

The investigation of a complaint
by Mrs A
against Wrexham County Borough Council

A report by the
Public Services Ombudsman for Wales
Case: 201403532

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Introduction

This report is issued under section 16 of the Public Services Ombudsman (Wales) Act 2005.

In accordance with the provisions of the Act, the report has been anonymised so that, as far as possible, any details which might cause individuals to be identified have been amended or omitted. The report therefore refers to the complainant as Mrs A and her son as B.

Summary

Mrs A complained that Wrexham County Borough Council (“the Council”), in its role as the local education authority (“LEA”) failed to properly consider, assess and identify her son, B’s, special educational needs (“SEN”). Mrs A said the LEA failed to consider whether B’s SEN would be better provided for by a statutory assessment. Mrs A considered that the Extended School Action Plus Agreement (“ESAP”) issued by the LEA for B was not monitored and the LEA failed to ensure that his school provided the support specified under that Agreement. Mrs A complained that the Council failed to properly handle her complaint about the LEA.

The investigation found that ESAP Agreements are not referred to, or recognised, either as part of a graduated approach or as an alternative to statutory assessment in any of the LEA’s information, procedures and/or its published policies for SEN provision. The Ombudsman concluded that in B’s case an ESAP Agreement, as an alternative to statutory assessment, was not a legitimate means of meeting B’s SEN. The LEA’s policy was clear when B’s school based interventions were insufficient to meet his SEN requirements, B should have been considered for a statutory assessment. The Ombudsman was concerned about the LEA’s use of ESAP Agreements as an alternative to statutory assessment.

The LEA argued that B’s ESAP Agreement was on a par with an SEN Statement but the investigation concluded this was not the case. Further, the ESAP Agreement issued by the LEA was only in place for a two week period during which B attended school on significantly reduced hours. As such the ESAP provision was not met by the LEA.

The Ombudsman upheld Mrs A’s complaint and concluded that the LEA failed to assess and identify B’s SEN and failed to provide B with the appropriate support to meet his identified needs. The Ombudsman upheld Mrs A’s complaint about the way the Council handled her complaint, although the Council had subsequently made changes to its complaint management procedure to avoid a recurrence of the situation.

The Ombudsman recommended the Council apologise to Mrs A and provide redress of £350 for Mrs A's time and trouble in pursuing a complaint. It was also recommended that the Council identify and instruct an independent educational specialist to review educational provision to B; the Council review its published SEN Policy; and the Council audit the ESAP Agreements currently in place to consider whether statutory assessments should be carried out in accordance with its SEN Policy.

The complaint

1. Mrs A complained that Wrexham County Borough Council (“the Council”) failed, in its role as the Local Education Authority (“LEA”), to properly consider, assess and identify her son’s, whom I shall refer to as B, special educational needs (“SEN”). As a result Mrs A also complained that the LEA had failed to provide the appropriate support to meet his educational needs whilst a pupil at School D from September 2012 until B’s name was removed as a pupil on 24 March 2014. Mrs A complained that the LEA had failed to consider whether B’s educational needs would be better provided for by a statutory assessment, and a formal SEN Statement. Mrs A said that the LEA issued B with an Extended School Action Plus (“ESAP”) Agreement but that it failed to monitor and ensure that School D provided the support specified in that Agreement. This was Mrs A’s substantive complaint against the LEA. Mrs A also complained that the Council failed to properly handle her complaint about the LEA.

Investigation

2. I obtained comments and copies of relevant documents from Mrs A, the Council, and the LEA including those documents held by School D relating to matters within the Ombudsman’s jurisdiction. I have also considered the applicable legislation and guidance. I have not included every detail investigated in this report but I am satisfied that nothing of significance has been overlooked.

3. At Appendix 1 is a list of the abbreviations referred to in this report.

4. Mrs A, the Council and the LEA were given the opportunity to see and comment on a draft of this report before the final version was issued.

The Ombudsman’s jurisdiction

5. The Public Services Ombudsman (Wales) Act 2005 (“the PSOW Act”) sets out the Ombudsman’s powers and jurisdiction. His role is to investigate alleged maladministration and service failure which has directly resulted in an individual suffering an injustice or hardship. He cannot question the merits of decisions taken properly without maladministration. The Ombudsman’s jurisdiction is also subject to certain restrictions and exclusions. He is not

able to investigate matters relating to teaching, curriculum, discipline and management in schools. Specifically, schools and their governing bodies are not bodies within the Ombudsman's jurisdiction. I have therefore not considered the actions/decisions of School D and/or its Governing Body, and my investigation is limited to the LEA's role in this complaint.

6. The Ombudsman has a limited role in scrutinising a complaint made to the relevant LEA in Wales about a school and/or its governing body. A school's complaints policy must name the relevant LEA as the final stage in its formal complaints process for it to consider whether the school has followed its complaints handling policy and procedure. The Ombudsman may consider complaints about the LEA in such situations, but he is similarly restricted to considering how the LEA dealt with the complaint process. The Ombudsman has no jurisdiction over the actual substance of the complaint about a school/governing body.

7. The Ombudsman may consider complaints about an independent exclusion appeal panel constituted under section 52 of the Education Act 1996 for permanent exclusions.

8. Accordingly, the remit of my investigation into Mrs A's complaint is limited to the actions and responsibilities of the LEA for the provision of B's SEN, and the way the LEA dealt with Mrs A's complaint.

Relevant legislation, guidance and policies

9. I have considered the applicable legislation, regulations and guidance together with the relevant Council Policies which I have set out in Appendix 2.

