

# Guidance on Looked After Children with Special Educational Needs placed out-of-authority



## **Introduction**

As a group, looked after children are nine times more likely to have a statement of special educational needs (SEN) than the general pupil population. The majority of looked after children have SEN. It is important that all children with SEN receive the educational provision which meets their needs. However, for looked after children, many of whom will have had difficult and unstable home and school lives before coming into care, it is imperative that their needs are quickly and efficiently assessed and provided for so that the effect of any instability on their education is reduced to a minimum.

Looked after children can be placed to live with foster carers or in a children's home a long way from where they would normally live and often this will be outside the area of the local authority which looks after them. Because they are placed "out-of-authority" there can sometimes be confusion as to the responsibilities that local authorities have towards the child if the child needs to be assessed for a statement of special educational needs or already has one. The purpose of this guidance is to explain how local authorities' responsibilities for meeting the special educational needs of looked after children placed out-of-authority operate. It does not create any new obligations, but decisions made in relation to individual children should be consistent with the operation of the law as described.

## Background

The term 'looked after children' is defined in law under the Children Act 1989. A child is looked after by a local authority if he or she is in their care or is provided with accommodation for more than 24 hours by the authority. Looked after children fall into four main groups:

- Children who are accommodated under voluntary agreement with their parents (section 20);
- Children who are the subject of a care order (section 31) or interim care order (section 38);
- Children who are the subject of emergency orders for their protection (section 44 and 46);
- Children who are compulsorily accommodated. This includes children remanded to the local authority or subject to a criminal justice supervision order with a residence requirement (section 21).

When a child comes into care the local authority will arrange a suitable care placement. In doing so, the child's allocated social worker, supported by other associated local authority services, should do all that is possible to minimise disruption to the child's education. While for many looked after children this will mean no changes to their educational placement, for a significant minority being taken into care will mean that they can no longer go to the same school. For about 30 per cent of looked after children, their care placement is not within the boundary of the authority which has taken the child into care (i.e. an out-of-authority placement) and this will often mean a new educational placement will need to be arranged because the distance to travel to the current school is too great.

Twenty-eight per cent of looked after children have a statement of special educational needs. Generally about 60 per cent of all looked after children have some form of SEN. Local authorities have a duty, where necessary, to undertake assessments, draw up and maintain statements for children with SEN, including looked after children. The following guidance and practice examples are based on the Department's understanding of the law (i.e. that the responsible local authority for assessing a child's SEN and for making and maintaining statements is the authority in which the child is ordinarily resident). In placing looked after children, local authorities must consider what is in the child's best interests.

## **Responsibility for Special Educational Provision**

Assessments, statementing and maintaining statements – the ‘responsible authority’

For children with SEN, but without statements, it is the school in the main that will make provision for the child’s special educational needs. Relevant obligations are in section 317 of the Education Act 1996. Local authorities only incur responsibilities for children with SEN when it becomes necessary for them to assess a child’s SEN and determine special educational provision in a statement. When a decision is made that a looked after child must be assessed to see whether a statement of special educational needs is required, the authority which carries out that assessment is determined by section 321(3) of the Education Act 1996.

### **Section 321(3) provides:**

For the purposes of Part IV of the Education Act 1996 a local education authority are responsible for a child if he or she is in their area and –

- (a) he/she is a registered pupil at a maintained school or maintained nursery school,
- (b) education is provided for him at a school which is not a maintained school or maintained nursery school but is so provided at the expense of the authority,
- (c) he/she does not come within paragraph (a) or (b) above but is a registered pupil at a school and has been brought to the authority’s attention as having (or probably having) special educational needs, or
- (d) he/she is not a registered pupil at a school but is not under the age of two or over compulsory school age and has been brought to their attention as having (or probably having) special educational needs.

