an annual review and either:
- ascertained that the young person does not wish to return to education or training (either at the institution specified in the EHC plan or otherwise); or
  - determined that returning to education or training would not be appropriate for the young person.<sup>203</sup>
- 2.107 In *Buckinghamshire CC v SJ*, UT Judge Jacobs considered whether the FTT had erred in concluding that a young person over the age of 18 did require the special educational provision in the EHC plan.<sup>204</sup>

199 SEND Regs reg 29(2); Code, para 9.202.

200 Code, para 9.202.

201 CFA 2014 s45(2).

202 CFA 2014 s45(3). See also the non-statutory (ie non-binding) guidance issued by the Department for Education on 21 February 2017, *SEND: 19- to 25-year olds' entitlement to EHC plans*.

203 SEND Regs reg 30(1); and see Code, para 9.203.

204 [2016] UKUT 254, [2016] ELR 350 at para 30. See also *Gloucestershire County Council v SH* [2017] UKUT 85 (AAC) in which UT Judge Mitchell held that the absence of evidence from a young person about the educational programme she wished to pursue did not prevent the FTT from lawfully concluding that an EHC plan was necessary, see para 48(a). The judge rejected an argument by the local authority that it had no duty to educate young people over compulsory school age, see para 48(f).

## 66 SEN and disability discrimination in schools / chapter 2

He rejected the submission that ‘the attainment of qualifications is an essential element of education’. He noted that for many of those to whom the CFA 2014 applied, attaining any qualifications at all was not an option. That did not mean that such young people did not require, or would not benefit from, special educational provision.

- 2.108 Where, following a review, the local authority ascertains that the young person wishes to return to education or training (either at the educational institution specified in the EHC plan or any other) and the local authority considers that it is appropriate for the young person to return to education or training, the local authority must amend the EHC plan as necessary (following the processes laid down in SEND Regs reg 22).<sup>205</sup>

### *Ceasing to maintain: the procedure*

- 2.109 Where a local authority is considering ceasing to maintain a child or young person’s EHC plan, it must:
- inform the child’s parent or the young person that it is considering ceasing to maintain the child or young person’s EHC plan;
  - consult the child’s parent or the young person;
  - consult the headteacher, principal or equivalent person at the educational institution named in the EHC plan.<sup>206</sup>
- 2.110 Where, following that consultation, the local authority determines to cease to maintain the child or young person’s EHC plan, it must notify the child’s parent or the young person, the institution named in the child’s EHC plan and the responsible commissioning body of that decision.<sup>207</sup> The local authority must also notify the child’s parent or the young person of their right to appeal.<sup>208</sup>

## Transfer of EHC plans between local authorities<sup>209</sup>

### *Generally*

- 2.111 In broad terms, a local authority in England will be responsible for a child or young person (and hence for supporting his or her SEN) if he or she is in the authority’s area and has been identified as someone who has or may have SEN, or has been brought to the local

205 SEND Regs reg 30(2).

206 SEND Regs reg 31(1).

207 SEND Regs reg 31(2).

208 SEND Regs reg 31(3).

209 See Code, paras 9.157–9.165.

- authority's attention by any person as someone who has or may have special educational needs.<sup>210</sup>
- 2.112 SEND Regs reg 15 makes provision for when a child or young person in respect of whom an EHC plan is maintained moves from the area of the local authority which maintains the EHC plan ('the old authority') into the area of another local authority ('the new authority').<sup>211</sup> The old authority shall transfer the EHC plan to the new authority on the day of the move (or where it did not become aware of the move at least 15 working days prior to the move, within 15 working days beginning with the date on which it did become aware).<sup>212</sup>
- 2.113 From the date of transfer the EHC plan is to be treated as if it had been made by the new authority on the date on which it was made by the old authority and must be maintained by the new authority.<sup>213</sup>
- 2.114 Within six weeks of the date of the transfer, the new authority must inform the child's parent or the young person of the following:<sup>214</sup>
- that the EHC plan has been transferred;
  - whether it proposes to make an EHC needs assessment; and
  - when it proposes to review the EHC plan.
- 2.115 The new authority must carry out an 'annual' review of the EHC plan before whichever is the later of: the period of 12 months beginning with the date of the making of the EHC plan or the date of the last review; or the period of three months beginning with the date of the transfer.<sup>215</sup>
- 2.116 If the new authority decides to conduct an EHC needs assessment there is a limit on the further evidence that may be obtained where: (a) the old authority has supplied the new authority with advice obtained in pursuance of the previous assessment; and (b) the person providing that advice, the old authority and the child's parent or young person are satisfied that the advice obtained in pursuance of previous assessment is sufficient for the purpose of the new authority arriving at a satisfactory assessment. In these circumstances the new authority must not seek further advice.<sup>216</sup>