Relevant background information and events

10. In view of the limitations on the Ombudsman's jurisdiction, I have limited the background details to those pertinent to the LEA's involvement. The events subject to this complaint are so closely aligned with School D's SEN provision that I have included some details of B's school based interventions.

11. The Educational Psychologist Service and the Behavioural Support Service have been involved with B's education and his SEN since **2009**, when he was four years old.

12. Where a child's additional educational needs cannot be sufficiently provided for by school based interventions the LEA introduced, in 2009, ESAP Agreements as an alternative to the statutory assessment process.

13. From **2011**, B received additional support for his SEN which was provided by school action ("SA"). B's support was increased in **2012** and his SEN was provided by school action plus ("SAP"). Both SA and SAP are school based interventions where the additional support identified and required for the pupil is provided and reviewed by the school with the assistance of the Special Educational Needs Co-ordinator ("SENCO"). B was also provided with behaviour plans and an individual education plan ("IEP") to address his specific needs. B's school based support and his IEPs were regularly reviewed.

14. In March, an Educational Psychologist was noted to be "of the opinion that [B's] diagnostic issues were not a priority at present and could be addressed at a future review."

15. B began attending School D in 2012, but the events complained about were substantively from September 2013, when B was eight years of age and attended the year three class.

16. On 9 October **2013** the Educational Psychologist observed B at home as his behaviour had changed since his transition to the year three class. In her report dated 14 October she recommended that School D request ESAP support for B, that a person centred plan be written for him and that B attend mindfulness sessions "to help to reduce his anxiety and increase coping mechanisms."

17. On 15 October B received a fixed term exclusion from School D of two days (16 & 17 October). At the reintegration meeting (a return to school meeting following an exclusion to decide how to reintegrate the pupil back into school) held on 17 October, School D requested an ESAP Agreement for B, and it was agreed that B should be referred to the Health Board for Speech and Language Therapy ("SALT") and to the Child & Adolescent Mental Health Services ("CAMHS") for assessments. The LEA referred School D's request for an ESAP to its Moderation Panel for consideration.

18. On 23 October the LEA Moderation Panel considered the ESAP request for B in conjunction with the additional information provided by School D and by the external experts involved with B's SEN provision under SAP.
19. On 24 October B received a fixed term exclusion for half a day.
20. At B's Review meeting held on 7 November, the LEA's Education Social Worker Team Manager ("ESWTM") confirmed that B had been referred for a SALT assessment and that Mrs A was to contact B's GP for the CAMHS referral. A further review meeting was scheduled for 4 December.
21. In the notes provided by the ESWTM he records that on 11 November he had a telephone discussion with School D's head teacher who said that the "school do not have the resources to manage him [B] in the interim".
22. B was excluded for three days from 12 November returning to school on 15 November. B's family had requested additional school work for him to do at home but Mrs A said this was not provided.
23. On 29 November B was excluded for a further three and a half days and the return to school date was set for 5 December 2013. The ESWTM's notes revealed that Mrs A had e-mailed and telephoned him about B's exclusion and she expressed concern that there was insufficient support for B at School D.
24. In a letter to School D's Chair of Governors, dated 3 December, Mrs A requested an appeal against B's four fixed term exclusions. Mrs A argued that School D had failed to implement the preventative measures put in place to manage/reduce B's known and predictable behaviour and that it used exclusions to punish the symptoms of B's disability. Mrs A explained that the exclusions had impacted on B's right to an education and on his emotional and psychological well-being. Mrs A's appeal was referred to the Pupil Disciplinary Committee ("PDC") for the Governing Body to review the head teacher's fixed term exclusions.

25. On 4 December, at B's reintegration meeting, Mrs A again expressed concern about School D's repeated use of exclusions. She said it could not provide the support that had been agreed to meet B's needs, and that this provision would not be available for B's scheduled return on 5 December. Mrs A said she was concerned for B's welfare if School D did not provide the additional support that had been identified for him and about the likelihood that he would receive further exclusions as a result. At this meeting the Educational Psychologist said "...it was becoming more evident that [B] requires additional support over and above the strategies ..." implemented by School D. It was agreed that a "flexible approach to [B's] schooling to the **end of the term** (my emphasis) with the suggestion that he attends mornings Monday to Thursday" would be adopted from 5 December with Mrs A collecting B daily at 12:45pm.

26. On 18 December the LEA's Moderation Panel issued B with an ESAP Agreement. The LEA agreed to provide funding for teaching assistant support for B for 25 hours per week. The LEA agreed to monitor B's ESAP provision and to attend his formal review meetings. The ESAP Agreement placed responsibility on School D to produce a study programme that would be appropriate to B's needs, produce an IEP targeted to meet B's specific needs, liaise with B's parents and the external bodies involved in B's SEN provision, and finally, organise B's formal reviews. Whilst the LEA funded and assigned the teaching assistant support for B's ESAP Agreement, it specified that School D would set out the teaching assistant's duties.

27. At B's review meeting on 18 December, both the ESWTM and the LEA's Inclusion Officer were present where B's educational assessment and his ESAP request was discussed. In the recorded notes for this meeting, the Inclusion Officer said serious consideration should be given for B to be placed at a Resourced Provision Unit ("the Resourced Unit") and, she "strongly recommended" that it was in B's best interest to move to the Resourced Unit where the resources he required are available for him. Mrs A said she wanted B to remain in mainstream education with the identified and agreed additional support provided to him.

28. The PDC met and its decision was dated 20 December. A LEA representative also attended this meeting. It upheld B's four fixed term exclusions.

