



## Out of school ... out of mind?

How councils can do more to give children out of school a good education

Focus Report: learning lessons from complaints

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*This report was first issued in September 2011. In January 2016, following a change in LGO process, the text 'but we usually waive this requirement if a child is out of school' was deleted from the end of the paragraph which beings 'normally we require' on page 4.*

# Introduction

This report focuses on the responsibilities of local authorities to provide education when, for one reason or another, a child is not fully attending school.

Some children struggle to cope with full-time education because, for example, they have health problems. Where there are special reasons for a child not being in school full time, councils have a statutory duty to make other arrangements.

It is a serious matter if a child does not have the opportunity of full-time education. He or she can fall behind, struggle to get qualifications and find it harder to get work or contribute to the community. It can affect them for the rest of their lives.

This is why all children are entitled to an education that is suitable to their needs. When a child is not in education, the local authority needs to find out why and to take action to help, wherever it has a duty to do so.

The Local Government Ombudsman investigates complaints about local authorities including those about children being out of school or not receiving full-time education.

We are issuing this report now because the Government changed the law on 1 September 2011 to make it clear that where local authorities have a duty to provide education for children who are not attending school, they should make the provision full time. The Ombudsmen believe that this is a helpful development that makes local authorities' duties much clearer and strengthens the rights of children.

In addition, local authorities currently face enormous pressures, caused by significant cuts to their budgets and staffing levels. There is a danger that these factors may result in more children missing out on crucial years of education.

This report aims to help ensure people are clear about the legal duties on local authorities. We have illustrated our key points with stories of people who have made complaints that we have investigated. We have highlighted what commonly goes wrong and what councils could do better.

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# Why children may be out of school

There can be a variety of reasons why a child is not attending school, including truancy. However, this report focuses on situations where a child is prevented, for a good reason, from attending school. Local authorities do not have a duty to provide alternative education in cases of truancy as the child has a place at a school and could and should be attending.

The examples below show situations we have found where local authorities have responsibility for providing some form of education. It is hard to know how many children face such circumstances, but the complaints that come to us suggest these situations are not uncommon.

A child might:

- > move into a council's area and find no school place available despite an application
- > be taken off the roll at one school but not placed at another despite an application
- > be unofficially excluded from school
- > be on the school roll but kept at home by a parent for a particular reason, such as bullying
- > have special educational needs but no appropriate specialist provision.

## What councils should provide

Section 19 of the Education Act 1996 says that if a child of compulsory school age (between 5 and 16 years old) cannot attend school for reasons of illness, exclusion from school or otherwise, the local authority must make arrangements to provide 'suitable education' either at school or elsewhere – at home, for example.

The term 'suitable education' is defined as efficient education suitable to the child's age, ability and aptitude and to any special educational needs he or she may have<sup>1</sup>. The education to be arranged by the local authority should be on a full-time basis, unless, in the interests of the child, part-time education is considered to be more suitable. This would be for reasons relating to the child's physical or mental health.

### A full-time education

The number of hours teaching that constitutes a full-time education varies according to the year a child is in. The assumptions schools work on are set out below:

Reception and Years 1 to 2 (children aged 5 to 7):	21 hours
Years 3 to 6 (children aged 7 to 11):	23.5 hours
Years 7 to 10 (children aged 11 to 15):	24 hours
Year 11 (children aged 15 to 16):	25 hours

## **Less than full time for health reasons**

It may be a child cannot go to school because of ill-health.

They may suffer from a long-term or recurrent illness, with doctors advising they do no more than a certain number of hours each week. They may be physically ill or injured, or suffering with mental health problems – including anxiety, depression, school phobia and school refusal associated with depression.

There are a variety of potential responses to these circumstances – for example, hospital teaching, home teaching, or a mix of the two – and the Government has produced guidance on what local authorities should do<sup>2</sup>.

For example, councils must provide what is known as a 'strategic planning framework', designed to ensure a child's education continues and the agencies involved liaise effectively.

Local authorities need to ensure children with health problems are not without education for more than 15 working days. So, if a child cannot attend school because of a health problem, after 15 days the council must intervene and provide suitable education for a *minimum* of five hours a week.

The teaching must be of a similar quality to that which the child would receive in school, based on a broad and balanced curriculum. Where a council contracts out the service, it remains accountable for the quality of education.