210 CFA 2014 s24. For the meaning of 'in the authority's area', see para 9.4 below.

211 SEND Regs reg 15(1).

212 SEND Regs reg 15(2).

213 SEND Regs reg 15(3).

214 SEND Regs reg 15(4).

215 SEND Regs reg 15(5).

216 SEND Regs reg 15(3)(b).

- 2.117 Finally, where by virtue of the transfer the new authority comes under a duty to arrange the child or young person's attendance at a school or other institution specified in the EHC plan but in light of the child or young person's move that attendance is no longer practicable, the new authority must arrange for the child or young person's attendance at another school or institution appropriate for him or her until such time as it is possible to amend the EHC plan.<sup>217</sup>

### *Change of responsible commissioning body*<sup>218</sup>

- 2.118 Where, by virtue of a child or young person's move, another commissioning body becomes the responsible commissioning body for that child or young person, the original responsible commissioning body must notify the new responsible commissioning body of the move on the day of the move (or where it did not become aware of the move at least 15 working days prior to the move, within 15 working days beginning with the date on which it did become aware).<sup>219</sup>
- 2.119 Where it is not practicable for the new responsible commissioning body to arrange the healthcare provision specified in the EHC plan, it must within 15 working days beginning with the date on which it first became aware of the move, request that the new local authority makes an EHC needs assessment or reviews the EHC plan. Where the new local authority receives such a request it must comply with it.<sup>220</sup>

## **Personal budgets (including direct payments)**

### **Introduction**

- 2.120 The Code defines a 'personal budget' as 'an amount of money identified by the local authority to deliver provision set out in an EHC plan where the parent or young person is involved in securing that provision'.<sup>221</sup> Personal budgets are optional, but if a local authority maintains an EHC plan, or is securing the preparation of an EHC plan for a child or young person, the local authority must prepare a

217 SEND Regs reg 15(6).

218 See Code, paras 9.163–9.165.

219 SEND Regs reg 15(7).

220 SEND Regs reg 15(8). See also SEND Regs reg 16 which covers the situation in which the identity of the responsible commissioning body changes, but the identity of the responsible local authority does not.

221 Code, para 9.95, and see CFA 2014 s49(2).

personal budget for him or her if asked to do so by the child's parent or the young person.<sup>222</sup>

2.121 The Code identifies four ways in which a personal budget can be delivered.<sup>223</sup>

- (1) direct payments: where individuals receive the cash to contract, purchase and manage services themselves;
- (2) an arrangement where the local authority, school or college holds the funds and commissions the support specified in the plan (sometimes known as notional budgets);
- (3) third party arrangements, where direct payments are paid to and managed by an individual or organisation on behalf of the child's parent or the young person;
- (4) a combination of each.

2.122 A direct payment is therefore only one way of delivering a personal budget. Consequentially, it is important to distinguish between a personal budget and a direct payment. There are important differences, namely:

- If a local authority maintains an EHC plan, or is securing the preparation of an EHC plan, there is a right to a personal budget.<sup>224</sup> There is no equivalent *right* to a direct payment: rather, a local authority must satisfy itself of certain matters prior to making a direct payment.
- A personal budget may include funding for special educational, health and social care provision.<sup>225</sup> A direct payment under the Special Educational Needs (Personal Budgets) Regulations 2014 SI No 1652 (SENPB Regs) must relate to special educational provision only (although separate direct payments for health<sup>226</sup>

222 CFA 2014 s49(1); Code, para 9.97.

223 Code, para 9.101.

224 CFA 2014 s49(1).

225 Code, para 9.99. The same paragraph adds that personal budgets should 'be focused to secure the provision agreed in the EHC plan and should be designed to secure the outcomes specified in the EHC plan'.