29. B returned to School D on 7 January **2014** by which time the teaching assistant was in place to provide B with the 25 hours weekly teaching assistant support specified in his ESAP Agreement. The teaching assistant was in place for a period of two weeks and during this time B attended School D on the part time basis previously agreed.

30. On 8 January B underwent a SALT assessment. The report dated 21 January concluded that B's "... primary area of difficulty is social communication. He has difficulties with self awareness, body language, conversational skills and assertiveness skills."

31. B did not attend School D from 24 January but remained registered as a pupil until 24 March. There is no clear evidence that B was provided with school work or alternative education during this time although the ESAP Agreement remained in place but the Council says that School D did send work home for B on 22 January. There are indications that B may have been home tutored by Mrs A. Mrs A submitted a complaint on 24 January to the Council, about School D, its Governing Body and the LEA's failures to provide B with the agreed and specified provision set out in his SA, SAP and ESAP Agreements.

32. B was assessed in February and March by CAMHS. The report concluded that B "...displays a profile which fits into both the AD/HD and Autistic Spectrum category". It also concluded that "there are indications that Dyslexia is part of B's profile as well."

33. On 24 March B's name was removed as a pupil from School D's admission register. He was then enrolled as a pupil at another school which subsequently requested and secured an amendment to B's ESAP Agreement, where the LEA had increased the hours of one to one teaching assistant support for B.

34. On 14 April Mrs A lodged a disability discrimination claim with the Special Educational Needs Tribunal for Wales ("SENTW") against the Governing Body of School D. The SENTW's subsequent decision on 14 October criticised the LEA's use of ESAP Agreements as an alternative to the statutory assessment process. The SENTW commented at Paragraph 90 of its decision that "...this is not a level of support recognised by the Special Educational Needs Code of Practice for Wales and adopting a scheme not

recognised under the Code of Practice deprives parents of their statutory rights.” These statutory rights are triggered when a request for a statutory assessment is made to the LEA. The SENTW also said, at Paragraph 90 of its decision, that “a timely and comprehensive statutory assessment would have identified [B’s] needs and secured provision to meet those needs. Had a statement been identified as being necessary then there would have been a legal duty upon the local authority to deliver the provision specified in the statement.”

35. The SENTW’s decision also referred to the Educational Psychology Service’s note in March 2012, that diagnostic issues were not a priority for B at that time. The SENTW commented at Paragraph 85 of its decision that “unfortunately this sentence is symptomatic of the failure of both the Local Authority and the school to address and to identify [B’s] special educational needs. Had those needs been identified then the school would have been better placed to provide the necessary support”. The SENTW also said, that “in the meeting on the 18 December 2013 the possibility of [B] transferring to a resourced provision unit at [the Resourced Unit] was discussed. How this unit could have been deemed appropriate to meet [B’s] needs is not clear, without first of all those needs being clearly identified”.

36. On 6 May Mrs A contacted the Council about the progress of her complaint. The Council responded by letter on 13 June. Mrs A was dissatisfied with the Council’s response to her concerns and she subsequently submitted a complaint to the Ombudsman.

37. Mrs A informed this office recently that B received a SEN Statement on 7 September 2015.

Mrs A’s evidence

38. Mrs A said that B has social and communication difficulties and he has ASD/ADHD spectrum features including hyper sensory sensitivity to both touch and sound. He has difficulties with transitions, contact and establishing peer relationships. Mrs A said that B has fixed thinking and literal translation, and he suffers from anxiety and substantial visual impairment. Mrs A’s complaint is detailed at paragraph 1 of this report.

39. Mrs A said that B's behavioural difficulties were known to the School, were predictable and avoidable if the measures provided to manage B's behaviour and needs had been followed. Mrs A said the teaching assistant support provided in B's ESAP Agreement was only in place for two weeks and that during this time B only attended School D for significantly reduced hours. Mrs A said the LEA had failed to provide B with the agreed provision under his ESAP Agreement during this two week period, and she said that following this period the LEA made no provision for B at all.

40. Mrs A considered that B's fixed term exclusions were a direct result of School D's failures to follow its strategies in his Behaviour Plan and his SAP and, she considered that if School D had adhered to these strategies then B's identified behaviour may have been reduced or avoided. Mrs A said that the PDC and the LEA failed to consider her argument that School D had not followed the measures put in place to control B's predictable behaviour and it had failed to provide the required support. She considered this ultimately resulted in his four fixed exclusions in a six week period.

41. Mrs A considered that School D repeatedly used the fixed term exclusions to keep B away from School D and that the ESWTM advised School D that it was permitted to do so. Mrs A believed they wanted B to be placed at the Resourced Unit which the LEA's Inclusion Officer had raised at his review meeting on 18 December, without any prior discussion with her. Mrs A said that the Resourced Unit is reserved for pupils with very challenging and aggressive behaviour, and she considered that the LEA had failed to identify and assess B's specific educational needs before it decided that his needs may be better provided for at the Resourced Unit. Mrs A said the actions and the approach taken by the LEA towards her son and his educational needs had deeply upset her. Mrs A said she had agreed with School D and the LEA to keep B at home in January 2014 because the LEA had failed to provide the additional support specified in his ESAP Agreement, and School D had consistently failed to implement the other measures recommended to manage B's behaviour.

42. Mrs A said she was dissatisfied with the Council's response to her complaint and considered its investigation was poor. She said the response reflected the Council's failure to robustly investigate her concerns about its role as the LEA responsible for B's SEN provision.

