

The Ombudsman's final decision

Summary: Miss X complained the Council did not provide a suitable alternative education for her daughter, Y, when she was out of school. Although the Council was not aware initially that Y was out of school, it was at fault for not checking the support in Y's Education Health and Support plan was in place, enabling her to return to school, and delays in identifying a new school when it became clear this was needed. As a result, Y missed out on education from March 2020 to July 2021. It should review its processes and make a payment to remedy the injustice caused.

The complaint

1. Miss X complained the Council did not provide a suitable education for her daughter, Y, between February 2019 and July 2021, when she was out of school.
2. As a result, Miss X says Y is now academically behind her peers, has missed opportunities to interact with peers socially, and her mental health has suffered. She is now attending a special school but is struggling due to severe anxiety about education.
3. Miss X also says she had to remain at home with Y, which meant she could not work, and was reliant on benefits. In addition, she had the expense of purchasing online learning resources and educational materials, which affected the family financially.

What I have investigated

4. I have investigated the Council's role from February 2019 when Y stopped attending school. I have not investigated Miss X's concerns about the actions of Y's school, for reasons set out at the end of this decision statement.

The Ombudsman's role and powers

5. 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*)
6. Miss X complained to us in October 2021. We would not usually investigate events more than 12 months before a person complains to us, but I have exercised discretion to investigate the period from February 2019 when Y stopped

attending school. This is because there was potentially a significant injustice to her caused by being out of education until July 2021 and I am satisfied the Council was aware she was out of school by April 2019.

7. We cannot investigate complaints about what happens in schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b), as amended*)
8. The law says we cannot normally investigate a complaint when someone can appeal to a tribunal. However, we may decide to investigate if we consider it would be unreasonable to expect the person to appeal. (*Local Government Act 1974, section 26(6)(a), as amended*)
9. 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.
10. 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*)
11. We cannot question whether a council’s decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
12. If we are satisfied with a council’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*)

How I considered this complaint

13. I considered:
 - the information provided by Miss X and the Council;
 - relevant law and guidance, as set out below; and
 - our guidance on remedies, available on our website.
14. Miss X and the Council had an opportunity to comment on my draft decision and I considered their comments before making a final decision.

What I found

Relevant law and guidance

Education Health & Care Plans

15. A child with special educational needs (SEN) may have an Education, Health and Care (EHC) plan. This sets out the child’s needs and what arrangements should be made to meet them.
16. The Statutory Guidance: Special Educational needs and disability code of practice: 0 to 25 (the Code) provides guidance to councils and other professionals about EHC plans and processes, including:
 - (para 9.71) health care provision specified in section G of the EHC plan must be agreed by the CCG and any health provisions should be agreed in time to be included in the draft EHC plan;

- (para 9.77) the council must send a draft EHC plan to the child's parent and give them at least 15 days to make representations on the content. During that period it must make its officers available to discuss the content on request;
 - (para 9.96 & 9.98) a parent has a right to request a personal budget when the council has completed an EHC needs assessment and confirmed it will issue an EHC plan, and during the statutory review of an existing EHC plan. Personal budgets enable a parent to arrange the support in a child's EHC plan themselves. The council must provide advice and information about personal budgets and prepare a personal budget when requested;
 - (para 9.126) the council must notify the parent of their right to appeal to the SEND Tribunal and the time limit for doing so;
 - (para 9.130) formal reviews of the EHC plan must take place at least annually. If the child's SEN change, the council should hold a review as soon as possible to ensure that provision specified in the plan is appropriate. The council can ask the child's school to arrange the review on its behalf (para 1.73); and
 - (para 9.169) the first review must be held within 12 months of the date the EHC plan was issued, and the council's decision following the review meeting – whether to amend, maintain or cease the plan - must be notified to the parent within four weeks of the review meeting.
17. We cannot investigate complaints about the support set out in the EHC plan nor the educational placement named in it. Parents can appeal to the SEND Tribunal if they are unhappy with those aspects.
 18. The Council is responsible for making sure that the support specified in the EHC plan is put in place. We can investigate complaints where support has not been providing or there has been a delay in arranging it.
 19. The Ombudsman considers 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 of 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.