226 Code, paras 9.114–9.117, 9.124. Direct payments for health require the agreement of a care plan between the CCG and the recipient. This requirement can be fulfilled by sections G and J of the EHC plan, as long as it includes the information contained in the Code, para 9.124. If the healthcare provision specified in an EHC plan is secured by a direct payment, the commissioning body will be treated as having discharged its duty in CFA 2014 s42(3) to make the healthcare provision, see CFA 2014 s49(6)–(8). As to the relevant legislation and guidance governing direct payments for health provision, see National Health Service (Direct Payments) Regulations 2013 SI No 1617 and guidance produced by NHS England, *Guidance on direct payments for healthcare: understanding the regulations*, 20 March 2014.

## 70 SEN and disability discrimination in schools / chapter 2

and social care provision<sup>227</sup> may be made under other legislative provisions).

- Where special educational provision is made by a direct payment, the local authority will be deemed to have secured that provision for the purposes of CFA 2014 s42(2) (which places the statutory duty on a local authority to make the special educational provision in an EHC plan).<sup>228</sup> There is no equivalent provision in respect of personal budgets.

### Information, advice and support

2.123 Where a local authority maintains an EHC plan or is securing the provision of an EHC plan for a child or young person, it must make arrangements for the provision to the child's parent or young person of the following information:<sup>229</sup>

- the provision for which a personal budget may be available;
- details of organisations that provide advice and assistance in connection with personal budgets; and
- the conditions which must be met before direct payments may be made.

2.124 The information should be provided as part of the Local Offer.<sup>230</sup> The Local Offer should include a policy on personal budgets that sets out a description of the services across education, health and social care that currently lend themselves to the use of personal budgets, how that funding will be made available, and clear and simple statements of eligibility criteria and the decision-making process.<sup>231</sup>

2.125 Further, local authorities must provide information about organisations that might be able to provide advice and assistance to parents and young people to make decisions about personal budgets.<sup>232</sup>

227 Code, paras 9.118, 9.123. For those aged 18 or under, see CA 1989 s17A; Community Care, Services for Carers and Children's Services (Direct Payment) (England) Regulations 2009 SI No 1887; and Department of Health, *Guidance on direct payments: for community care, services for carers and children's services*, 2009. For those aged 18 or over, see Care Act 2014 ss31–33; Care and Support (Direct Payments) Regulations 2014 SI No 2871; and Department of Health, *Care and support statutory guidance*, 2014, chapter 12.

228 CFA 2014 s49(5).

229 SENPB Regs reg 3.

230 See paras 1.39–1.44 above.

231 Code, para 9.96.

232 Code, para 9.97.

## Right to a personal budget

- 2.126 If a local authority maintains an EHC plan, or is securing the preparation of an EHC plan for a child or young person, the local authority must prepare a personal budget for him or her if asked to do so by the child's parent or the young person.<sup>233</sup>
- 2.127 There is one exception to the right to a personal budget, namely where:<sup>234</sup>
- the provision is secured by the local authority by arrangements between the local authority and a third party under which the local authority pays an aggregate sum for special educational provision which includes the specified provision;
  - the aggregate sum paid by the local authority under the arrangements includes a notional amount for the specified provision; and
  - the notional amount cannot be disaggregated from the aggregate sum because the disaggregation: (a) would have an adverse impact on other services provided or arranged by the local authority for children or young people with an EHC plan, or (b) would not be an efficient use of the local authority's resources.
- 2.128 Where the exception applies, the local authority must inform the child's parent or the young person of the reasons it is unable to identify a sum of money and work with them to ensure that services are personalised through other means. Further, if there is demand from parents and young people for services that are disaggregated, this should inform future commissioning arrangements.<sup>235</sup>

## When requests for a personal budget (including direct payments) can be made

- 2.129 A child's parent or a young person may make a request to a local authority for a personal budget, including a request for direct payments, at any time during the period in which the draft EHC plan is being prepared (in accordance with CFA 2014 s38), or the EHC plan is being reviewed or re-assessed (in accordance with CFA 2014 s44).<sup>236</sup>