The term ‘in their area’ is not defined in the legislation. In line with established practice, the Department construes this phrase to mean ‘ordinarily resident in their area’. This means that an SEN assessment must be carried out by the authority where the child is ordinarily resident. Where a looked after child is in a settled placement with foster parents or in a children’s home, then the authority where the foster parents are resident, or where the home is situated, will be the authority responsible for carrying out the SEN assessment and for making and maintaining any statement of special educational needs.

However it is open to local authorities to make 'ad hoc' arrangements in individual cases. The local authority where the child is ordinarily resident could delegate the responsibility for assessing a child or making and maintaining a statement to the placing authority where, for example, there are practical reasons for doing this or in cases where this would be in the child's best interests. Clearly both authorities must be in agreement before such arrangements can go ahead.

## Ordinary Residence

'Ordinary residence' is also not defined in the Education Act 1996, or in any Act of Parliament. However, the concept of 'ordinary residence' was held by the House of Lords to imply the following<sup>1</sup>:

*Ordinary residence is established if there is a regular habitual mode of life in a particular place 'for the time being', 'whether of short or long duration', the continuity of which has persisted apart from temporary or occasional absences. The only provisos are that the residence must be voluntary and adopted for 'a settled purpose'<sup>2</sup>.*

In assessing whether a settled purpose lies behind the adoption of a particular place of residence, it is necessary to consider whether the residence shows a sufficient degree of continuity. This does not mean that the person must intend to stay in the place indefinitely. He or she may have a settled purpose even though it is for a strictly limited period.

'Settled' in this context means 'fixed' or 'predetermined', as opposed to merely casual. A person may become ordinarily resident immediately when they move to a different place. It is also possible for a person, initially moving somewhere for a temporary purpose not constituting ordinary residence, to become ordinarily resident through a change of intention.

As a general rule it may be assumed that a child under the age of 16 shares the same place of ordinary residence as his or her parents (even if the child is away at boarding school)<sup>3</sup>. The ordinary residence of looked after children placed away from home, older children, those whose parents are living apart and those who have been left in the care of other relatives may be more difficult to determine. If the child's age and means are such that he or she is capable of deciding for himself where he will live and exercises such a choice, his place of ordinary residence will be where he chooses to reside.

The cases of children in care who are placed by a local authority, either with foster carers, or in boarding schools, are discussed further in later sections.

<sup>1</sup> R -v- Barnet LBC ex parte Shah [1983] 1 All ER 226

<sup>2</sup> It was also said that Ordinary residence is proven more by evidence of matters capable of objective proof than by evidence as to state of mind.

<sup>3</sup> Re P(GE) (an infant) [1964] 3 All ER 977

## **Making a new assessment**

Generally for looked after children placed out-of-authority, where it becomes necessary to conduct an assessment of their special educational needs, the local authority in which they are 'ordinarily resident' will be the authority responsible for undertaking the assessment. Should there be a statement, then that authority will maintain it. Being an out-of-authority looked after child should make no difference to the assessment process. The placing local authority should be engaged in the process where they are the corporate parent of the child and should advocate for and support the child in the same way as any good parent would.

## **Children with existing statements**

When an out-of-authority placement is made for a child who already has a statement of special educational needs, generally that statement should transfer to the authority where the child will be living. As an educational placement should be secured at the same time as the care placement both the school and the receiving authority should be aware that this will be happening. Good practice is that local authorities should always discuss moves of looked after children with receiving authorities before a final decision is made as this is a good way to ensure such placements are made as smoothly as possible.

The transfer of the statement is provided for by Regulation 23 of The Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 and the new authority should treat such a transfer in the same way as any other. The receiving authority must continue to maintain the existing statement and can consider bringing forward arrangements for a review of the statement. The maintenance of the statement remains the responsibility of the receiving authority until such time as circumstances may change so that they are no longer responsible. More details can be found in Chapter 8 (8:113 onwards) of the SEN Code of Practice.

While the placing authority no longer maintains the statement, in the case of looked after children, they will still have financial responsibility for the special educational provision set out in the statement because the child continues to 'belong' to them as determined by regulation 7 of The Education (Areas to which Pupils and Students Belong) Regulations 1996 (the 'Belonging Regulations'). The receiving authority will be able to recoup the cost of the statement through the normal recoupment process – see the section relating to financial responsibility.