Councils must also regularly review what is being offered and adjust the number of teaching hours if necessary. Children's needs change and their education should reflect this. So, as a child's health improves, the hours can normally be increased.

## **Less than full time for other reasons**

There may be other good reasons why a council might not think that full-time education is suitable for a child. It may be that the child has been permanently excluded from school and their behaviour is so challenging that full-time education is too much to cope with. In this case, the main issue is how best to meet the educational needs of the child, not whether the child is difficult to deal with, which is a matter for the school or other provider to manage.

Some children have behavioural, emotional or social difficulties that mean that life in school is very challenging. It could be reasonable in those cases for the council to put in place a part-time timetable at a short-stay school for a permanently excluded child – as long as that is kept under review and the provision is increased as the child's ability to cope improves.

There are specific rules on what needs to happen when a child is permanently excluded<sup>3</sup>.

After five days, the council must put some educational provision in place. The starting point should be that it is full time – it will normally be at a short-stay school. If part time, the council needs to have evidence that this is more suitable and must keep the situation under review. In the case of a 'looked-after child' – a child who is in the care of the local authority – the council must ensure there is educational provision from day one, with no gap at all.

Some children are given a 'statement of special educational needs', which is a formal document detailing a child's learning difficulties and the help they will receive. The statement might specify that the child should receive a part-time education. These children should also have an individual education plan.

Statements of special educational needs should be reviewed annually and individual education plans more regularly, usually each term. If parents wish to challenge a statement of special educational needs, they can appeal to the Special Educational Needs and Disability Tribunal.

## A suitable education

When assessing what is suitable provision, councils need to consider each child as an individual with different needs, abilities and circumstances – there is no fixed answer.

In the case of a child who has just moved into a new area, for example, if they have no specific needs they are likely to thrive in an ordinary school. But if they have been severely bullied and are showing signs of mental health problems, they may not be able to cope. Home-based provision might be more effective.

In a key court case<sup>4</sup> concerning two 14-year-old unaccompanied asylum seekers in the care of a council, the judge said: “individual consideration [should] be given to the child’s abilities and needs in the context of his education, and to the range of factors, including his educational history and other matters”.

When investigating complaints against councils, we expect them to have taken advice from all relevant professionals, listened to that advice and made a reasoned decision. We will not question the merits of reasonable decisions, but we will look at how and on what basis councils have made choices.

## The role of the Local Government Ombudsman

For over 35 years we have independently and impartially investigated complaints about councils and other bodies within our jurisdiction – our services are free of charge.

If we find something wrong, we can ask the council to take action to put it right. What we ask the council to do will depend on the particular complaint, how serious the fault was, and how the complainant was affected.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay compensation
- > take action or make a decision that it should have made before
- > reconsider a decision that it did not take properly in the first place, and
- > improve its procedures so that similar problems do not happen again.

In relation to children not receiving suitable education, we will criticise councils when they get things wrong and we will pursue recurring issues in order to promote improvements.

Normally we require councils to first consider a complaint through their complaints procedure before we investigate.

Whereas the courts determine what is and is not lawful, we have wide discretion to decide what constitutes administrative fault. This means we can criticise councils for unreasonable practice, as well as for failing to consider or take account of their legal duties.

We do not normally take up a complaint where a complainant has an alternative remedy through the courts or a statutory tribunal. For example, in cases involving children with statements of special educational needs, the complainant may have a right to appeal to the Special Educational Needs and Disability Tribunal. We would not normally need to become involved in such cases.

# Case studies

These case studies highlight some of the situations where we think councils should step in and make educational provision for a child.

## Case study one: a child moves into a council's area

When a child moves into its area, the council should allow the parents to say which school(s) they prefer and try to meet their request. If this does not result in a school place being offered within a reasonable time, we consider that the council should provide suitable education in some other way, such as home tuition.

### Kyle's story

Kyle was a bright 15-year-old boy who moved to a new home with his mother during term time one November. His diabetes had previously affected his school attendance but it was now under control.

His mum applied for him to start school the following month. She expressed a preference for two schools, one of which definitely had spaces. But this school refused to take Kyle after speaking with his previous school and finding out about his attendance.

Kyle's mum explained to the council that he had diabetes and that she had not mentioned this when applying as it was now less of an issue. But the matter went unresolved for several months as the council approached several other schools.

The following March, the council held a Fair Access Inclusion Panel to consider Kyle's case. The Panel directed the original school to take Kyle and he started in mid-May.

