

The Ombudsman's final decision

Summary: Ms C complained the Council failed to provide their child with access to a full-time education over two academic years. We upheld the complaint finding the Council did not show enough consistent attention to the case despite knowing of the child's absence. As a result, it caused unnecessary distress for Ms C, as she did not know if their child could have had a greater access to education. The Council has accepted these findings and agreed actions to remedy this injustice. However, we note these does not differ significantly from proposals the Council previously made to Ms C, following its own investigation of the complaint.

The complaint

1. Ms C complained the Council failed to provide their child, D, with access to a full-time education during years nine and ten of their education (the academic years 2022/23 and 2023/24).
2. Ms C said as a result D missed a significant portion of their education, feeling unsupported during this time. Ms C says she found it stressful trying to get support from the Council, which negatively impacted on her.

The Ombudsman's role and powers

3. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word fault to refer to these. We consider whether there was fault in the way an organisation made its decision. If there was no fault in how the organisation made its decision, we cannot question the outcome. (Local Government Act 1974, section 34(3), as amended)
4. The Ombudsman's view, based on caselaw, is that 'service failure' is an objective, factual question about what happened. A finding of service failure does not imply blame, intent or bad faith on the part of the council involved. There may be circumstances where we conclude service failure has occurred and caused an injustice to the complainant despite the best efforts of the council. This still amounts to fault. (see R (on the application of ER) v CLA (LGO) [2014] EWCA civ 1407)
5. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused significant injustice, or that could cause injustice to others in

the future we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)

6. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (Local Government Act 1974, sections 26B and 34D, as amended)
7. The law says we cannot normally investigate a complaint when someone has a right of appeal, reference or review to a tribunal about the same matter. However, we may decide to investigate if we consider it would be unreasonable to expect the person to use this right. (Local Government Act 1974, section 26(6)(a), as amended)
8. The First-tier Tribunal (Special Educational Needs and Disability) considers appeals against council decisions regarding special educational needs. We refer to it as the SEND Tribunal in this decision statement.
9. If we are satisfied with an organisation's actions or proposed actions, we can complete our investigation and issue a decision statement. (Local Government Act 1974, section 30(1B) and 34H(i), as amended)
10. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children's Services and Skills (Ofsted).

How I considered this complaint

11. During my investigation I considered:
 - Ms C's written complaint to the Ombudsman and any supporting information she provided;
 - correspondence exchanged between Ms C and the Council about the matters covered by the complaint, which pre-dated our investigation;
 - information provided by the Council in reply to enquiries I made;
 - relevant law and Government guidance referred to in the text below;
 - relevant guidance published by this office, referred to in the text below.
12. I also gave Ms C and the Council opportunity to comment on a draft version of this decision statement and / or provide further evidence they considered relevant to its content. I took account of any response they made before finalising the decision statement.

What I found

Relevant law and guidance around special educational needs

13. A child or young person with special educational needs may have an Education, Health and Care (EHC) Plan. This will set out the child's needs and arrangements made to meet them, in different sections. We cannot direct changes to the sections about a child's needs, education, or the name of the educational placement. Only a SEND Tribunal or the council can do this.
14. The Government publishes statutory guidance - 'Special educational needs and disability code of practice: 0 to 25 years' ('the Code'). This explains how councils should carry out need assessments and produce EHC Plans. The Code flows from the content of the Children and Families Act 2014 and the SEN Regulations 2014. Of relevance to this complaint, it says:

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- the process of assessing needs and developing EHC Plans “must be carried out in a timely manner”. Steps must be completed as soon as practicable;
 - if the council agrees to undertake an EHC needs assessment, it must decide whether to issue an EHC Plan within 16 weeks;
 - if the council goes on to issue an EHC Plan, it should take no more than 20 weeks to issue the final EHC Plan from the day it receives an assessment request (unless certain specific circumstances apply).
15. A parent has a right of appeal to the SEND Tribunal if unhappy with some parts of an EHC Plan. This includes how the Plan describes a child or young person’s special educational needs and the provision specified.