43. In Mrs A's complaint to the Ombudsman she said that the Council's investigation and its response did not comply with the formal timescales set down in its complaints policy. Furthermore, she said the Council's investigation was not thorough and it had failed to collate and consider all the available information, such as a statement from B's assigned teaching assistant, which was unfair. Mrs A considered that the Council's system for allocating a complaint for investigation was poor, convoluted and confusing with the "onus placed on the customer to navigate an unwieldy and clearly lacklustre and ineffective process."

The LEA's evidence

44. The LEA said that it had fully considered B's SEN requirements and that it had endeavoured to take account of the views and wishes of B's parents. The LEA said that the individual needs of each pupil are assessed on the evidence presented to it and that in B's case, it considered the appropriate provision had been put in place to meet his SEN. The LEA also said that B's provision was regularly monitored and reviewed.

45. The LEA said it had not received any request for a statutory assessment for B, from either School D or Mrs A. The LEA said that B's additional educational needs could be met by an ESAP Agreement and that a formal statement was not necessary.

46. The LEA said that in 2009 it received criticism from the Welsh Government ("WG") and Estyn (the Inspectorate for Education and Training in Wales which inspects quality and standards in both education and training in Wales) about the high number of SEN Statements issued in Wrexham. As a result and following the WG's direction to reduce the number of SEN Statements issued and the need to develop alternative systems in Wales, the LEA said it introduced ESAP Agreements as an alternative support for children with SEN in its area. The LEA said that many other Welsh local education authorities had introduced alternative systems as a result of the WG's direction.

47. The Council was asked to provide evidence of the "WG's direction" but nothing was provided to confirm this position. However, in response to additional enquiries, the Council referred this office to two Estyn reports, the

first followed Estyn's inspection of the LEA in October 2007 ("the 2007 Estyn Report") and, the second report followed Estyn's inspection of the LEA in November 2010 ("the 2010 Estyn Report").

48. The 2007 Estyn Report stated that "The proportion of pupils with statements, at 4.37%, is well above the Welsh average of 3.15%, and is the third highest in Wales. The authority educates a relatively high proportion of pupils with statements of special educational needs (SEN) in special classes or units in mainstream schools, and a correspondingly low proportion in ordinary classes in mainstream schools. Officers are working effectively with mainstream schools to build their capacity to identify and meet pupils' additional learning needs. This work is at a more advanced stage in secondary schools than in primary schools" (Paragraph 45). Estyn also stated that "in response to shortcomings identified in the last inspection of SEN, the authority has taken effective action to improve the monitoring and control of expenditure from the authority's centrally-held SEN budgets. Following a thorough review in 2005, the authority increased overall funding for SEN and revised the formula for funding SEN through schools' delegated budgets in a way that removes the incentive for schools to seek statements of SEN. The new formula was introduced in primary schools in April 2006, and there are firm plans to implement an equivalent system in secondary schools in April 2008. At the same time, the authority plans to introduce a tighter system for monitoring the use of all delegated SEN funding" (Paragraph 154).

49. The Council also referred to the 2010 Estyn Report, which considered the Council's support for additional learning needs (page 6). This stated that "Wrexham has the highest percentage of pupils with statements of special educational need in Wales. However, the strategy to reduce the number of statements is starting to have a positive impact. As a result of good joint work with partner agencies, the authority now provides school based support for early years pupils without undertaking a statutory assessment."

50. The LEA said when ESAP Agreements were introduced in 2009, it provided training on this alternative system to schools, SENCOs and other external services involved in SEN provision, such as CAMHS, Psychology Services and SALT. I shall refer to these specialist services as "the external services" for the remainder of this report.

51. The LEA was asked to produce evidence that its introduction of ESAP Agreements had been approved by the Council through its decision making process, that ESAPs are referred to in its Policy for SEN and that it had provided information and publicised ESAP Agreements as an alternative provision to statutory assessment. The LEA produced two A4 pages, dated March 2009 and headed “Reducing Statements”. In these documents the LEA detailed the steps it had taken to introduce ESAP as an alternative. The LEA said it had visited a neighbouring LEA which had succeeded in reducing the number of SEN statements issued and reduced the number of statutory assessments both undertaken and requested. It produced comparative data to evidence the success in reducing the number of statements since the implementation of its alternative system.

52. The LEA had concluded that the neighbouring LEA’s success in the reduced number of SEN Statements was “significantly affected by their higher delegation of funding to schools and an agreed expectation that they [the schools] will meet the needs of the majority of pupils from the fund provided”. The LEA took steps towards greater delegation and introduced “virtual” delegation of centrally funded support staff, with the requirement that schools plan their SEN spending and demonstrate the use of the budget.

53. The LEA concluded that for the alternative system to succeed, it had to ensure that its external services were “on board”. The LEA’s A4 documents stated that “Meetings have been arranged in March 2009 to discuss the protocols and processes for providing support without the need for a Statement of Special Educational Need with the Speech & Language Service, Area Support Teachers and Educational Psychology Service.” The LEA said it provided training to all schools on its “mission”, and the strategy was also shared with the schools via its SENCO forums.

54. The LEA said that it had replaced many of its SEN Statements with ESAP Agreements, and it had focussed on the use of ESAP Agreements to meet the needs of children with additional educational needs (above that provided under their SAP Agreements), in preference to statutory assessment. The LEA said that most of the children in Wrexham with SEN have these needs provided for by an ESAP Agreement, rather than a SEN Statement.

