

The Ombudsman's final decision

Summary: The complainant (Mr X) said the Council failed to review his son's (Y) Education, Health and Care Plan (EHCP) following the family's move, failed to ensure delivery of all special educational provisions (SEP) included in the EHCP, failed to follow the right EHCP review process and delayed removing Y from the school roll. We found fault with the Council in parts of Mr X's complaint. Some of these faults caused Y and Mr X injustice. The Council agreed to apologise, issue Y's final EHCP within two weeks, refund educational and therapy costs to Mr X, make payment for Y's lost education and make service improvement within its EHCP review processes.

The complaint

1. Mr X says the Council failed to:
 - Review Y's EHCP following the family's move into the Council's area;
 - Ensure all SEP included in Y's EHCP are delivered;
 - Follow the right EHCP review process;
 - Remove Y from the school's roll in a timely manner after parental request.
2. Mr X says the Council's failings caused decline in Y's mental health, self-esteem and increased his anxiety. They had, according to Mr X, negative impact on Y's parents' health and well-being.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. 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 an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), 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 and we may recommend a remedy for the injustice caused. (*R (on the application of ER) v CLA (LGO) [2014] EWCA civ 1407*)

5. We cannot investigate complaints about what happens in schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b), as amended*)
6. 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(j), as amended*)

How I considered this complaint

7. I spoke with Mr X and considered the information he provided.
8. I made enquiries with the Council and considered the information it provided.
9. I reviewed 'Special Educational Needs Code of Practice: 0 to 25 years' (the Code).
10. Mr X and the organisation had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.
11. Under the information sharing agreement between the Local Government and Social Care Ombudsman and the Office for Standards in Education, Children's Services and Skills (Ofsted), we will share this decision with Ofsted.

What I found

Legal and administrative framework

Transfer of EHC plans between councils

12. Where a child or young person moves to another council, the 'old' council must transfer the EHC plan to the 'new' council. The new council must tell the child's parent or the young person, within six weeks of the date of transfer, when it proposes to make an EHC needs assessment. (*Special Educational Needs and Disability Regulations 2014*)

Delivery of special educational provisions

13. The council has a duty to secure special educational provision specified in an EHC plan for the child or young person. (*Children and Families Act S.42*)
14. The Courts have said this duty to arrange provision is owed personally to the child and is non-delegable. This means if a council asks another organisation to make the provision and that organisation fails to do so, the council remains responsible. (*R v London Borough of Harrow ex parte M [1997] ELR 62*), *R v North Tyneside Borough Council [2010] EWCA Civ 135*)
15. The Ombudsman does recognise it is not practical for councils to keep a 'watching brief' on whether schools are providing all the special educational provision for every pupil with an EHC plan. The Ombudsman does consider that councils should be able to demonstrate due diligence in discharging this important legal duty and as a minimum have systems in place to:
 - check the special educational provision is in place when a new or substantially different EHC plan is issued or there is a change in placement;
 - check the provision at least annually via the review process; and
 - investigate complaints or concerns that provision is not in place at any time.

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16. Councils may arrange for any special educational provision that they decided are necessary for a child to be made otherwise than in a school only if they are satisfied it would be inappropriate for the provision to be made in a school. (*Children and Families Act 2014, Schedule 61 paragraphs 1 and 2*)

Education Otherwise than in School

17. Councils must arrange suitable education at school or elsewhere for pupils who are out of school because of exclusion, illness or for other reasons, if they would not receive suitable education without such arrangements. [The provision generally should be full-time unless it is not in the child's interests.] (*Education Act 1996, section 19*). We refer to this as section 19 or alternative education provision.
18. This applies to all children of compulsory school age living in the local council area, whether or not they are on the roll of a school. (*Statutory guidance 'Alternative Provision' January 2013*)
19. The courts have considered the circumstances where the section 19 duty applies. Caselaw has established that 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*)
20. Councils have a power, but not a duty, to provide support for example funding or therapy at home for children with SEN who are EHE. The SEN Code of Practice states that councils should fund the SEN needs of home-educated children where it is appropriate to do so.