The placing authority will still be under a duty to promote the educational achievement of the child for as long as the child continues to be looked after by them, and should therefore continue to advocate for that child in the same way as any good parent would. The placing authority (involving the foster carer as appropriate) would need to consider any proposed changes to the statement that might be proposed by the receiving authority and respond as a parent would if

the child was not looked after. This includes, where necessary, appealing decisions made to the First-tier Tribunal (SEND).

### **52-week placements**

When making an assessment of a child's SEN (or re-assessing the needs of a child with an existing statement) it may be that the most appropriate provision would be for the child to be placed in a 52-week residential education placement. This is especially the case where the assessed needs are severe and/or complex. Often these placements are out-of-authority, particularly if the provision is for low-incidence needs and are in non-maintained residential special schools.

In such cases it is the Department's view that for the purposes of ordinary residence the child continues to be considered as living in the placing authority and therefore they would continue to have the duty to maintain any statement of SEN. Placing authorities are reminded that they have a duty of notification (under regulation 5 of the Arrangements for Placements of Children (General) Regulations 1991) whenever they place a child out-of-authority and children in 52-week placements are no exception. Such notification should be made prior to the placement being made, or where that is not practicable, as soon as possible thereafter.

### **38-week placements (or other time period)**

It may be that some SEN stated residential placements are for a time period of less than 52-weeks – usually 38 week (term-time) placements. In such cases as the looked after child returns 'home' to the placing authority, i.e. to where they are ordinarily resident outside term time, then the placing authority would maintain the statement.

### **Serial short-term placements**

Where a looked after child with a statement of SEN has a number of short-term out-of-authority placements, usually because of difficulties in making a permanent placement decision, consideration must be given to the implications this has on the child's educational provision. When such placements move between a number of different authorities, the child will be considered to remain ordinarily resident within the area of the placing authority where it is the case that he/she has not been placed with a settled purpose. The placing authority will therefore maintain any statement until such time as arrangements are settled for the child and the placement is intended to be of a more permanent nature.

## Placing children in an emergency

The over-riding consideration for both care and education placements for looked after children is that they should be;

- a. in the child's best interests; and
- b. done after a thorough assessment of the child's needs.

While in many cases processes will have been undertaken and decisions taken before the child becomes looked after, there will be times when, due to the circumstances of the case, a child is taken into care in an emergency and the need will arise for him/her to be placed in a different educational establishment. In these circumstances, there may be little or no time to properly determine whether a particular establishment can meet his/her needs. When this occurs and a child is placed out-of-authority, it is particularly important that arrangements are made as swiftly as possible so that the child continues to receive an appropriate education.

Statutory guidance<sup>4</sup> states that when a placement has been made in an emergency and a new education placement is required (or where an educational placement has broken down), then the placing authority should ensure that a suitable new education placement is secured within 20 school days.

A child having a statement of SEN will be an important factor when making any decision about the educational placement for that child. There are a large number of different scenarios in such circumstances and it is not possible to list every combination. As a general rule when such cases occur (or even if one is likely to occur as there are times when a possible breakdown can be predicted) then it is important that all parties involved in the decision discuss what needs to happen at the earliest opportunity.

By its very nature an emergency placement may have some degree of instability and so, as for children in serial short term placements, the placing authority will continue to be the authority responsible for maintaining any statement of SEN until such time as the placement either becomes permanent, or another permanent placement option has been agreed. At this point the statement can be transferred to the authority where the child now lives.

## Interim Care Orders

Children under an interim care order should be treated in the same way as other looked after children. For those who have statements coming into care, a decision will need to be taken as to how the statement can be maintained if the child is to be placed out-of-authority. Given that it is unlikely that a decision about a

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<sup>4</sup> Statutory guidance on the duty on local authorities to promote the educational achievement of looked after children under section 52 of the Children Act 2004



permanent placement has been made and that there will be further deliberations as to what will happen after the interim order, then the child continues to be ordinarily resident within the placing authority. The placing authority must continue to maintain the statement until a more permanent placement decision has been made.