Relevant law around Section 19 of the Education Act and alternative provision

16. Councils must arrange suitable education at school or elsewhere for pupils out of school because of exclusion, illness or for other reasons, if they would not receive suitable education without such arrangements. (Education Act 1996, section 19). We refer to this as section 19 or alternative education provision.
17. This applies to all children of compulsory school age living in the local council area, whether or not they are enrolled at a school. (Statutory guidance ‘Alternative Provision’ January 2013)
18. The provision generally should be full-time unless it is not in the child’s best interests for reasons of the child’s physical or mental health. (Education Act 1996, section 3A and 3AA)
19. The courts have considered the circumstances where the section 19 duty applies. A council will have a duty to provide alternative education under section 19 if there is no suitable education available to the child which is “reasonably practicable” for the child to access. The “acid test” is whether educational provision the council has offered is “available and accessible to the child”. (R (on the application of DS) v Wolverhampton City Council 2017)

Relevant Council policy

20. The Council has a policy for what should happen if a child is not in school. It says that a parent, school or another council officer can refer a case to its Fair Access Protocol team. That team can provide advice and guidance, consider the child’s case through a weekly meeting and appoint an officer to manage the case.
21. Where children have missed more than 20 days of education the Council can refer their case to its Vulnerable Children Education Commissioning Panel. It says it uses the panel when “current interventions by officers are not resolving the situation” and the Council “may have [a] duty” to provide the child’s education. The Panel can offer further advice to services, schools and families as well as offer ‘challenge’ to actions taken so far. It can also agree funding of “interim provision” for a child. Team Managers have responsibility for referring cases to the Panel. The Council also has a procedure to escalate cases further, to a Child Missing Education Board. A manager can do this where they consider a child has “had no education for an unreasonable period of time”.
22. The Council also has a policy covering the “delivery or commissioning of learning for children and young people through education other than at school 2024-2028”. While that post-dates some of the events covered by this complaint, I have assumed its contents relevant to the investigation.

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23. The policy says the Council considers pupils should usually be enrolled at a school, and this should be a mainstream school wherever possible. It says that schools have access to support services offered by the Council where pupils do not attend. Schools can also commission (i.e. arrange and pay for) tailored education for individual children; for example, from alternative education providers. But, in “exceptional circumstances” the Council can directly commission education for children not in school.
24. The policy explains those circumstances include:
- where a child cannot access school for 15 days or more because of physical or mental illness;
 - where a school needs time to make alternative arrangements for a pupil;
 - where a child has an EHC Plan, but for “a specific period of time” a school cannot meet their needs, or they have no school place.
25. The policy also says for those pupils who have an EHC Plan, while schools can commission alternative provision, it expects this to be an “interim provision”. It says the school must involve its SEN service in discussions and the Council expects schools to “provide details of a plan to support the pupil”.
26. Among the specialist support services schools can request from the Council (see paragraph 23), is access to its Communication and Interaction Team. The Council says this provides support to pupils with communication and interaction needs, including autism. Its aim is to understand the reasons for a child’s absence from school and offer advice and support for their needs. It can help planning for reintegration for school.

Chronology of key events

Events during Year 9 of D’s education

27. D is a child with special educational needs who experiences high levels of anxiety. Before the events covered by this complaint D had experienced disruption to their education and became known to CAMHS (Children and Adolescent Mental Health Services) from 2020.
28. From September 2022 onward D could not attend their mainstream school because of their needs.
29. In December 2022 D became known to the Council’s Communication and Interaction team, who provided an officer to help support D and liaise with their school.
30. The Council has provided limited records of its involvement during the 2022/23 academic year. It has provided a minute of a meeting where it discussed D’s case in April 2023 and recorded they were “really struggling to attend” school.
31. In comments, the Council has said from March 2023 it identified D as a “pupil missing education”. It Fair Access Protocol Team monitored D’s case throughout the rest of the school year and its Communication and Interaction Team provided advice and support to Ms C, D and the school. During the summer term 2023, D’s school arranged for them to receive some teaching from a home tutor. However, D could not engage with the tutor.

Events during year 10 of D’s education

32. At the beginning of the school year (September 2023), D said they wanted to try to return to school. However, because of their needs D continued to struggle with attendance.