EHCP Reviews

21. The Council's duties on EHCP Annual Reviews are specified in Special Educational Needs and Disability Regulations 2014:
- Councils must review an EHCP at least every 12 months;
 - At least two weeks in advance of the review meetings the advice from the child's parents, school, council's officer, health care professional and social services should be obtained and circulated;
 - Within two weeks of the review meeting the school must provide a report to the council with any recommended amendments;
 - Within four weeks of the meeting, the council must decide whether it will keep the EHCP as it is, amend, or cease to maintain the plan. It must notify the child's parent and the school. If it needs to amend the plan, the council should start the process of amendment without delay;
 - The council must send the proposed amendments with a draft EHCP to the child's parent and give them at least 15 days to give views on them;
 - When the parent suggests changes that the council agrees, it should amend the draft plan and issue the final EHCP as quickly as possible;
 - Where the council does not agree the suggested changes it may still issue the final EHCP;
 - In any event the council should issue a final EHCP to the parent and any school named within 8 weeks of issuing the draft plan. It must also notify the child's parent of their right to appeal to the Tribunal and the time limit for doing so. (*SEND Regulations 2014 regulations 18-22*)

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22. Council may propose to amend an EHCP at any time. It should proceed as if the proposed amendment were an amendment following a review. (*SEND Regulations 2014 regulations 28*)

What happened

Background

23. Y is ten and has a diagnosis of Autistic Spectrum Disorder (ASD) with a sub-category of the Asperger's Syndrome.
24. Before moving to the area of the current council (Council A) in the autumn of 2021, Y's family lived within a different council (Council B).
25. In May 2021, following parental appeal to the First-Tier Tribunal (SENDIST), Council B issued Y's final EHCP, naming the independent non-maintained special school for him in Section I (the School).

September 2021 till the end of May 2022

26. Y started attending the School in September 2021.
27. Council A held two placement review meetings with the School – in November 2021 and March 2022. At both meetings the School told Council A the placement was going well, Y was engaging with learning and there were no issues. Y's rate of attendance at the autumn meeting was reported as almost 95% and at the spring meeting as 100%.
28. At the end of March Y's parents contacted Council A with concerns about suitability of the School. Shortly after this communication they asked whether it would be possible to educate Y otherwise than in school (EOTAS).
29. Y's Case Officer responded at the end of April, suggesting that all parental concerns would be reviewed at the coming up Annual Review meeting, which took place in the beginning of May. At this meeting the attendees discussed:
- Lack of direct Occupational Therapy (OT) for Y;
 - Y's progress and good attendance;
 - Parental concerns:
 - a) Y's dysregulation when leaving the School and the issue of him masking anxiety when at school;
 - b) Lack of direct OT;
 - c) Y's feelings of not being safe when at school;
 - d) Deterioration in the day-to-day communication between the School and the parents;
 - e) Suitability of Y's current peer group and a potential future peer group;
 - f) The School's failing to deliver all SEP included in his EHCP.
30. In the meeting notes Council A recorded its position that no amendments were necessary to Y's EHCP apart from the change to Y's home address and his General Practitioner's (GP) details. It also pointed out Y's EHCP would be transferred to the Council A's format.
31. In the week before May half-term Mr X asked Council A to take Y off the School's roll as it was not suitable. Mr X told Council A Y's peer group behaviour was a continuing source of stress and anxiety for him and the School failed to deliver most of the SEP identified in Y's EHCP. In light of the Clinical Psychologist's

report Mr X did not consider it would be possible to move Y to another school placement immediately, therefore the parents were keen to explore EOTAS with the associated personal budget (PB).

32. Council A replied to Mr X that providing Y with alternative provision as EOTAS would not be an option as alternative provisions should not be used as a permanent placement. Council A indicated it would be looking for another school place for Y and asked Mr X to provide a list of schools which might be parental preference.