Suitable education

20. 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. (*Education Act 1996, section 19*). We refer to this as section 19 or alternative education provision.
21. 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*)
22. Suitable education means efficient education suitable to a child's age, ability and aptitude and to any special educational needs he may have. (*Education Act 1996, section 19(6)*)
23. The education provided by the council must be full-time unless the council determines that full-time education would not be in the child's best interests for reasons of the child's physical or mental health. (*Education Act 1996, section 3A and 3AA*)

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24. The law does not define full-time education but children with health needs should have provision which is equivalent to the education they would receive in school. If they receive one-to-one tuition, for example, the hours of face-to-face provision could be fewer as the provision is more concentrated. (*Statutory guidance, 'Ensuring a good education for children who cannot attend school because of health needs'*)

What happened

25. Y has a number of physical disabilities and special educational needs. She moved to secondary school, school 1, in September 2018, although only on a part-time basis, due to extreme fatigue arising from her disabilities. The transition to school 1 did not go well and by February 2019 Y had stopped attending. School 1 recorded her absence as "*anxiety related non attendance*" (ARNA).
26. Initially, Miss X contacted school 1 and it agreed a range of actions to help Y return to school. Miss X says those actions were either not taken or were not successful. Miss X complained to school 1 in May 2019, following which school 1 said it would support her request for an Education Health and Care (EHC) plan for Y, which she had made in April 2019.
27. The Council said it was not aware of Y until Miss X requested an EHC plan. It then carried out an assessment of Y's special educational needs (SEN).
28. Miss X says she was initially given three days to comment on the draft EHC plan instead of the 15 days required by the Code. The Council accepted this but said the full time was given when Miss X raised concerns. In addition, a meeting was held at the school in September 2019 to discuss the draft plan.
29. It is unclear whether the paediatrician was invited to that meeting. They did not attend it and they said they could not comment on the draft plan in the required timescales. The Council said the paediatrician sent regular "clinic" letters providing updates on Y's health needs but acknowledged that when it did not receive a response from the paediatrician it should have followed up on this. Miss X says Y's needs and the support she needed were not accurately reflected in the EHC plan as a result.
30. The Council issued a final EHC plan on 24 September 2019, which was almost 22 weeks after the request. The EHC plan set out the support Y needed and named school 1 as a suitable school for Y. Miss X had the right to appeal to the SEND Tribunal if she was unhappy with the content but did not do so.
31. In April 2019, school 1 told Miss X it would ask for support from the Council's Health Related Education Team (HRET). It is unclear when the referral was made but the school told Miss X it was meeting with HRET in May 2019. Miss X said there was a delay in HRET providing tuition due to a lack of resources, but home tuition was put in place for seven weeks after the EHC plan was issued. The Council was aware of the plan for home tuition as part of a "*staged reintegration to school*", and this was set out in the EHC plan.
32. In December 2019 school 1 arranged a meeting to discuss the support Y needed. Miss X says she asked for a mix of home tuition and sessions in school so Y could get used to the school environment but that school 1 told her Y could not have home tuition and remain in its roll. Although a Council officer from the Integrated Children with Disabilities Service (ICDS) attended that meeting, the Council has no record of it and cannot say whether home tutoring or further assessments for Y were discussed. Its officer recalled it was a positive meeting, which reported that Y had engaged with HRET and the plan was for her to start

attending sessions at school. In its complaint response it apologised if its officer had not explained all the available options.

33. Miss X understood the December 2019 meeting was an early annual review. However, the Council said it did not receive annual review documents from school 1 following the meeting and therefore did not consider it was a formal annual review meeting.
34. In January and February 2020, a teaching assistant (TA) from school 1 provided seven sessions of up to one hour each at Y's home to build a relationship with her to support her return to school. Alongside this, Y had some visits to the school.
35. Miss X says there was a meeting with school 1 in February 2020 in which it said it could not meet Y's needs. Miss X says School 1 said it would arrange an urgent annual review and suggest a change of placement. It advised Miss X to start looking at special schools, which she did. The Council says where schools are not able to deliver the support in an EHC plan they should complete a Placement Discussion form, which informs a discussion with the Council about whether an early review is needed. There is no record that school 1 told the Council it could not meet Y's needs at this stage or completed a form.
36. In mid March school 1 closed due to the first national lockdown in response to the COVID-19 pandemic and the TA visits stopped. Miss X contacted school 2, an independent special school, but she could not visit due to COVID-19 restrictions. School 1 carried out a risk assessment and also carried out welfare checks during the summer term. It did not tell the Council it had any concerns about Y.
37. In May 2020, the Council contacted Miss X as part of an exercise to contact all families whose children had EHC plans for "*structured conversations*" about provision for them during the pandemic. Miss X asked if the conversation could be by email. She said Y would need to remain at home to protect a sibling who was extremely clinically vulnerable to COVID-19. Miss X said she had set up an educational timetable for both children for the rest of the academic year. In the same email, Miss X asked the ICDS team for financial support to cover the cost of educational resources for Y "*whilst school was not an option*". The Council accepted it did not respond to this request, for which it apologised in October 2021. It held the structured conversation in June 2020, which it said did not indicate any concerns about Y at that time.
38. Whether or not it had agreed to an early annual review, the school should have arranged a routine review of Y's EHC plan in September 2020. It did not do so until November 2020. The Annual Review records a request for a change of school for Y.
39. Following the review meeting, Miss X asked the ICDS team to fund an assessment at school 2. It did not respond. An officer later told Miss X her email had gone into a "junk" email folder, although the email string indicates Miss X was replying to an email the officer sent her. The Council, in its complaint response in June 2021 apologised for the "*unacceptable time*" she had to wait for a response and said it would remind staff of the need to check all email folders daily.
40. School 1 sent the annual review paperwork to the Council in December 2020 and in January 2021 the Council started consulting with alternative schools, including school 2, which was Miss X's preferred school.
41. The Council issued a final amended EHC plan in February 2021. This plan named school 1 as the suitable school for Y. The Council told Miss X this was because it