233 CFA 2014 s49(1); Code, para 9.97.

234 SENPB Regs reg 4A; Code, para 9.106.

235 Code, para 9.106.

236 SENPB Regs reg 4(1); Code, para 9.98.

## 72 SEN and disability discrimination in schools / chapter 2

- 2.130 Where a request for direct payments has been made, a local authority must consider that request (although as noted below, it can only accede to the request where certain requirements are met).<sup>237</sup>

### Settling and agreeing a personal budget

- 2.131 The Code provides that the child's parent or young person should be given an indication of the level of funding that is likely to be required to make the provision specified, or proposed to be specified in the EHC plan. An indicative figure can be identified through a resource allocation or banded funding system.<sup>238</sup>
- 2.132 The Code indicates that local authorities should agree the provision they propose to make in the EHC plan and help the child's parent or the young person to decide whether he or she wants to take up a personal budget.<sup>239</sup>
- 2.133 If the personal budget is implemented by way of a direct payment, the local authority must identify the 'agreed provision' which must be specified in the notice provided to the parent or young person under SENPB Regs reg 8(2)(b) (see para 2.142 below).<sup>240</sup>
- 2.134 Further, if the personal budget is implemented by way of a direct payment, the final amount of the direct payment specified by the local authority must be sufficient to secure the agreed provision.<sup>241</sup>
- 2.135 Where any special educational provision is to be secured by a direct payment, section J of the EHC plan must set out the special

237 SENPB Regs reg 4(2); Code, para 9.98.

238 There has been case-law in the community care context about the method of calculation of the indicative amount: see *R (JL) v Islington LBC* [2009] EWHC 458 (Admin), (2009) 12 CCLR 413 (per Black J at para 39); *R (Savva) v Kensington and Chelsea RLBC* [2010] EWCA Civ 1209, (2011) 14 CCLR 75 (per Maurice Kay LJ at para 7); and *R (KM) v Cambridgeshire CC* [2012] UKSC 23, (2012) 15 CCLR 374 (per Lord Wilson at para 28).

239 Code, para 9.102.

240 SENPB Regs reg 2 defines 'agreed provision' as 'the goods or services specified in the local authority's notice under regulation 8(2)(b)' of the SENPB Regs.

241 SENPB Regs reg 10(1); Code, para 9.102. The local authority can increase or reduce the amount of the direct payment provided that the local authority is satisfied that the new amount is sufficient to secure the agreed provision, see SENPB Regs reg 10(2). The local authority may reduce the amount of the direct payment where payments remain unused, and the local authority considers that it is reasonable to offset unused direct payments against the outstanding amount to be paid, see SENPB Regs reg 10(3).

educational needs to be secured by a direct payment, and the out-comes to be met by a direct payment.<sup>242</sup>

## Persons to whom direct payments may be made

- 2.136 A local authority may make direct payments, as appropriate, to the child's parent, to the young person, or to a person nominated in writing by the child's parent or the young person to receive direct payments on their behalf ('a nominee').<sup>243</sup>
- 2.137 There are some limits on the persons to whom a direct payment may be made, namely:<sup>244</sup>
- the person must appear to the local authority to be capable of managing direct payments without assistance or with such assistance as may be available to him or her;
  - the recipient must be over compulsory school age;
  - the recipient must not lack capacity within the meaning of the Mental Capacity Act 2005 to consent to the making of direct payments to them or to secure the agreed provision with any direct payment; and
  - the person must not be a person listed in the Schedule to the SENPB Regs (namely a person subject to specified orders imposed by the criminal courts).

## Deciding whether to make direct payments (SEN)

- 2.138 A local authority may only make a direct payment where a request has been made, and where the local authority is satisfied that:<sup>245</sup>
- the recipient will use the direct payment to secure the agreed provision in an appropriate way;
  - where the recipient is the child's parent or a nominee, that person will act in the best interests of the child or the young person when securing the proposed agreed provision;

242 SEND Regs reg 12(1)(j); Code, paras 9.102–9.103.

243 SENPB Regs reg 5(1). If the child's parent or young person notifies the local authority in writing that they wish to withdraw or change their nomination, the local authority must stop making direct payments to the nominee as soon as reasonably practicable and, where applicable, consider whether to make direct payments to the alternative nominee, see SENPB Regs reg 5(3). Further, SENPB Regs reg 16 makes provision for the situation in which either the child's parent or the young person lacks capacity.