June 2022 till August 2022

33. In the beginning of June, after Y stopped attending the school, Mr X wrote to Council A explaining once again why, in his view, the placement in the School broke down. He was not aware of any schools locally which would be suitable for Y. As Council A was discarding an option of EOTAS, Mr X proposed to electively home educate Y asking for PB to cover therapeutic needs. Mr X clarified he was forced by Council A's position to choose this option rather than voluntarily opting for it. Mr X also attached estimates of the OT costs from two properly qualified therapy providers.
34. In June Council A communicated with the School about any education and/or therapy the School could deliver to Y when he was not attending. The School's view, supported by the parental view, was that taking account of Y's school anxiety it would not be in his best interest for the School to be involved in his education any more.
35. In the third week of June the Case Officer asked for the details of Mr X's PB request, to which he replied on the same day. Mr X explained PB would be covering the cost of OT services which were not available through the National Health Service (NHS).
36. In the beginning of July Council A carried out an emergency review for Y. Council A recognised that since the last Annual Review Y struggled to attend the School due to his anxiety. Y's parents told Council A they wanted to amend Section I of Y's EHCP by removing the School and Section F by adding the arrangements to deliver EOTAS. They did not want to amend any other sections of Y's EHCP.
37. During the emergency review meeting Y's parents expressed their views on the EOTAS package and said Y was attending once a week a provider (the Activity Centre), which delivered outdoor learning but no therapy.
38. At the review meeting in the beginning of July Council A issued a letter agreeing to amend Y's EHCP and saying it would aim to issue a final EHCP in the Council A's format within eight weeks.
39. A day after the emergency review meeting Mr X filed his complaint.
40. A day later Council A:
- agreed to take Y off the School's roll and provide EOTAS;
 - agreed to fund OT commissioned by Council A;
 - declined Mr X's request for PB.
41. At the same time Council A sent consultation letters to special schools and alternative providers. For alternative providers Council A set up a shortened timescale to ensure the arrangements are made for Y's start of alternative education from the beginning of the new school year.

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42. Council A received a confirmation of suitability from one alternative provider (Tutoring Agency) who said it would be able to deliver 12 hours of tutoring to Y from the beginning of September.
 43. Two weeks later Mr X escalated his complaint to stage two.
 44. In the mid-August Council A provided Mr X with the proposed amendments to Y's EHCP.
 45. A few days later Council A commissioned Tutoring Agency to deliver education to Y.

From September 2022

46. In the beginning of September Council A sent Mr X its final response to his complaint.
47. In the second week of September Tutoring Agency told Mr X it would be supporting Y when he was not at school. It would arrange a home visit to discuss the tuition plan. First visit at the Tutoring Agency took place in the third week of September.
48. Throughout September and October Mr X and Tutoring Agency exchanged communication about the place of tuition and Y's individual requirements including specialist equipment which would allow him to relax and regulate. Y's parents did not think it was suitable for him to have tuition at home so various alternatives of suitable settings were explored. Council A agreed also to fund the specialist equipment to be bought by Tutoring Agency.
49. At the end of October Council A held a meeting to discuss Mr X's request for PB. Although Council A allocated an OT provider for Y, this provider could not start delivering therapy until the fourth week of January 2023. In such circumstances, as an exception, Council A agreed to fund the OT sourced by the parents but only until the fourth week of January and refunding travel costs at the certain rate.
50. For the first half-term of the autumn term Y continued attending the Activity Centre for five hours once a week.
51. In the second week of November Tutoring Agency sent Mr X a weekly plan of tuition – four days a week for three hours a day. A few days later tutoring started. At the end of November Tutoring Agency advised Y attended seven out of nine sessions.
52. Over a week after starting tutoring Mr X told Tutoring Agency of the increase in Y's anxiety levels and worsening of his mood.
53. In the beginning of December Mr X contacted Council A saying Tutoring Agency is unsuitable for Y.
54. Tutoring Agency continued providing Y with tuition throughout December although Y's attendance was reduced.
55. Meanwhile Council A found a potential placement for Y and contacted Mr X to arrange for the family to visit the school.
56. In the second week of January 2023 Council A agreed to stop its funding for Tutoring Agency. Council A told the parents to identify a suitable tutor for Y as all Council A's options have already been explored.

Education, activities and therapies for Y since June 2022

57. Council A arranged and funded tutoring for Y from mid-November till the end of the autumn term, although after two first weeks Y's attendance decreased.

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58. Council A paid invoices for the OT arranged by Mr X till the end of December 2022. Mr X told me Council A had recently revised its position on the OT and confirmed it would continue funding privately arranged OT until March 2023 when it will commission a new, more local provider.
59. To ensure Y received some education and therapeutic provision, Mr X arranged and funded some activities and therapies for him, which included sessions in the Activity Centre, counselling sessions, climbing and drumming lessons. He also bought workbooks, stationery, fidget and regulation equipment and a subscription to an educational website.