55. The LEA said when it receives a request for an ESAP Agreement it is referred to its Moderation Panel for consideration. The LEA said the relevant school and/or external service decides whether to request an ESAP Agreement or a statutory assessment, and that this is done with the consent of the child's parents. The LEA said it was not a decision for it to make, although it provides LEA officers to advise schools on the decision about whether it is appropriate to submit a request for an ESAP Agreement, or a statutory assessment, to the LEA. The LEA also said that schools in Wrexham have been issued with the criteria and evidence required to support a statutory assessment request.

56. The LEA considered that ESAP Agreements are on a par with SEN Statements and said that both are reviewed and monitored by the LEA in exactly the same way. The LEA said the only difference between the two is that a SEN Statement is required to access provision at its Specialist Schools.

57. The LEA listed the benefits of operating ESAP Agreements as an alternative system, and said it was less bureaucratic, reduced assessment time (as SEN assessment process is usually 26 weeks) and enabled a child to access the resources to meet the identified educational need in a more timely and cost effective manner.

58. The LEA explained that it was not involved in B's transition from year two to year three which was the responsibility of School D. It contacted School D which said that transition support was provided for all children moving from year two to year three and included a transition week with the year three class teacher in the July, prior to the move. B had received additional support for the move.

59. The Council explained the usual process when it received a complaint under its Corporate Complaints Policy ("the Complaints Policy"). The complaint would be acknowledged and allocated to an Investigating Officer in the Corporate Complaints Team. At the same time, the complainant would be informed of the complaint process and the timescales involved. The Council accepted that Mrs A's complaint, received on 24 January 2014, was not processed, recorded and investigated in accordance with the Complaints Policy until 6 May. The Council explained that this was an oversight on its

part and was partially attributed to the Complaints Team Manager's absence through illness at the time, together with the limited resources available within the Team.

60. The Council said the investigation of Mrs A's complaint was complex as a number of the issues raised related to matters within a school and involved legal processes being followed. These would exempt Mrs A's complaint from investigation under its Complaints Policy. The Council said that the investigating officer attempted to address Mrs A's concerns "as comprehensively" as possible within the Council's remit.

61. The Council accepted that there were failings in the way Mrs A's complaint was managed and it said there had been a restructure within complaint management and the creation of a new team in November 2014. The Council said its procedures and processes had been updated to avoid future complaints being overlooked and any such errors being repeated. It noted improvements in its complaint handling service.

Analysis and conclusions

62. I have carefully considered Mrs A's complaint together with the information obtained from her, the LEA and the Council. I must reiterate the limitations on my powers in the PSOW Act, which means I am unable to consider the majority of Mrs A's concerns about the internal management, discipline and/or the school based decisions/actions of School D and/or its Governing Body.

63. Mrs A's concerns are inextricably linked and I have therefore considered them together as her substantive complaint. They relate to the LEA's failure to properly consider, assess and ultimately provide appropriate support to meet B's SEN. I have dealt with the complaints handling issue separately.

The substantive complaint

64. The LEA's Policy for SEN provision sets out a graduated approach which mirrors the provisions in the SEN Code. The LEA Policy states that where a child's specific SEN requirements are not sufficiently provided for by school based support and interventions, consideration for statutory

assessment is required. There is also an obligation on the LEA under section 323 of the Education Act 1996 for it to carry out a statutory assessment of a child if it considers a child has SEN and it is **necessary** (my emphasis), or at the request of a parent or the school (section 329). However, should the LEA decide that a statutory assessment is not required, the parent has a right to appeal the LEA decision to the SENTW.

65. ESAP Agreements are not referred to, or recognised, under the LEA's Policy for SEN, either as part of its graduated approach or as an alternative to statutory assessment. ESAPs are similarly not referred to in any of the LEA's information, procedures and/or policies for SEN provision. The SENTW concluded that an ESAP Agreement "is not a level of support recognised by the Special Educational Needs Code of Practice for Wales and adopting a scheme not recognised under the Code of Practice deprives parents of their statutory rights." Having seen the evidence in this case and the length of time B was left without suitable educational provision I repeat SENTW's view on this and consider that an ESAP Agreement was not a legitimate means of meeting B's SEN as an alternative to the statutory assessment process.

66. The LEA argued that the decision about whether to request an ESAP Agreement or a statutory assessment is for the school working with external services, with the consent of the parents. This statement must be considered in the context of the LEA's extended involvement and the reasonableness of its actions, once the evidence has demonstrated that the school based support had failed to meet B's needs. In this context, the ESWTM attended various meetings about B from September 2013 and he also had discussions with both Mrs A and School D's head teacher regarding their concerns about B's behaviour and his educational needs. By October 2013 the LEA was clearly aware that B's needs required additional support over and above that provided under his SAP and whilst it argued that neither B's parent nor School D had requested a statutory assessment, the LEA could have acted under the general duty in section 323 of the 1996 Act. The LEA had an opportunity to review B's needs in light of this and its SEN Policy but did not do this; it accepted and subsequently issued B with an ESAP Agreement on 18 December 2013, contrary to its published Policy provisions and the SEN Code.

67. That said, the LEA did issue B with an ESAP Agreement and his teaching assistant support was in place when he returned to School D on 7 January 2014. However, there was no evidence to establish how B would be reintegrated into the school or of a date/strategy for his return to full time education (as the agreed part time basis was only to last until the end of December 2013).

68. The teaching assistant support was assigned to B under his ESAP for 25 hours per week but there is no evidence that she received any training about B's condition or the strategies in place to support his behaviour, or how she should provide the support. Furthermore, this support was only in place for two weeks, and I have seen no evidence that the LEA made any/alternative arrangements after that to provide B with the additional support under his ESAP. Similarly, there is no evidence that B's ESAP was reviewed. Again the LEA missed the opportunity to consider a statutory assessment of B's needs and to consider the appropriate support he required.