could not remove school 1 and name school 2 until it had received a formal offer of a place.

42. School 2 carried out an assessment to decide if it could meet Y's needs in March 2021. It confirmed it could offer Y a place in May 2021 and she started there in early July 2021, initially on a part-time basis to help her reintegrate into a school environment.

Complaints process

43. Miss X complained in early May and the Council responded at stage 1 of its process in early June. It apologised for delays in responding to emails and a failure to progress the change of school placement in a timely manner. Miss X was unhappy with the response. On 6 June 2021 she raised further questions and asked the Council to consider the complaint at stage 1.
44. The Council responded at stage 2 in October 2021. It said:
- It could not investigate some of Miss X's concerns because school 1 was an academy;
 - School 1 had not told it Y was not attending school and she remained on its roll until an alternative placement was confirmed in May 2021;
 - It was not aware of Y until Miss X asked for an EHC plan. This was issued slightly outside statutory timescales, but this period included school summer holidays. It was aware school 1 provided support for seven weeks after the plan was issued;
 - It could not comment on the annual review being two months later as reviews are arranged by schools. Council officers were not required to attend unless either the school or parent had raised concerns that required the Council's input;
 - School 1 could not be removed from Y's EHC plan until after a new school had been found and a formal offer made. It could not explain why officers told Miss X on two occasions that she needed a further annual review in order to change the named school, since the review in November 2020 had confirmed a change of school was needed;
 - It said before April 2021, IDCS cases did not have an allocated case worker unless there was specific work that needed doing. Since then, all cases have an allocated caseworker;
 - It accepted some fault around communications. Records show one caseworker did not inform Miss X they had been allocated, and although they did confirm in January 2021 that they would be consulting alternative schools, they did not provide any updates about this. The Council acknowledged Miss X had sent several emails asking for information and updates that were not responded to, and that her request for financial assistance in June 2020 was not replied to. It apologised for the poor communication, offered Miss X £300 and said it would raise the issue with managers so they could learn from the complaint.

My findings

45. Miss X's account is that school 1 could not meet Y's needs from the outset but school 1 did not request an EHC assessment and plan nor explain to her that she could do so herself. As a result, the Council was not aware of Y until Miss X asked for an EHC plan in April 2019. I cannot investigate the actions or inactions of schools.