On investigating this complaint, we judged that the council had taken too long to resolve the case. Kyle had missed some five months of education and been disadvantaged as a result. He had not been able to make any new friends and had been bored at home.

We concluded that the council had allowed matters to drift as it believed approaching a number of schools was sufficient action. It had also failed to consider providing education on an interim basis while looking for a school place.

At our recommendation, the council agreed to review its policies and pay £1,500 to Kyle's mum so she could organise extra tuition for Kyle.

## Case study two: unofficial exclusion

If a council becomes aware that a child has been unofficially excluded from their school, education welfare officers should raise this with the school. They should point out that informal or unofficial exclusions are illegal.

Unofficial exclusions are where a child is excluded but this is not recorded properly, or at all, which can mask the problem. They are also often done without proper reasons or clarity about how long the exclusion will last. A child on an unofficial exclusion has no rights – for example to challenge the exclusion before the school governors.

If the school continues to unofficially exclude the child and the council is aware of this, the council should raise this with the school and consider providing some other education for the child.

### Molly's story

Molly was a seven-year-old girl who lived with her twin sister, Anna, and her dad, a single parent. Both Molly and Anna had challenging behaviour which meant they were disruptive in class and physically violent to other pupils and school staff. They attended a mainstream school where a special class had been created to meet their needs and the needs of two other pupils with special needs. Molly and Anna continued to have difficulties in class. In July, the council offered Anna a place in a specialist unit at a new school, which their dad was pleased to accept.

Molly returned to the mainstream school in the September and her challenging behaviour continued to cause difficulties. This resulted in her being excluded several times in the autumn term. The school was concerned that Molly's behaviour put her at risk of being permanently excluded from the school. In October Molly was excluded again, for five days this time. The council was told about this by the school. Molly did not return to school after the five days, her exclusion was extended unofficially and the formal procedures were not followed.

Molly remained out of school from October until the following May when the council found her a place in another school.

When investigating this complaint we found that the council had taken too long to find a suitable school for Molly. Between October and May the council did make some provision for Molly but she had been out of school for seven months while her twin sister was happily settled in her new school. This made it more difficult for Molly's dad to manage her behaviour at home, causing him distress.

We asked the council to pay Molly's dad £250 in recognition of the distress caused to him. We also asked the council to provide educational resources to the value of £500 to help Molly catch up with what she had missed. Finally, we asked the council to review its procedures to take account of the problems caused by schools unofficially excluding pupils.



## Case study three: permanent exclusion

If a council becomes aware that a child has been permanently excluded, the council has a duty to provide education from day six of the exclusion.

### Ryan's story

Ryan was a bright 16-year-old boy who did well in his GCSEs.

This was despite the fact he was excluded permanently from his secondary school during Year 10.

His mum did not challenge the decision and Ryan remained at home while she waited for the council to explain the options available.

The council promptly referred Ryan to a home tuition service and began finding him another school for the following September. But Ryan's mum did not hear anything so after the Easter holidays she began telephoning the council.

Ryan was given four hours' tuition in English and maths per week for a period of three weeks, finishing well before the summer term ended. He was entitled to 25 hours a week teaching or supervised study for the whole of the school term. He did, however, start another school the following September.

When investigating this complaint, we decided that the education provided over the summer term was not sufficient and did not cover the period that Ryan was absent from school.

We asked the council to pay £750 as a financial remedy in recognition of the harm done to Ryan's education. We also asked the council to review procedures for dealing with excluded pupils and to ensure that there is no delay in making full-time provision for them.

## Case study four: a child is on a school roll but kept at home by parents or carers

This situation occurs regularly among the complaints we receive. It usually happens because the parents or carers believe that their child is not safe at school, for example because of bullying, or because the school can no longer effectively provide education for them.

An education welfare officer will usually try to resolve the problem, working with the special educational needs department if appropriate. In some cases a council might consider enforcing attendance through legal proceedings.

But if a child cannot reintegrate into the school or the school is unsuitable, and the council decides not to take legal proceedings, the council has a duty to provide an alternative. The time taken to make such a decision will depend on circumstances in each case, but we will criticise councils for unnecessary delay.

### Ben's story

Ben was 11 years old and having difficulties at his primary school. His behaviour included throwing objects, scribbling on books, shouting in class, refusing to settle, kicking out when angry and then curling up in the corner of the class.