244 SENPB Regs reg 5(2).

245 SENPB Regs reg 6(1); Code, para 9.123.

## 74 SEN and disability discrimination in schools / chapter 2

- the direct payments will not have an adverse impact on other services which the local authority provides or arranges for children and young people with an EHC plan which the local authority maintains; and
  - securing the proposed agreed provision by direct payments is an efficient use of the local authority's resources.
- 2.139 Further, there are limits on the manner in which direct payments can be used:
- Direct payments can only be used to make the special educational provision specified in an EHC plan. A local authority may not make direct payments for the purpose of funding a place at a school or post-16 institution.<sup>246</sup>
  - A local authority may not make direct payments in respect of any goods or services which are to be used or provided in a school or post-16 institution without the written consent of the head-teacher.<sup>247</sup> Local authorities should normally do this when they consult the institution about naming it on the child or young person's EHC plan. Further, the local authority should seek assurances from the child's parent, young person or nominee that any person employed by them, but working on school or college premises, will confirm to the policies and procedures of that institution and may write such an assurance into the conditions for receipt of the direct payment.<sup>248</sup>
- 2.140 Finally, a local authority may not make direct payments unless various conditions have been satisfied (see paras 2.141–2.143 below).

### Direct payments: the conditions

- 2.141 Even if the local authority is satisfied: (a) the recipient is a person to whom direct payments can be made; (b) of the matters set out in para 2.138 above, the SENPB Regs set out a process by which the local

246 SENPB Regs reg 6(2).

247 SENPB Regs reg 9(1) (and the same applies in respect of premises at which early years education is provided, see SENPB Regs reg 9(2)).

248 Code, para 9.104; para. 9.105 makes clear that where the educational institution's agreement cannot be reached, the local authority must not go ahead with the direct payment, but that they should continue to explore other opportunities for personalisation of provision in the EHC plan (and in particular, the potential for arrangements under which the educational institution holds a notional budget with a view to involving the child's parent or young person in securing the provision).

authority must secure the agreement of the recipient to the making of direct payments, which includes agreement to any conditions imposed by the local authority.

2.142 First, the local authority must provide written notice to the recipient specifying:<sup>249</sup>

- the name of the child or young person in respect of whom the direct payments are to be made;
- the goods or services which are to be secured by direct payment;
- the proposed amount of the direct payments;
- any conditions on how direct payments may be spent;
- the dates for payment into the bank account approved by the local authority.

2.143 Upon receipt of this notice, the recipient<sup>250</sup> must notify the local authority in writing that they agree to:<sup>251</sup>

- receive the direct payments;
- use the direct payments only to secure the agreed provision;
- comply with any conditions on how direct payments made by spent imposed by the local authority;
- notify the local authority of any changes in circumstances which might affect the need for the agreed provision;
- use the bank account approved by the local authority solely for the purposes of direct payments;<sup>252</sup>
- ensure that the bank account approved by the local authority is only accessible by the recipient or any other person approved in writing by the local authority; and
- keep a record of money paid in and withdrawn from the bank account approved by the local authority and, on request, or at intervals specified by the local authority, provide the local authority

249 SENPB Regs reg 8(1).

250 Where the recipient is a nominee, the child's parent or the young person must provide written consent to the local authority to direct payments being used to secure the agreed provision, and the nominee must provide written confirmation to the local authority that he or she is responsible as a principal for all contractual arrangements entered into for the benefit of the child or young person and secured by means of direct payments, see SENPB Regs reg 8(4).

251 SENPB Regs reg 8(2).

252 Although this account can be for the use of direct payments for special educational provision under the SENPB Regs, and for direct payments for social care pursuant to the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887, and/or for direct payments for healthcare provision under the National Health Service (Direct Payments) Regulations 2013 SI No 1617.

## 76 SEN and disability discrimination in schools / chapter 2

with information or evidence relating to the account and the agreed provision.