69. From 24 January 2014 B did not attend School D but he remained registered as a pupil at the school until 24 March 2014. If, as the LEA maintain, ESAP Agreements have the same advantages as Statements, then during this period, the LEA would be responsible for reviewing and/or arranging suitable education (appropriate to the child's individual needs) for B. I have seen no evidence that B received any additional/alternative support from the LEA, and whilst this issue is not specifically raised in Mrs A's complaint, in my view this is symptomatic of the fragmented approach taken by the LEA in providing B with the appropriate support required to meet his SEN.

70. In 2009, the LEA said it took action to ensure that all schools and external services involved in the provision of SEN in its area were "on board", trained and aware of its "mission" to use the alternative system of ESAP Agreements as an alternative to statutory assessment. This was specifically to reduce the number of SEN statements issued, and the number of statutory assessments requested and/or it received, in accordance with the WG approach to SEN provision in Wales. The LEA has provided no evidence of such a direction from the WG and whilst the Estyn reports appear to favour this approach, and this may be indicative of the WG's policy intention to reduce the number of SEN Statements issued in Wales, it does not propose that LEAs stop issuing SEN Statements and find an alternative to statutory

assessment in all cases. It appears the LEA may have been overzealous in its drive to reduce SEN Statements and that it placed the onus on schools in its area to pursue alternatives to statutory assessment, without reminding/guiding them on the current overarching statutory responsibilities under the SEN Code and legislation. In B's case, a significant amount of time elapsed without his educational needs being identified, assessed and provided for and, this resulted in a lengthy period when B failed to receive appropriate education.

71. The LEA maintain that ESAP Agreements are "on a par" with SEN Statements but this is simply not the case. An ESAP does not impose a legal duty on the LEA to provide the specified SEN provision. A SEN Statement does. ESAP Agreements deprive parents, and children, of their statutory rights to appeal to the SENTW which the statutory assessment process provides. These statutory rights are triggered when a request for a statutory assessment is made to the LEA.

72. A statutory assessment does not necessarily lead to the issue of a SEN Statement but it could have assisted the LEA to identify B's specific educational needs and the appropriate strategy to properly provide for his needs.

73. The LEA Policy is clear. When it became evident that B's educational school based interventions and support had proved to be insufficient to meet his SEN requirements, B should have been **considered** (my emphasis) for statutory assessment. Indeed the SENTW concluded that "A timely and comprehensive statutory assessment would have identified [B's] needs and secured provision to meet those needs".

74. Mrs A said that B received a SEN Statement on 7 September 2015. If the LEA had not undertaken a statutory assessment of B's SEN needs, I would have made such a recommendation in this report.

75. On the evidence provided, I have concluded that the LEA failed to assess and identify B's educational needs, and accordingly failed to provide B with the appropriate support to meet those identified needs. The failures identified in this report amount to maladministration which represents an injustice to Mrs A, but particularly to B, and I therefore **uphold** the substantive complaint.

76. The concerns I have identified about the LEA's use of ESAP Agreements must be considered in the wider public interest. The LEA's use of ESAP Agreements as an alternative to statutory assessment may have affected other children with SEN in the Wrexham area. There is evidence of alternatives to formal SEN Statements being pursued for lengthy periods of time without the LEA considering the formal statutory assessment of needs. In many cases alternatives to SEN provision can be legitimately followed by LEAs in Wales in line with WG and LEA policies, but where such arrangements fail to meet a child's needs LEAs must not lose sight of their statutory duties. Changes to the SEN regime in Wales are being proposed through the Draft Additional Learning Needs and Education Tribunal (Wales) Bill. However, until the law changes in Wales LEAs must continue to operate within the current legislation and guidance.

The Council's failure to properly handle Mrs A's complaint

77. Mrs A said that the Council failed to answer all her concerns, that she lost faith in the Council's complaints process and that she ultimately considered its investigation was meaningless. The Council said that Mrs A's complaint would normally be exempt from consideration under its corporate complaints policy because it involved complaints about school matters, and was not a service that it provided to the public. The Council should have informed Mrs A of this position at the outset, as she naturally believed her complaint would be investigated properly with the expectation of a robust investigation response. Clearly, this was not the case and Mrs A was understandably disappointed.

78. The Council has acknowledged its failings in its investigation process and has accepted its failure to follow the complaints policy. I have noted that the Council has made changes to its complaint management procedure to avoid a recurrence of these failures. However, the failures identified in the Council's complaint handling amount to maladministration, and represent an injustice to Mrs A. These failures resulted in Mrs A having to spend additional time in pursuing the complaint. I therefore **uphold** Mrs A's complaint.

Recommendations

79. I **recommend** that the Council/LEA should implement the following recommendations within **one month** from the date of the final report unless otherwise stipulated:

- (a) Provide Mrs A with an apology from the Chief Executive for the failings identified in the substantive complaint of this report.
- (b) In recognition of the acknowledged failures identified in its complaints handling, and of Mrs A's time and trouble in pursuing this complaint, the Council should apologise to Mrs A and offer her redress of £350.
- (c)
 - (i) Consider whether training of staff involved with the handling of complaints through the Corporate Complaints Policy is required, to ensure that the failings identified are not replicated.
 - (ii) Consider whether further training on school complaints is needed for staff involved in complaints handling, and give consideration to the introduction of a process for its staff to identify exempt complaints and signpost the complainant, in a reasonable time, to the correct complaints process.