## **Financial responsibility for children with statements**

The Education (Areas to which Pupils and Students Belong) Regulations 1996 (the 'Belonging Regulations').

Where an assessment of SEN results in a statement for a looked after child, then the authority looking after the child will be financially responsible for the special educational provision (as determined by reference to regulation 7 of the 'Belonging Regulations'). The receiving authority, where the child is placed out-of-authority, will be able to recoup the cost of the statement through the normal recoupment process as determined by the Education (Inter-authority Recoupment) Regulations 1994.

The 'Belonging Regulations' have recently been amended<sup>5</sup> so that it is now clear that they do not determine the authority responsible for the making and maintaining of a statement of SEN. This means that the 'responsible authority' for maintaining the statement may not be the same authority as the authority to which the child 'belongs' for financial purposes. The Department's view has always been that the 'Belonging Regulations' should not be used to determine which local authority is responsible for making and maintaining SEN statements. However, a court case (the 'Waltham Forest judgement') in 2007 suggested that the Regulations could be used for this purpose and the 'Belonging Regulations' were amended in order to prevent them being used in this way.

## **Transport issues**

In general, local authorities are obliged to pay for transport where the child is an eligible child; the statement names the nearest suitable qualifying school, and that school is beyond statutory walking distance. However the local authority is not obliged to pay the transport costs where, for example, a nearby school can meet the needs but the parent expresses a preference for a school that is further away and beyond reasonable walking distance – the parents will have to pay the transport costs.

For looked after children placed out-of-authority the Inter-Authority Recoupment Regulations provide that, for children with SEN statements, the local authority to which the child belongs must pay to the providing authority (i.e. the authority maintaining the statement of SEN) such amounts as the authorities agree or such amount as the Secretary of State directs. This will generally mean that all the costs

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<sup>5</sup> See The 1996 Regulations were amended by the Education (Areas to which Pupils and Students Belong) (Amendment) (England) Regulations 2009.

of the statement will be covered, including the costs of home/school transport where the statement provides that the local authority will pay for it.

Where the statement does not cover transport or where the placing authority, as corporate parent expresses a preference for a school further away and beyond reasonable walking distance, then the placing authority (as 'parent') will still be financially responsible for the transport.

## **Conclusion**

It is of prime importance when considering any decision-making around a child who is:

- looked after;
- has a statement of SEN; and
- is placed out-of-authority;

that the decision is made in the best interests of that child. For the placing authority, a good measure of whether this is so is to consider whether 'if this were my child would I be happy with this decision?'

Placing authorities should act as if they were a good parent and make their decisions with this in mind. However there must be a degree of 'reasonableness'. It is not reasonable to present a receiving authority with a situation where all the relevant decisions have been made without any input from them if they are expected to provide services to that child.

Where possible, authorities should work up bilateral and regional protocols and procedures so that it is clear before any decisions are taken what can be expected from each party.

Whenever there is a dispute all efforts should be made to ensure there is a continuity of service to the child so as to minimise disruption to their education. It is better to allow an education placement to take place and discuss responsibilities afterwards than to allow a child to have no educational placement at all.

Looked after children are some of the most vulnerable young people. However, by working together schools, local authorities and others can ensure that their educational experience is a positive one and one that will lead them to achieve their full potential. This guidance is designed to help local authorities come to decisions about who will be responsible for assessing looked after children's SEN and making and maintaining their statements. Timely decisions on these matters will help to ensure a positive educational experience for these children.

## Case Studies

The straightforward case:

Billy aged 8 and his family have been known to social services for some time – he has a statement of SEN. After being taken into care, a decision is made to place Billy with foster carers on a long-term basis some distance away in another local authority. Arrangements are made for Billy to attend a school local to the foster carer and the statement of SEN is transferred to the authority where Billy now lives. The new authority, where necessary, must continue to maintain the statement but can decide to bring forward the review. The placing authority will have financial responsibility for meeting Billy's educational needs, and the costs of this can be recouped from them.