The council decided not to issue a statement of special educational needs, a decision the parents agreed with at that stage. But after several fixed-term exclusions and some complaints made by another parent – including a threat of violence – the parents withdrew Ben from school.

They were desperate and felt they had no choice but to try and educate him at home. They needed this to be temporary because Ben had damaged the house, threatened self-harm, hurt his brother and had lied about how the injury occurred.

The council assessed Ben's home education as unsuitable and told his parents that there was a place for him at a different school, news that came as a relief. But officials delayed for two months before contacting the school, only to be told it could not meet Ben's needs and would not accept him.

The council told the family that it could not direct the school to take Ben because the school was in special measures. It then did nothing else to ensure Ben got a suitable education, even though it knew his home education was unsuitable.

Ben's parents argued that placing him in a mainstream school could be detrimental to other pupils in view of his disruptive and aggressive behaviour. They wanted Ben to go to a special non-maintained school that caters for boys with behavioural, emotional and social difficulties. Eventually, they were successful.

However, Ben had missed five months of education and the family had suffered significant distress. We determined that this was unacceptable and asked the council to help to remedy the injustice by paying Ben's family £1,000.

## Case study five: helping a school refuser or a school phobic

When a child refuses to attend school or appears to have a phobia about attending, the local authority concerned must consider whether he or she is medically fit to attend school. If not, it needs to decide how many hours of what kind of education it should provide.

In cases where a child is physically ill, he or she would probably get the minimum requirement of five hours education a week. But councils should not assume this is adequate in the case of a school refuser or a school phobic child. In these cases, a council would need to consider what more was necessary.

Indeed, whenever a council offers a child less than full-time education, it must regularly review the situation with a view to increasing their hours as appropriate. When investigating complaints, we expect to see evidence that a council properly considered what was suitable for a particular child.

### Jon's story

Jon, a 14-year-old school boy, was about to embark on his GCSEs. But he suffered from periods of anxiety that were so severe that on some occasions he could not leave the house.

He regularly refused to go to school and at one stage his attendance fell to just 38 per cent. Eventually he stopped attending altogether. As a result, his GP referred him to the Children and Adolescent Mental Health Service (CAMHS) and the council considered prosecuting his parents for his poor attendance.

The council said they would defer any action until they had the opinion of the mental health team. The difficulty was that getting this would take up to six months.

In the meantime, Jon was not attending school so his parents asked for interim educational provision. However, the council refused on the grounds there was no medical evidence to justify it.

Jon was diagnosed with mild to moderate learning difficulties and his parents then requested hospital school provision. Again the council refused, this time saying they would not offer interim provision for non-medical needs.

But his parents complained that the council had made no interim provision for a total period of some ten months. Jon eventually went to a college of further education.

Investigating this complaint, we concluded that the council had misunderstood the legislation.

Councils do need to offer interim educational provision to children whose absences from school are for authorised reasons other than exclusion or illness. And in any case, the law does not say interim provision will only be given where there is medical evidence.

The council accepted that it got it wrong. It agreed to pay the family £2,750 for the loss of educational provision – to help meet Jon's educational, practical and social needs – as well as for the time and trouble of bringing the complaint.

## Case study six: a failure to help a child with special educational needs

Where a child has a statement of special educational needs, it is the responsibility of the local authority to ensure the requirements in the statement are met.

We have sometimes found that before statements are finalised – often because of difficulty identifying an appropriate provider – there can be a period of delay when a child's education is not being provided for, either properly, or at all.

In this situation, we would normally expect councils to offer interim education.

We accept that in some particularly complex cases, it may be genuinely difficult for the council to find the right provision. Therefore, we will consider how reasonable it is for the council to meet its responsibilities before deciding whether there was fault.

### Charlotte's story

Charlotte was 15 years old and about to embark on her GCSEs. But she had real difficulties when she first attended secondary school and started self-harming as a result. So she moved to another school.

She was diagnosed with a severe speech and language disorder. Six months later she was assessed for a statement of special educational needs. She was also referred to the Children and Adolescent Mental Health Service (CAMHS).

During her wait for help, Charlotte experienced severe difficulties at school and at home and was put on a reduced school timetable to try to manage her anxiety. Her mental health deteriorated and she tried to commit suicide.

The council lost her file and then failed to issue the statement for more than 14 months. The CAMHS subsequently advised Charlotte's mum to take her out of school for the sake of her mental health.

Her mum applied for interim education provision, but it was turned down on the grounds that education was already available through the school.