Analysis

Taking off the School's roll

60. I do not consider Council A failed by not taking Y off the School's roll until the beginning of July 2022.
61. Before taking a child off a school's roll councils need to be satisfied this school is not suitable and once this is established the normal process would involve identifying and naming a different placement. Similarly, when agreeing to deliver SEP outside school, councils need to be satisfied it would be inappropriate for the provision to be made in any school. This is a high threshold for a decision which, depending on the individual circumstances, might take some time to reach.
62. The first time Mr X queried suitability of the School for Y was in his correspondence with Council A at the end of March 2022. This matter was explored further during the Annual Review meeting in May. The School did not have any concerns about Y's progress and engagement with education. This position was supported by his regular attendance. Although the lack of a direct OT for Y was raised, the review attendees discussed how this could be remedied. Later in the month the School told the parents the current OT was retiring at the end of the school year. It would not be in Y's best interest to start therapy before summer holidays, as in September he would have to get used to a new therapist.
63. In their correspondence in the fourth week of May parents told Council A of the increase of Y's anxiety and stress which prompted them to withdraw him from the School. It is justifiable that with the history of no concerns reported from the School, Council A would be reluctant to immediately take Y off the roll. Instead, it first considered a possibility of the School providing education and SEP to Y when he was staying at home. Council A eventually accepted it would not be in Y's best interest to have any further contact with the School and shortly afterwards undertook school consultations, trying to identify an alternative placement.
64. It took Council A just under five weeks to decide on taking Y off the School's roll from the day Y stopped attending, excluding a half-term. This cannot be seen as excessive in light of the earlier placement reviews, the recent Annual Review as well as the gravity of such decision.
65. Council A's decision on Y remaining on roll in the School had the following results:
- Suitability of the School could be explored;
 - The School could be held responsible for arranging to provide education for Y;
66. Y remaining on the School's roll did not, however, affect any of Council A's duties about provision of education, as explained under paragraph 18 of this decision.

Transfer of EHC plans between councils

67. As explained under paragraph 12 of this decision, Council A should have advised Mr X within six weeks from the EHCP transfer when it intended to make an EHC needs assessment for Y. Failing to do so by Council A is fault.
68. I do not, however, consider this fault caused any injustice to Y or his parents for the following reasons:
- Y's EHCP was finalised in May 2021, following an appeal to SENDIST;
 - During the telephone conversation Mr X told me the content of Y's EHCP accurately reflected his needs. Provisions identified as needed by Y were based on the recent professional reports;
 - At the reviews in May 2022 and July 2022 Y's parents did not propose any amendments to Y's needs; the only request for amendments in July 2022 was to remove the School from Section I and include an EOTAS package in Section F;
 - Council A carried out two placement reviews during which the School raised no concerns about Y's EHCP.
69. For the reasons above even if Council A had carried out an assessment of Y's needs following the transfer from Council B, the content of his EHCP was likely to have remained the same as in the one issued in May 2021. Council A's failing, therefore, did not have a negative impact on Y and/or his parents.

Education and delivery of special educational provisions

70. The evidence available for this complaint and in particular the records of two placement reviews carried out in November 2021 and March 2022 satisfy the requirement of Council A to oversee the child's progress and delivery of SEP.
71. SENDIST ordered to name an independent, non-maintained school for Y, which he started attending in September 2021. For the Tribunal to do so the School must have presented evidence it had staff and resources suitable to meet Y's needs. If at the placement reviews the School failed to report any problems with SEP, on the contrary, reported Y's progress and that he was engaging with learning, Council A had no reasons to query it.
72. Thus until May 2022 I find Council A cannot be held responsible for the failings to deliver some of the SEP identified in Y's EHCP as it complied with the monitoring requirement detailed under paragraph 15 of this decision.
73. From the Annual Review in May 2022 Council A was aware of the School's failing to deliver all SEP to Y. Because of Y's difficulties with forming relationships it was agreed it would not be in his best interest to start the OT sessions in May with the professional who was about to retire at the end of the school year.
74. Despite its many efforts, which are detailed in this decision, Council A **failed to provide Y with suitable education and deliver all SEP included in Y's EHCP** in the following months:
- June to July 2022;
 - September to mid-November 2022;
 - From the beginning of January 2023 until now;
75. In May 2022 and from mid-November to the end of December 2022 Y received education but not all of his SEP.