This is the simplest of cases and most times there will not be any difficulties. However it is possible to make the process better by improving the communications between authorities, so:

- If it is likely that the placement will be out-of-authority then early warning to the receiving authority would be useful.
- As it will be the receiving authority who will maintain the statement, discussions with them prior to the move will enable the receiving authority to arrange a suitable educational placement for the child.
- Local/regional protocols will mean that placing authorities will know what they can expect in the way of services to support the child.

## **Unidentified special educational needs:**

Sally, aged 13, and her two younger sisters were taken into care late one night after police were called to a domestic incident. They were placed at some distance from the family home for their protection and arrangements were made to find educational placements for them. It was envisaged that the placement would be a long-term one. Sally was placed in a local secondary school but it quickly became clear that she was having difficulty with the work expected for her age, was often disruptive and was in danger of being excluded.

At an emergency meeting at the new school, together with the foster carer, the social worker and the child it was agreed that Sally would be assessed to see if there were any underlying problems (i.e. whether she had special educational needs). As Sally was now ordinarily resident in a new local authority a request was made to that authority to carry out the assessment.

When children are taken into care in an emergency it can be the case that education needs are put to one side because of the immediate welfare (and possibly health) concerns. However it is vitally important that the child's educational needs are considered at the earliest opportunity.

- When a child comes into care in an emergency, a Personal Education Plan (PEP) must be initiated within 14 working days
- The Designated Teacher at the school where the child has been placed should ensure that, as part of the PEP, there is an assessment of the teaching and learning needs of that child. This should involve talking to the previous school
- In the early stages of being in a new school, the child should be closely monitored and professionals, such as the school SENCO, should be informed of potential problems.

## More than two authorities

Most local authorities will be aware of cross border issues for children with SEN and the recoupment process – especially for those pupils who go to school in a neighbouring authority. However, for some looked after children, there can be the added complication of a third authority. This is where a child is placed by Authority A within Authority B but goes to school in Authority C.

