

Supplementary written evidence submitted by Matt Keer

Background

1. I am a parent of two young people with SEND. I write occasionally for the Special Needs Jungle website. I have already submitted oral and written evidence to this Inquiry, so please accept my apologies for writing again.
2. Last week, I read a submission from East Sussex County Council, published on the Committee's website in March (SCN0685). After reading it, I thought it would be useful to bring some relevant data to the Committee's attention on this local authority's SEND services.
3. I have no personal or financial connection to East Sussex. I have previously provided information on the SEND system and local SEND policies to families who live there, but I have not asked for or received any payment for this information.

High Needs Block Funding

4. In their most recent submission to your Committee, East Sussex County Council (ESCC) stated that "there is insufficient resource from central government to Local Authorities in order to meet the demands of the Children and Families Act."
5. **This evidence is consistent with submissions from many other local authorities. However, in its separate communication with its schools and governors, ESCC offers a more nuanced – and concerning – explanation of how they match resources to need.**
6. According to a report that ESCC produced for the East Sussex Schools Forum in July 2018,¹ "the current projected [High Needs Block] spend for 2018/19 is within the agreed budget and no additional resource is anticipated at this stage...the picture for 18/19 appears, at this stage, to be relatively secure in East Sussex."
7. In the July 2018 report, ESCC attributes its success in keeping high-needs SEND costs within budget to the following: a reduction in the number of new EHCPs issued, reduction in placement costs in the FE sector, increases in placements in mainstream SEND bases and local special schools, and a reduction in placements at independent and non-maintained special schools.

¹ Item 4, "High Needs Block Update", ESCC report to East Sussex Schools Forum, 6th July 2018 - <https://democracy.eastsussex.gov.uk/documents/g3734/Public%20reports%20pack%2006th-Jul-2018%2008.30%20East%20Sussex%20Schools%20Forum.pdf?T=10>

8. **In December 2018, ESCC’s SEND team sent a newsletter to school staff and governors.** Provocatively titled “Help us to keep YOUR money in YOUR schools”, the newsletter stated that “East Sussex is one of the few councils within the South East that is not projecting a significant overspend on the High Needs Budget.²”
- a) However, ESCC’s newsletter also stated that **“in order to bring the spend on the High Needs Block within the budget that the DfE provides, we need to move 100 pupils out of special schools into mainstream and 50 pupils out of independent schools, back into special or mainstream schools.”**
 - b) **ESCC did not provide further details on how they planned to carry out this measure:** how they had identified the 150 SEND pupils that they intended to move, how they planned to communicate their intentions to the affected families, and **how they planned to implement a wholesale relocation of children & young people with high-needs SEND without breaching their statutory duties under the 2014 Children & Families Act.**
9. Put bluntly, it is difficult to reconcile the evidence that ESCC has recently given your Committee on their funding position with the information that it has supplied to its own schools. **In practical terms, there is a high risk that the measures that East Sussex County Council uses to stay within the High Needs Block funding envelope will breach its statutory obligations to meet children & young people’s SEN under the CFA 2014.**
10. One way of testing this proposition is to look at East Sussex’s success and expenditure in defending appeals to the Special Educational Needs & Disability Tribunal (SENDIST).

SENDIST Appeals

11. According to Ministry of Justice statistics, **East Sussex County Council has the greatest prevalence of SENDIST appeals of any English county**³. This data only extends to the end of 2017, but information supplied by ESCC in August 2018⁴ to a Freedom of Information request indicates that **ESCC continues to experience a sharp rise in appeals – a rise of up to 40% year-on-year. This increase is sharper than the national average.**

² East Sussex ISEND Schools Bulletin, December 2018 - <https://eastsussexlearning.org.uk/iSEND-Newsletters/1300>

³ HMCTS Tribunals & Gender Recognition Statistics Quarterly, multiple datasets - <https://www.gov.uk/government/collections/tribunals-statistics#tribunal-statistics-quarterly>

⁴ East Sussex County Council FOI response 430733, 2 Aug 18 - <https://www.whatdotheyknow.com/request/495108/response/1209091/attach/2/Response%20some%20not%20held.pdf>

12. The information supplied by ESCC in their FOI response states **that East Sussex families lodged 141 appeals to SENDIST from June 2017 to June 2018**, of which 30 appeals were still in process.

- a) For all 111 appeals that had been resolved, just 16 had an outcome that did not alter East Sussex's original decision – **a success rate for the LA of 14%**.
- b) For the 44 SENDIST appeals that went all the way to a hearing, only 6 upheld the LA's original decision – **again, a success rate of just 14%. The FOI response states that ESCC spent £38,395.60 on external solicitors and barristers** in defending these appeals.
- c) **However, this is likely to be a fraction of the overall costs to the LA**, as it does not include managerial, administrative and specialist professional resource that ESCC will also have expended in defending these appeals. If ESCC defended these appeals as other LAs have, **their additional SENDIST resource costs are likely to have been in the region of £840,000⁵**.