### Deciding not to make a direct payment

- 2.144 Where a local authority decides not to make a direct payment, it must inform the child's parent or the young person of its decision in writing, the reasons for its decision, and the right to request a review.<sup>253</sup> Where requested to do so, the local authority must review its decision. In carrying out the review, the local authority must consider any representations made by the child's parent or the young person.<sup>254</sup> Further, the local authority must inform the child's parent or young person of the outcome of the review in writing, and give reasons.<sup>255</sup>

### Consequences of the local authority making a direct payment

- 2.145 Where a local authority makes a direct payment in respect of special educational provision, it is to be treated as having secured the special educational provision for the child or young person for the purposes of CFA 2014 s42(2).<sup>256</sup>

### Monitor and review of direct payments

- 2.146 The local authority must monitor the use of direct payments by the recipient.<sup>257</sup> The local authority must review and monitor the making and use of direct payments at least once within the first three months of direct payments being made, and when conducting a review or reassessment of an EHC plan (under CFA 2014 s44).<sup>258</sup>

253 SENPB Regs reg 7(a); Code para 9.107. If the CCG also decide not to make a direct payment when requested and/or social care also decide not to make a direct payment when requested, the Code suggests that the local authority and partners should consider sending a single letter setting out the reasons for the decisions: Code, para 9.109.

254 SENPB Regs reg 7(b); Code, para 9.107.

255 SENPB Regs reg 7(c); Code, para 9.107.

256 CFA 2014 s49(5).

257 SENPB Regs reg 11(1).

258 SENPB Regs reg 11(2).

- 2.147 Alternatively, a recipient may make a request for a local authority to review the making and use of direct payments and the local authority must then consider whether to carry out a review.<sup>259</sup>
- 2.148 When carrying out a review in either case, the local authority must consider whether:<sup>260</sup>
- it should continue to secure the agreed provision by means of direct payments;
  - the direct payments have been used effectively;
  - the amount of the direct payments continues to be sufficient to secure the agreed provision;
  - it is still satisfied of the matters set out in SENPB Regs reg 6(1) (and set out at para 2.138 above); and
  - the recipient has complied with the conditions set out in SENPB Regs reg 8(3).
- 2.149 The local authority has a number of powers after a review, namely it may:<sup>261</sup>
- substitute the person receiving the direct payments with a nominee, the child's parent or the young person, as appropriate (where the conditions in SENPB Regs reg 8(3) have been complied with in respect of that person);
  - increase, maintain or reduce the amount of direct payments;
  - require the recipient to comply with either or both of the following conditions: (a) the person must not secure a service from a particular person; (b) the person must provide such information as the local authority considers necessary;
  - stop making direct payments.
- 2.150 Where the local authority decides to reduce the direct payment, or to stop making direct payments, SENPB Regs contain procedural requirement with which the local authority must comply.<sup>262</sup>
- 2.151 The recipient of a direct payment can require the local authority to stop making the direct payment at any time.<sup>263</sup>

259 SENPB Regs reg 11(4).

260 SENPB Regs reg 11(3) and (4)(b).

261 SENPB Regs reg 11(5).

262 See SENPB Regs reg 12 and 14 respectively. The local authority also has the power to require the recipient to repay all or part of the direct payments in the circumstances set out in SENPB Regs reg 13.

263 SENDPB Regs reg 14(1)(a).

## Transition: when a child becomes a young person

- 2.152 Where a child in respect of whom direct payments are being made becomes a young person, the local authority must take reasonable steps to ascertain whether the young person consents to receive direct payments.<sup>264</sup>
- 2.153 The legislation contemplates three possibilities on transition:
- (1) Where the young person has notified the local authority in writing that he or she wishes to receive direct payments, the local authority must make direct payments where the making of such payments is in accordance with SENPB Regs regs 5 and 6.<sup>265</sup>
  - (2) Where the young person consents in writing that the local authority continue to make direct payments to the young person's parent or nominee, the local authority must do so.<sup>266</sup>
  - (3) Where the young person notifies the local authority in writing that they do not consent to the making of direct payments, the local authority must stop direct payments as soon as reasonably practicable.<sup>267</sup>

## Disputes

- 2.154 There is no right of appeal against a decision not to provide a direct payment or against the amount of a direct payment. A challenge to this decision must be brought by way of judicial review in the Administrative Court (or by a complaint under the local authority's complaints procedure).

264 SENPB Regs reg 15(1).

265 SENPB Regs reg 15(2).

266 SENPB Regs reg 15(3).

267 SENPB Regs reg 15(4).