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33. In October 2023 the Council received a request to undertake an education, health and care needs assessment for D. It agreed to this in November 2023 and began consultation with professionals supporting D.
34. As part of that consultation the Council obtained advice from its Communication and Interaction Team and CAMHS. Both said that D's needs made it difficult for them to engage with education. The Communication and Interaction Team suggested D needed to build a relationship with a tutor or keyworker, at first for around two to three hours a week. CAMHS said interventions to support D should focus on their emotional health and "reduce the social and educational expectation associated with mainstream school".
35. In January 2024 the Council decided to issue D with an EHC Plan. It consulted Ms C on a draft version of the Plan and then issued a final version in February. This continued to name their mainstream school. But it also said that to return to the school D needed support from a trusted adult and required "a significant level of transition support".
36. In March 2024 Ms C made a complaint to the Council. While recognising D now had an EHC Plan, Ms C said they remained without access to a full-time education. And Ms C expressed her dissatisfaction that D had missed so much education since the beginning of year nine.
37. The Council replied to the complaint the following month. Its response implied the Council accepted a need to amend D's EHC Plan. This is because it said D should receive EOTAS provision (education other than at school) instead. So, for now D's school would arrange for them to receive alternative provision for three hours a week, which might increase once D's attendance settled. It did not comment on any service provided by the Council before it issued D with an EHC Plan.
38. Ms C replied to the Council later in April 2024, explaining why she considered the reply inadequate. Ms C set out her view the Council should provide education to D under Section 19 of the Education Act and had failed to do so since they were in year nine.
39. In its further reply the Council said it had a legal responsibility to ensure D received the education set out in their EHC Plan. It recognised Ms C's view that three hours a week was not enough. But it said the pace of D's integration with education took account of Ms C's views, D's school, CAMHS and the Council's Communication and Interaction service. At the same time the Council also acknowledged the school had planned to increase access to the alternative provision to two days a week. But it said it could not do this because of the alternative provider's lack of capacity.
40. The Council said in recognition of the limited access to education D had from December 2023, that it would offer a symbolic payment to Ms C of £1900. It calculated this at:
- £300 a month for D having no education provision between December 2023 and March 2024; and
 - £200 a month for the period April to May 2024, when D received some part-time provision.
41. While Ms C pursued her complaint she had regular contact with the SEN service, around D's alternative provision. I noted that when there was initial discussion about the alternative provision arranged by the school this envisaged D attending for up to two days a week beginning from February 2024. But, due to the limited

capacity of the provider, D could not start until the summer term. At first D engaged well with the provision and Ms C asked the Council about increasing the hours to two days as first discussed. But D's school suggested the provider and / or professionals supporting D believed a slower integration appropriate.

42. D attended for several weeks before a key worker at the alternative provider left. After that D could not engage as well with the service, and when Ms C contacted the provider about D's absence it did not respond. She asked about a different alternative provider which at first suggested it could support D during the summer term. However, it later told the Council it could not support D before the start of the 2024/25 academic year.
43. As well as making a complaint, Ms C also made an appeal against the content of D's EHC Plan. This covered how the Plan described D's SEN, the provision identified to meet their needs and that it named the mainstream school. The Council later conceded this last point, when it agreed to name EOTAS provision instead.

My findings

The Ombudsman's jurisdiction

44. The term jurisdiction refers to our legal powers to investigate a complaint. As I explained above, the law sometimes restricts our ability to investigate late complaints (see paragraph 6). This was relevant, because some of the events Ms C complained about took place more than 12 months before her complaint to this office, received in June 2024.
45. However, I decided the passage of time should not limit our investigation. At the beginning of the events covered by this complaint, Ms C wanted a service from D's school, the Council or both working in unison. Ms C only made a complaint at the point she felt she had given both parties enough time to provide effective support and they had not done so. This was March 2024, when despite D receiving an EHC Plan, she remained out of education.
46. I did not consider I could realistically fix a date at which Ms C should have complained earlier. Consequently, it would not be fair to Ms C to decline to investigate from the time the Council first learnt of C's absences, which was no later than December 2022.
47. The second issue potentially impacting our investigation was Ms C's appeal against the content of D's EHC Plan, made in February 2024. We cannot investigate if a parent has made an appeal about the content of an EHC Plan to a SEND Tribunal, and they have (or have had) the ability to raise the matter complained about as part of that appeal.
48. I considered this restriction prevented me considering the detailed content of D's EHC Plan. However, it did not prevent me investigating matters outside the scope of any appeal. In this case, while the EHC Plan named a school setting for D, clearly there was no expectation in February 2024 they return to the school immediately. The records show the Council both knew this and agreed it was not possible for D to attend school then. Instead, it supported D attending an alternative provision before re-integrating later at school. At first, for just three hours a week.
49. So, I considered it was within the scope of our powers to investigate the provision D received up to July 2024. At that point the Council abandoned any proposal D re-integrate to their mainstream school. Instead, it named an "EOTAS" provision on their Plan. I considered after that change took place, any dispute about the

nature of the EOTAS provision would be outside our jurisdiction to investigate. Because the Plan should specify the EOTAS provision, making any dispute about it (such as the location or number of hours), suitable for appeal to the SEND Tribunal.