13. In the written evidence that ESCC submitted to your Committee under SCN0685, the **Council made several assertions about the objectivity of the SENDIST Tribunal and its approach to evidence.**

- a) **At least one of these assertions is untrue** - SENDIST does take account of the role of Local Authorities as custodians of the public purse. Efficient use of public expenditure is factored into the substance of many SENDIST appeal decisions. **Evidence showing this will almost certainly be present in many of the 300+ SENDIST decision notices involving East Sussex County Council since 2014.**
- b) **Another assertion is potentially misleading without further context.** East Sussex may well have "examples of tribunals directing placements to settings which are deemed inadequate by Ofsted and to unregistered provision." However, **without detail on what placements and provision East Sussex proposed to offer instead, it is difficult to determine what alternatives SENDIST had when making its decisions, and it is entirely likely that ESCC's preferred placements were even less suitable than the placements that SENDIST ordered.** SENDIST makes decisions on the basis of the evidenced need of

⁵ This estimate is based on the type and quantity of appeals that ESCC defended in this 12-month period, with costs per case estimated using research carried out into LA Tribunal costs by research teams at the University of Warwick and London Economics. This research - drawing on detailed survey data provided by local authorities can be found here (pp 261-291) <https://www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-england-review>

the child, the evidenced provision required to meet those needs, and the LA's statutory obligations.

14. When considering ESCC's remarks about SENDIST, it should be noted that **local authorities are able to appeal to an Upper Tribunal if it believes a SENDIST decision is flawed**, and if there are legal grounds for doing so. According to HMCTS data, East Sussex have registered only three acceptable Upper Tribunal appeals since September 2014⁶ – **a rate likely to be lower than 1% of all SENDIST decisions involving East Sussex in that period.**

ESCC's Interpretation of the EHC Needs Assessment Threshold

15. In their written evidence submitted in SCN0685, **East Sussex County Council argue that the threshold for EHC needs assessment is too low.** They are entitled to their opinion. However, **in explaining their opinion, they have omitted some important and relevant detail.**
16. **Firstly, ESCC's statement that** "the legal test is whether Children and Young People (CYP) 'may have' SEN which require additional provision" **is factually inaccurate.** The legal threshold is found in s36(8) of the Children & Families Act, and says the following:
- "The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that— a) the child or young person has or may have special educational needs, and b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan."*
17. **This is a substantively higher threshold than ESCC claim to be the case. It is surprising that East Sussex appear unable to understand this fundamental point of SEND law** – particularly given that ESCC helped to pilot the SEND reforms, given that the Department for Education granted ESCC £2.1m to help it understand the SEND reforms, and given that ESCC will have had repeated reminders of where the threshold lies from defending hundreds of SENDIST appeals since 2014.
18. **ESCC have also told your Committee that** "In reality, the current threshold means local authorities have to agree to conduct a needs assessment every time a request is made."
19. In this version of reality, ESCC would presumably refuse almost no requests for EHC needs assessment. However, **the reality that schools and SEND families in East Sussex live in is very different to this.**

⁶ HMCTS Upper Tribunal (Administrative Appeals Chamber) decisions database, accessed 28th April 2019 - <https://www.gov.uk/administrative-appeals-tribunal-decisions>

- a) **Department for Education data shows that East Sussex refused over 40% of all initial EHC needs assessment requests in 2017** (the last year for which public data currently exists)⁷.
- b) **This refusal rate is nearly double the national median, and is highly likely to be driven by post-2017 shifts in local SEND policy, rather than by their interpretation of the legal threshold.** By way of comparison, ESCC refused 9% of EHC needs assessments in 2016.

20. **If ESCC genuinely believe that** “local authorities have to agree to conduct a needs assessment every time a request is made,” then **it is extremely difficult to explain why they refuse over 40% of these requests when East Sussex schools and families actually make them.** Either there is a massive disconnect between ESCC’s SEND strategy and operations, or ESCC have taken a deliberate decision to act in defiance of what they believe the law to be.

- a) An alternative competing hypothesis, of course, is that ESCC do not actually believe that the legal threshold is what they claim it to be in their evidence to your Committee.

Final Thoughts

21. In their SCN0685 submission to your Committee, East Sussex County Council seek to explain the difficulties they face in implementing the SEND reforms. Although they have clearly found this task difficult, they seem to have had no problem identifying obstacles. In their evidence, ESCC make it very clear what – or more specifically, who – the obstacles are.

22. **In the course of the 70 paragraphs and 3,700 words of SCN0685, East Sussex County Council find fault with every single one of its stakeholders.** Central government is at fault. Ofsted are at fault. Mainstream schools are at fault. Maintained schools are at fault. Academies are at fault. Special schools are at fault. Parents are at fault. The legal system is at fault. The Education & Skills Funding Agency is at fault. Health services are at fault. In a couple of paragraphs, the dimensional constraints of time are at fault. And most appallingly, in paragraph 67 of their evidence, they find young people with SEND at fault.

23. In ESCC’s eyes, it would seem that only one organisation is not at fault. Itself. And yet, a three-minute search of decisions made by the Local Government & Social Care Ombudsman says otherwise. Since the SEND reforms became law, **the LGO has upheld every single complaint made about East Sussex**

⁷ Department for Education “Statements of SEN and EHC plans: England, 2018”, January 2019 - <https://www.gov.uk/government/statistics/statements-of-sen-and-ehc-plans-england-2018>

County Council's SEND services that they had jurisdiction to investigate⁸.
Every single one.

24. This is an organisation that has learned nothing and forgotten nothing during its eight-year journey through the SEND reforms – at ruinous expense to the life chances of many of the people it is employed to serve.

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⁸ Search of LGO decisions database, conducted on 29th April 2019 using the following search string:
<https://www.lgo.org.uk/Decisions/SearchResults?q=%22East%20Sussex%22&t=both&fd=2014-09-01&td=2019-04-29&c=4%2BSpecial%20educational%20needs&dc=c%2Bnu%2Bu&sortOrder=descending>