80. The LEA/Council should, within **three months** of the final report being issued:

- (a) Identify and instruct an independent educational specialist to undertake a review of the LEA documentation and educational provision made for B from December 2013 to March 2014. If the review identifies that the provision made was not suitable, the LEA should put in place a plan for how it will now make up the shortfall in any lost educational provision to B and implement it. The LEA should notify the Ombudsman and Mrs A of the outcome of the review and any recommendations resulting from the review.
- (b) Review its current published SEN Policy as regards Extended School Action Plus Agreements in light of the failings identified in this report.

(c) Audit the Extended School Action Plus Agreements currently in place and consider whether there are cases where statutory assessment should be carried out in accordance with its SEN Policy. The LEA should provide the Ombudsman with the results of this Audit and any resulting recommendations.

81 I am pleased to note that in commenting on the draft of this report Wrexham County Borough Council has agreed to implement these recommendations.



Nick Bennett
Ombudsman

22 January 2016

Appendix 1

List of abbreviations

ADHD	–	Attention Deficit Hyperactivity Disorder
ASD	–	Autistic Spectrum Disorder
CAMHS	–	Child & Adolescent Mental Health Services
ESAP	–	Extended School Action Plus
Estyn	–	Inspectorate for Education & Training in Wales
ESWTM	–	Education Social Worker Team Manager
IEP	–	Individual Education Plan
LEA	–	Local Education Authority
PDC	–	Pupil Disciplinary Committee
SA	–	School Action
SALT	–	Speech & Language Therapy
SAP	–	School Action Plus
SEN	–	Special Educational Needs
SENCO	–	Special Educational Needs Co-ordinator
SENTW	–	Special Educational Needs Tribunal Wales
WG	–	Welsh Government

Appendix 2

Relevant legislation, guidance and policies

I have considered the following applicable legislation and guidance together with the relevant Council Policies:-

- The **Education Act 1996 (as amended)** (“the 1996 Act”) requires that all children with special educational needs (“SEN”) should, as far as possible, be educated in mainstream schools as long as adequate provision can be made, as their needs require, and as long as this is not incompatible with the efficient education of other children within the school and the use of its resources. This Act provides that guidance should be formulated to give specific detailed advice and guidance to local education authorities (“LEA”) on how to comply with their SEN statutory duties and undertake those functions. In Wales the guidance was produced by the National Assembly in 2002, and is referred to as the Special Educational Needs Code of Practice 2002.
- Under **Section 312** of the 1996 Act, children are defined as having a SEN if they have a learning difficulty which calls for special educational provision to be made for them. Learning difficulty is defined as a child who has significantly greater difficulty in learning than the majority of children of the same age. Special educational provision means that for children of two years or over, “educational provision is additional to, or otherwise different from, the educational provision made generally for children of their age in schools maintained by the LEA...”
- Under **Section 323** of the 1996 Act, a LEA can decide to carry out a statutory assessment of a child where a LEA are of the opinion that a child has SEN and it is necessary to determine the SEN provision which any learning difficulty the child may have calls for. Where a LEA decides to make an assessment under this section, they shall give notice in writing to the child’s parent of that decision and of their reasons for making it. Where, after serving the notice a LEA decide not to assess the child’s SEN, it shall give notice in writing to the child’s parent of the decision.

- Under **Section 329** of the 1996 Act a LEA can decide to carry out a statutory assessment of a child if it considers necessary, or at the request of a parent or the school. However, should the LEA decide that a statutory assessment is not required; the parent has the right to appeal the LEA decision to the Special Educational Needs Tribunal for Wales (“SENTW”).
- Under **Section 19** of the 1996 Act every LEA is to make arrangements for the provision of suitable education at school, or otherwise than at school, for those children of compulsory school age who by reason of illness, exclusion from school or otherwise, may not receive suitable education for any period, unless such arrangements are made for them. For these purposes, “suitable” education is defined as “efficient education suitable to the age, ability, aptitude and to any special educational needs the child may have”.
- **The Special Educational Needs Code of Practice 2002 (“the SEN Code”)** was effective from 1 April 2002 and from that date all LEAs in Wales must have regard to it. The overall aim of the Code is to enable children with special educational needs to reach their full potential, to be included fully in their school communities and to make a successful transition to adulthood. The fundamental principles of the SEN Code are listed as follows:
 - That a child with SEN should have their needs met
 - Those needs will normally be met in mainstream schools or settings
 - The views of the child should be sought and taken into account
 - That parents have a vital role to play in supporting their child’s education
 - Children with special educational needs should be offered full access to a broad, balanced and relevant education

The SEN Code allows for flexibility and variation in the responses to SEN provision by schools, early years settings and LEAs but they need to demonstrate in their arrangements for children with SEN, that they are fulfilling their statutory duty to have regard to the SEN Code. (Paragraph 1:47).

The SEN Code expects LEAs to publish their general arrangements, including any plans setting out objectives, targets and timescales covering local arrangements for identifying, monitoring and providing support to schools for children with SEN. The LEA must also secure training, advice and support for staff working in SEN and explain that element of provision of SEN (but without statements) which it expects normally to be met from maintained school budgets and, that element of such provision the LEA expects normally to be met from its central funds (Paragraph 1:23). Section 7 of the SEN Code covers statutory assessment process and it recognises that the majority of children with SEN have their needs met effectively within mainstream settings through Early Years Action and Early Years Action Plus or, School Action and School Action Plus without the LEA needing to make a statutory assessment. However, in a small number of cases the LEA will need to make a statutory assessment and then consider whether or not to issue a statement (Paragraph 7:1).