As a result of these difficulties, the family moved to another area. Charlotte's mum said she was forced to give up work to care for her daughter. Sadly, Charlotte's condition worsened again and she made another suicide attempt.

Investigating this complaint, we concluded that the council caused considerable distress by making two unjustified refusals of interim tuition. A girl who already suffered severe anxiety was made to worry even more and significant extra pressure was put on the whole family.

The council accepted it was at fault and confirmed that its own internal restructuring, and the temporary loss of the child's file, contributed to a significant delay. It paid £2,300 to Charlotte for delaying the statement and for the loss of education, and £1,000 to her mum for the distress and inconvenience caused to her by the council's actions.

# Priority areas for councils

Our investigations show that some local authorities misunderstand their duties or pay less attention to them than they should; but we also see many examples of good practice that are worth sharing more widely. Drawing on our work, we have identified four key areas of potential confusion and made six recommendations for best practice.

## Areas of potential confusion

### 1. The duty on councils to act

One potential area of misunderstanding is where absence from school is not caused by either health or exclusion.

In such cases, we have seen councils assume they have no duty to act. But the law says they must step in where the absence is for 'illness, exclusion or otherwise'. The word 'otherwise' is key and, in our view, potentially includes any kind of reason for absence from school, provided it is reasonable.

Clearly, short absences that a school deals with appropriately are not a matter for the council. But in other cases, if absence is prolonged and the school seems unable to resolve the difficulties, councils need to consider their legal duties.

If a council becomes aware that a child is not receiving their educational entitlement, the council should clearly raise it with the school and satisfy itself that appropriate action is being taken. But in the interim, the council may still have a duty to provide education directly to the child.

### 2. Hours of education provided

Another area of confusion arises where councils do act but assume they can simply provide the minimum entitlement for sick children of five hours teaching a week.

We are very clear that if a child is not sick, he or she should not be treated as such. The council should work out what is suitable based on the individual needs of the child, taking full-time education as the starting assumption.

If there is evidence that a reduced number of hours is suitable, the council can provide a part-time timetable. But if it does so, it must keep this under regular review and return the child to full-time education as soon as possible.

In addition to duties, councils also have powers, particularly in relation to truancy. While councils have the duty to provide education, the duty to ensure a child receives education falls on parents and carers. If a child truant, the council can enforce the duty by issuing parents or carers with penalty notices or – as a last resort – taking them to court.

If a child is absent from school for reasons other than health or exclusion, the council should find out the reason, consulting with the professionals who know the child. It should decide whether to take enforcement action or intervene in another way, such as providing alternative education.

Where a council chooses enforcement, it has no parallel duty to make alternative out-of-school provision for the child in question. This is because the child has a place at school and there is no good reason for them not attending.

### 3. Where a child is on a school roll but attendance is low

Councils should not assume that schools shoulder the entire responsibility for a child's education. If a child is still on the school roll but their attendance is low, a council may also need to consider its legal duties and take action where appropriate.

### 4. Delays in organising provision

Finally, councils must bear in mind that whenever there is a delay in organising provision for a child, they may have to provide an interim solution.

## Good practice

Drawing on our experience, we have identified six recommendations based on examples of good practice in councils:

- > Consider the individual circumstances of each case and be aware that, potentially, a council may need to act whatever the reason for absence (with the exception of minor issues that schools deal with on a day-to-day basis) – even when a child is on a school roll.
- > Consult all the professionals involved in a child's education and welfare, taking account of the evidence in coming to decisions.
- > Choose, based on all the evidence, whether to enforce attendance or provide the child with suitable alternative education.
- > Keep all cases of part-time education under review with a view to increasing it if a child's capacity to learn increases.
- > Adopt a strategic and planned approach to reintegrating children back into mainstream education where they are able to do so.
- > Put whatever action is chosen into practice without delay to ensure the child is back in education as soon as possible.

## Further information

Visit our website at: [www.lgo.org.uk](http://www.lgo.org.uk)

Contact the LGO Advice Team on 0300 061 0614

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1 Section 19(6) of the Education Act 1996

2 *Access to education for children and young people with medical needs* – 2001, DFES 0732/2001

3 See *Improving behaviour and attendance: guidance on exclusion from schools and pupil referral units* – 2008, DCSF – 00573-2008

4 *R (KS and ZU) v The London Borough of Croydon* [2010] EWHC 3391 (Admin)