Was the Council at fault?

50. As part of my investigation, I considered the process followed by the Council when it undertook an education, health and care needs assessment of D. I found no fault in this, as the Council completed the steps prescribed by law and statutory guidance in the expected timescales. I recognised Ms C did not agree with all the content of the Plan, but she could (and did) exercise her right of appeal. So, it was not for me to comment on those points of disagreement.
51. My investigation therefore focused on the Council's Section 19 duty. As I noted above there was no dispute the Council knew of D's absence from school by December 2022. In its own words its Fair Access Protocol Team monitored events between then and July 2024. So, it held an active interest in D's case, except for a few weeks around September 2024 when D attempted a return to school which sadly failed.
52. I summarise that monitoring as comprising the following:
 - that it noted its Communication and Interaction Team made efforts to understand D's needs. That Team gave some advice and information to D, Ms C and the school. It also contributed to D's education, health and care needs assessment;
 - that it noted the school provided D with access to a tutoring service around the summer term 2023, with which they could not engage;
 - that it noted the school provided D with some alternative provision which they attended for several weeks, for a maximum of three hours a week, during the summer term 2024.
53. While I saw no reason to criticise any of these efforts, I did not consider they showed enough engagement with D's case. Because the case records did not show:
 - there was ever a recognisable integration plan or re-integration plan for D to return to education drawn up by those professionals working with them, including their school, CAMHS and relevant Council services;
 - any consideration of D's case at a Vulnerable Children Education Commissioning Panel. This was despite the evidence that interventions by officers did not resolve D's absence from school over many months;
 - any systematic consideration by the Council of its Section 19 duties. Despite knowing of D's long-term absence from school there was no record it ever asked itself if it should do more to help D gain access to education given its legal duties. I note specifically that it knew during the Spring Term 2024 that D could not access the alternative provision identified by their school because it had no capacity. Yet it did not look for any different provider or ask the school to do so.
54. The failure of the Council to show that it considered these matters, meant I found fault with its record keeping. But more than that, I also considered it showed a fundamental lack of attention and regard to D's needs and how it performed its legal duty.

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55. I also considered its complaint handling flawed. In her complaints Ms D made clear her view the Council had not supported D sufficiently since the start of Year nine of their education. However, the Council's replies did not address this point. That was a fault.

Did the fault cause Ms C and D an injustice?

56. The Council could and should have done more to review D's education provision between December 2022 and July 2024. However, I noted the evidence showing D struggled to engage with education on offer between those dates. They could not engage with home tutoring. While the alternative provision set up in Summer 2024 broke down. I also noted the evidence of professionals around the Spring Term 2024. Their view then, was that D could not engage in full-time education, nor anything close to that.
57. So, I did not consider the Council's fault resulted in a quantifiable loss of education provision for D. Instead, I found the Council's fault resulted in considerable distress for Ms C and D. This resulted from the uncertainty they had in not knowing what would have happened if the Council had taken a more active role in D's case.
58. In addition, I considered the Council's poor complaint handling caused Ms C some further avoidable frustration and distress.
59. But I noted that following its own investigation of Ms C's complaint, the Council had offered a symbolic payment to Ms C. It offered this because C had received limited or no education over a six-month period. Its calculation of the amount it offered was similar to that used in our published guidance on remedies for lost education provision ([Guidance on remedies - Local Government and Social Care Ombudsman](#)). I noted this was despite the Council not clearly explaining why it considered it was at fault.
60. It flows from my own findings on this matter that I considered this approach was wrong. But I did not consider the symbolic payment offered to Ms C inappropriate given the distress caused, which was prolonged and had more than one cause.

Agreed action

61. The Council has accepted these findings. To remedy Ms C's injustice it has agreed that within 20 working days of this decision it will:
- provide a written apology to Ms C accepting the findings of this investigation (the Council should consider the advice we provide on making an apology set out in section 3.2 of our guidance on remedies);
 - offer again a symbolic payment of £1900 to Ms C, if she did not accept this previously.
62. The Council will provide us with evidence when it has complied with the above actions.

Final decision

63. For reasons set out above I upheld this complaint finding fault by the Council caused injustice to Ms C and D. The Council accepted these findings and agreed action that I considered would remedy that injustice. Consequently, I completed my investigation satisfied with its response.

Investigator's decision on behalf of the Ombudsman