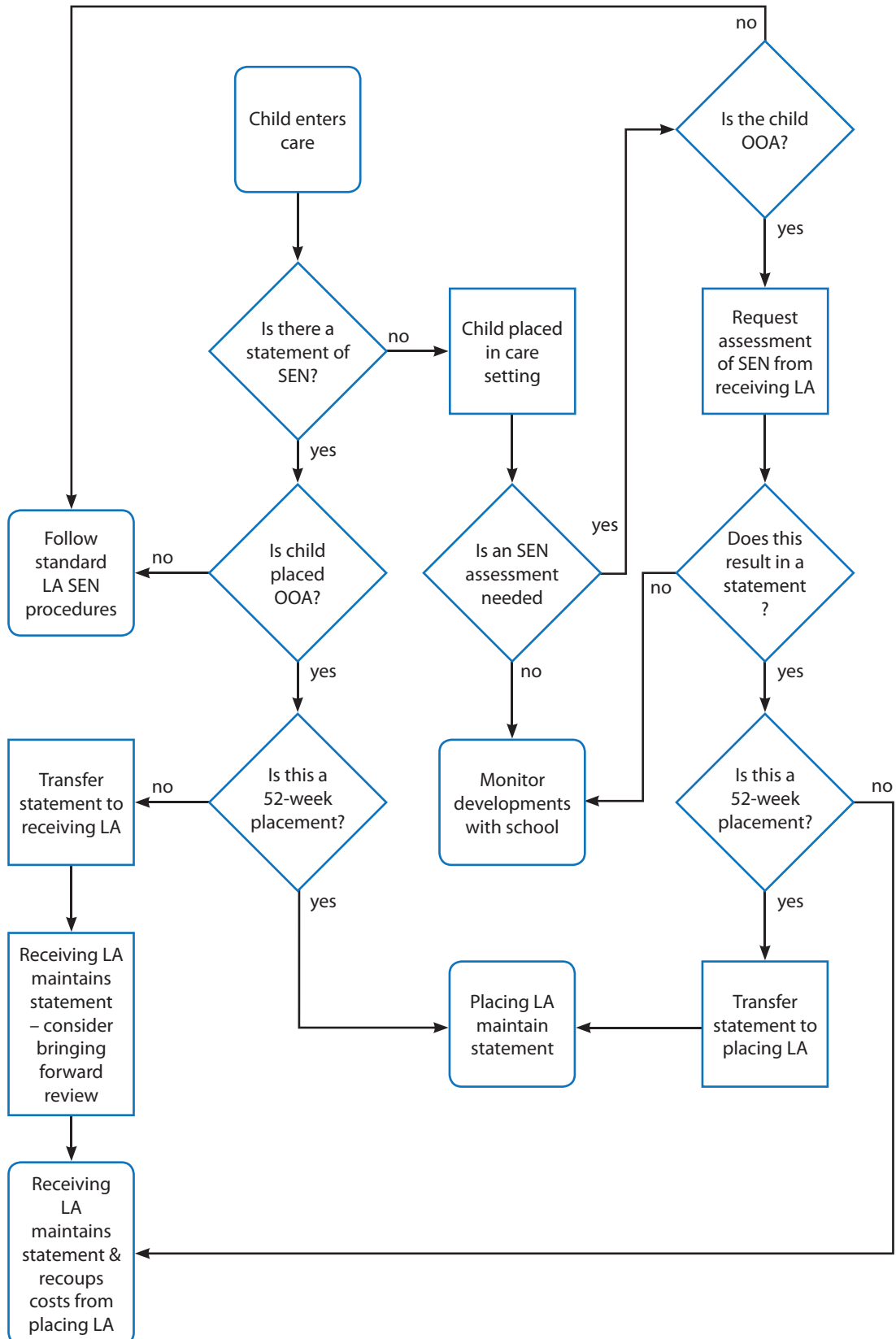
Amadi is 14 and has been in care for a number of years. He is in a stable, out-of-authority, foster placement and goes to a school near his foster home which is situated in a neighbouring authority (Authority C). Amadi has got special educational needs and has been at school action plus for some time. Recently, after moving into year 10, he has found it difficult to keep up with his work and the school SENCO believes that Amadi should be assessed for a statement of SEN to enable him to receive more intensive support.

It is for the authority where Amadi lives with his foster parents (Authority B) to carry out the SEN assessment and the SENCO should approach them with the assessment request. Authority B should undertake the assessment in the normal manner, liaising with the school as it usually would. In addition, as the child is looked after by another (third) authority (Authority A) they should be involved in the process just as any parent would.

Should the assessment determine that Amadi requires a statement of special educational needs, then the placing authority (Authority A), as corporate parents, need to make the decisions that parents normally make in such circumstances. As the child 'belongs' to Authority A (as determined by regulation 7 of the Belonging Regulations) then the receiving authority (Authority B) will be able to recoup the cost of the statement from the placing authority.

- This scenario highlights why it is important for local authorities to notify each other when they place looked after children out-of-authority. In this scenario the local authority where the child is living (Authority B) has relatively little to do with the child, nevertheless it is their responsibility to make and maintain a statement of SEN.
- The SEN section of the receiving authority (B) should liaise with the placing authority (A) in the placing authority's role as the corporate parent.
- The above is a relatively simple SEN case. Where the child has more complex needs, it may be that the recommendation is for a 52 week residential placement in another authority (therefore also altering the care placement). In such circumstances, as the foster placement would come to an end, the statement would be transferred to the placing authority as they would need to maintain a statement of SEN for a child that they look after who is in such a placement because the child would be deemed to be ordinarily resident in the placing authority's area.

## Flow Diagram of possible actions for LAC with SEN





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