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46. Nor did school 1 tell the Council that Y was not attending school from February 2019. The Council has a system that requires schools to report absences of more than 15 days for health reasons, so the relevant team can consider what support is needed. Again, I cannot comment on the actions or lack of action by schools, but the Council has agreed to remind school 1 of its obligations to prevent a recurrence of this situation.
 47. After Miss X contacted it in April 2019, the Council carried out an EHC assessment and issued a final EHC plan in September 2019, which was in line with statutory timescales.
 48. The Council acknowledged it did not initially offer Miss X the full 15 days to comment on its draft plan, but this was rectified when she raised concerns and a meeting was arranged to discuss the draft. The Council also acknowledged it had not followed up when the paediatrician failed to respond to a request for comments on the draft plan. The Council did not fully adhere to the Code in these respects, which was fault, but I am satisfied this did not cause an injustice to Miss X or Y.
 49. The Council was aware that Y was being educated at home when it issued the EHC plan, which set out a programme for reintegration. An officer attended a meeting in December 2019 to discuss the support Y needed to return to school. The Council has no record of that meeting. It acknowledged the poor record keeping fell below accepted standards. The lack of a proper record of a key meeting was fault. As a result, there is uncertainty about what was discussed and whether the officer provided appropriate advice to Miss X about the available options for Y.
 50. There is no evidence school 1 told the Council in February 2020 that Y had not been able to return to school, nor that it could not meet her needs. However, the Council was aware in December 2019 that Y was not attending school and therefore I consider it should have followed up with school 1 to ensure the reintegration plan was working. It failed to do so. This meant it was not aware Y was still not attending school in February 2020 and that a review of her EHC plan may be needed.
 51. In March 2020 support for Y at home from school 1 staff stopped due to COVID-19 restrictions. The Council did not identify any concerns when it carried out a risk assessment in June 2020. However, it accepts it overlooked Miss X's request for financial support, which was fault. The Council could have considered using a personal budget to enable Miss X to arrange for the support in Y's EHC plan to be provided privately whilst school 1 was unable to do so.
 52. School 1 should have arranged an annual review in September 2020. It did not hold the review until November and did not send the review documents to the Council until late December 2020. The Council was entitled to delegate the arranging of the review to school 1. I have seen the comprehensive guidance the Council provides for schools about annual reviews and am satisfied the guidance was sufficient for school 1 to understand what it needed to do and when. However, I have not seen evidence of a system whereby the Council monitors this and follows up with schools when reviews are late. The Council's failure to monitor was fault. This added to the delay in identifying a suitable alternative placement for Y.
 53. At the annual review school 1 said it could not meet Y's needs and recommended a special school. Miss X asked the Council to consult school 2 in November 2020 and it acknowledged this request but took no action to do so until January 2021.

School 2 said it needed to carry out assessments but these were not arranged until March 2021, which appears to be due to delays in agreeing the funding for the assessments. The Council accepted there was a delay in the consultation process, which was fault. In its response to my enquiries, it said it was carrying out a review of its process and would be implementing changes to prevent recurrence of this fault.

54. The Council issued a final amended EHC plan in February 2021. It named school 1, despite having accepted school 1 could not meet Y's needs. The Council accepted this was wrong because it was actively seeking a specialist placement at that point and should therefore have named a type of placement. Its failure to do so caused Miss X additional time and trouble in pursuing this.
55. The Council, in its complaint response, accepted there were failings in its communications, including failures to respond to emails from Miss X and delays in doing so. This was fault, which caused frustration for Miss X and added to her time and trouble pursuing the Council. The failings occurred in part because the Council did not have a consistent point of contact for parents of children with SEN. It has since reviewed its processes and is implementing a new system.
56. There was no fault in the way the Council responded to Miss X's complaint at stage 1. But there was a long delay between June and October 2021 in responding at stage 2, which was fault. This meant Miss X had to keep chasing for a response so she could complain to us.

Agreed action

57. The Council will, within one month of the date of the final decision:
 - apologise to Miss X for the failures identified, including the failure to keep a proper record of the meeting in December 2019, the failure to follow up on the reintegration plan in Y's EHC plan, its failure to consider the request for financial support, the failure to monitor and follow up on the late annual review in 2020, the delays in its consultation process with schools, its error in naming school 1 in the amended plan in February 2021, its poor communication and the delay in responding to the complaint at stage 2;
 - pay Miss X £300 for the frustration caused, and the time and trouble she was put to in pursuing the Council;
 - pay Miss X, for the benefit of Y, £3,600 to recognise the additional time Y was out of school and without a suitable education as a result of the Council's failings.
58. The Council will, within three months of the date of the final decision, complete its review of its process for EHC assessment and plans, including ensuring a consistent point of contact for families of children with SEN and reducing delays in consulting with schools. It should report to us on its review and the changes it has made.
59. The Council will, within three months of the date of the final decision, review its processes to ensure it:
 - monitors annual reviews and follows up with schools where it has not received annual review records on time;
 - checks the provision in new and amended EHC plans is being delivered and, in particular, checks that plans for reintegrating children into school have been successful and provides further advice and support if needed;

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- responds to complaints in line with the timescales in its policy.

Final decision

60. I have completed my investigation. I have found fault leading to personal injustice. I have recommended actions to remedy that injustice and prevent recurrence of the fault.

Parts of the complaint that I did not investigate

61. Some of Miss X's concerns were about how Y's school handled matters, particularly during Y's transition to secondary school in Autumn 2018, its failure to advise her about requesting an EHC plan for Y and its failure to tell the Council that Y was not attending school. We cannot investigate concerns about what happens in schools.

Investigator's decision on behalf of the Ombudsman