It further recognises that statutory assessment involves the LEA considering whether an assessment of a child's SEN is necessary working co-operatively with parents, the school and other agencies involved with the child. If the LEA decide statutory assessment is required then the assessment should be conducted in close collaboration with parents, schools and other agencies involved with the child (paragraph 7:2). When the LEA is considering whether statutory assessment is necessary, it may conclude that school based interventions are appropriate or, the LEA may be able to identify different ways in which the school could help the child through such intervention. If this was the case, the LEA may conclude that a statutory assessment was not necessary (paragraph 7:5).

The SEN Code also recognises that statutory assessment itself will not always lead to a statement. The information gathered during an assessment may indicate ways in which the school can meet the child's needs without the need for any special educational provision to be determined by the LEA via a statement, such as the provision of a particular piece of equipment which would allow the school, guided as appropriate by expert help to meet the child's needs or devise alternative strategies which may enable a child to progress (Paragraph 7:6).

The SEN Code says that children with statements may be educated otherwise than at school where either the LEA has made other arrangements or the child's parents have made suitable arrangements. However, where the child has a SEN statement it remains the LEA's duty to ensure that the child's needs are met (Paragraph 8:95).

The SEN Code sets out a three stage graduated approach (model of action and intervention in schools and settings for children with SEN) to meeting a child's SEN provision, commencing with school based interventions through Early Years Action/School Action ("SA") and Early Years Action Plus/School Action Plus ("SAP"). The third stage of this approach is consideration of a statutory assessment by the relevant LEA where the school based interventions fail to meet the individual child's SEN requirements. This approach recognises that there is a continuum of SEN that, where necessary, increasing specialist expertise could be introduced to assist with the difficulties a child may be experiencing. The LEA should also provide schools, social services, health authorities and local voluntary agencies full information on the LEA's statutory assessment arrangements and procedures (Paragraph 10:36).


- **The Special Educational Needs (Provision of Information by [Local Authorities]) (Wales) Regulations 2002** places a duty on local education authorities to publish information about matters relating to the provision of education for children with SEN. In particular they are required to publish an explanation of that part of SEN provision that they expect maintained schools to fund from their budget shares, and that element that they will expect to fund themselves. They must also publish information about the broad aims of their policy on SEN, as well as specific action they are taking on SEN issues.
- Under the **Education (Pupil Registration) (Wales) Regulations 2010 ("the 2010 Regulations")** schools are provided with clear guidance as to when they can delete a pupil from their admissions register. There is a list of the prescribed grounds on which the name of a pupil of compulsory school age should be deleted from a school's admission register and accordingly its attendance register.

- **Wrexham County Borough Council's Special Education Policy and Provision ("the LEA Policy")** for 2006-2016 sets out and endorses the approach outlined in the SEN Code, as the appropriate framework within which the provision of SEN can be delivered in its area. The provisions of the LEA Policy predominantly mirror those provisions set out in the SEN Code. It states that each school in its area will have a SEN Policy to describe the arrangements made for children with SEN; for example observation of the child by the class/subject teacher, parental observations and assessment through teaching. In supporting pupils with SEN the LEA's Policy sets out a graduated approach (action and intervention in schools and early education settings to assist children with SEN) for schools to follow. This approach recognises that where necessary increasing specialist expertise should be brought in to support a child should the graduated school based provision not be sufficient for the child's individual SEN. In this regard an Individual Education Plan ("IEP") is often devised for a child by the school's teacher (s) and the SENCO (SEN Co-ordinator is usually a teacher who leads on SEN within a school), where the IEP is shared and reviewed with the child's parent (s), the school and any specialist providing advice on the individual child's needs.

Such actions and interventions are additional to or different from those provided as part of a school's usual curriculum. The provision of the child's SEN is a graduated approach which is initially met by the relevant school, not the LEA. In the primary and the secondary sectors, the graduated approach starts with the provision of School Action ("SA"), and if following a review this support is not sufficient the child progresses to support through School Action Plus ("SAP"). These provisions are school based SEN provisions with the class teacher responsible for the day to day planning and delivery of the child's IEP. The SENCO is responsible for planning any future interventions for the child in discussion with the class teacher and the parent(s). The SENCO also monitors and reviews the agreed school based intervention.

- Under the LEA's SEN Policy where following review the school based support and interventions (SA & SAP) are not sufficient/fail to meet a child's individual SEN requirements, then the LEA should consider whether to undertake a statutory assessment of the child's SEN. A statutory assessment does not necessarily result in a SEN Statement but it is a formal route to assess and identify a child's SEN requirements.

- The LEA Policy also states that the LEA conducts statutory assessments in line with the procedures set out in the SEN Code and such requests are usually at the final stage of the graduated approach. There is a process and a time frame for the LEA to assess and collate evidence of the school based interventions, the child's progress/lack of educational progress, reports from those involved in meeting the child's educational needs including professional knowledge and expertise outside the school setting. If the evidence provided shows the child has "significant difficulties" despite the provision of the appropriate help and support, then statutory assessment is carried out and should be completed within 26 weeks of the request.
- The **Council's Education Inclusion Department Criteria for Statutory Assessments** sets out the evidence required by a LEA to support a request for a statutory assessment. It also sets out the eligibility criteria for a statutory assessment for a child with SEN. The general criteria are applicable to all requests for statutory assessment, and the additional criteria sets out specific conditions for children with specific difficulties such as visual impairment.



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