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76. Recognising Council A's efforts to comply with its legal duties I consider its failings amount to **service failure** rather than maladministration for the following reasons:
- In May Council A tried to remedy the lack of direct OT sessions for Y, but with the school therapist retiring at the end of the school year all agreed starting this provision then was not in Y's best interest;
 - In June Council A communicated with the School about sending some learning materials home for Y. Y's parents and the School did not consider it was in Y's best interest because of his school anxiety;
 - In July Council A contacted over 90 alternative providers and consulted with over 20 special schools;
 - From the beginning of September 2022 Council A had a suitable alternative provider assigned for Y but because of the specific circumstances of the case such as Y's requirement to have tuition delivered away from home and the need for a specialist sporting equipment (both agreed by Council A), the start of the tuition got delayed.
77. Y's parents arranged the OT and counselling sessions to support his physical and sensory as well as social, emotional and mental health needs in line with his EHCP. Although Council A refused their request for PB, Mr X said it has now paid the OT invoices till the end of December 2022 and agreed to fund Y's OT arranged by the parents till March 2023 when the OT commissioned by Council A will be able to deliver therapy to Y.
78. Council A's faults caused **injustice** to:
- Y - loss of education, deterioration of his mental health, self-esteem and increase of anxiety;
 - Mr X - impact on his health and well-being, negative financial consequences.

Reviews

79. There are certain EHCP review functions which councils can delegate to schools. As explained in the Code when a child attends school reviews are generally most effective when led by the educational institution. The local authority in which area the child lives remains, however, responsible for the whole process.
80. In relation to the independent schools councils have much less power when exercising their educational functions including those under the special educational needs legislation.
81. Any school failings within Y's reviews would be outside our jurisdiction.
82. However, even when EHCP review meetings are held by the school, the council must:
- Within four weeks of the review meeting decide whether it proposes to keep the EHCP as it is, amend it or cease to maintain it and notify the child's parents and the school;
 - If the plan needs to be amended to start a process without delay and issue a final EHCP within eight weeks from the date of sending proposed amendments.
83. After the Annual Review in May 2022 Council A failed to send out a letter with its plan to keep Y's EHCP without any amendments, apart from Y's address and the details of his GP. It also failed to fulfil its undertaking to send Y's EHCP with these

minor amendments. Although this is fault, I do not consider it caused any injustice to Y and/or his parents as Council A carried out another review shortly afterwards.

84. After the EHCP review carried out in July 2022, Council A should have issued a final EHCP within eight weeks from mid-August when it sent the proposed amendments to the parents. Mr X told me he has not yet received Y's final EHCP.
85. **Council A's failing to issue a final EHCP for Y by mid-October 2022 is fault.** This fault caused **injustice** to Y and his parents, as it deprived them of the opportunity to challenge Council A's position on the content of Section F. Mr X wanted the EOTAS package to be included in Section F of Y's EHCP which Council A did not include in its proposed amendments.

Agreed action

86. To remedy the injustice caused by the faults identified, we recommend the Council within two weeks of the final decision will issue Y's final Education, Health and Care Plan following the review in July 2022 and send it to Mr X with the advice on his appeal rights. The Council will provide us with the evidence it has happened.
87. We also recommend the Council complete within four weeks of the final decision the following:
- apologise to Mr X for the injustice caused to him and Y by the faults identified;
 - pay Mr X £300 a month to recognise Y's loss of education and special educational provisions from June 2022 till the middle of January 2023, excluding holidays and the autumn half-term as well as a part of the second half-term when Y received tutoring. The total the Council should pay is £1,350 for the period of four and a half months;
 - pay Mr X £1,747 to refund the Activity Centre and counselling sessions as well as stationery and equipment necessary to provide Y with education at home or by the tutors;
 - pay Mr X £300 to recognise the distress caused to him by the Council's failing to secure education and SEP for Y and to issue a final EHCP following the EHCP review in July 2022;

The Council should provide us with evidence it has complied with the above actions.

88. We recommend the Council within three months of the final decision review its EHCP review process and provide relevant training to the front-line staff and their managers to ensure:
- Sending post-review letters within four weeks from the review meeting, notifying of the Council's position and advising parents/young people of their appeal rights when required, are part of the review process;
 - Final EHC plans are always issued within eight weeks from the date of the Council sending proposed EHCP amendments to the parents/young people;

The Council will provide us with the evidence the above action has been completed.

Final decision

89. I uphold part of this complaint. I found fault with the provision of education and delivery of special educational provisions for Y as well as within the Council's EHCP review processes. The Council's fault caused injustice to Y and Mr X. The Council has accepted my recommendations, so this investigation is at an end.

Investigator's final decision on behalf of the Ombudsman