

## **The Ombudsman's final decision**

Summary: The complainant (Mrs X) said the Council had failed to arrange alternative provision for her son (Y) when he could not attend his school. We found fault with the Council which meant Y lost some education. The Council's fault also caused injustice to Mrs X. We did not investigate anything that happened from the second week of March 2024 as Mrs X appealed the Education Health and Care Plan issued for Y at this time and alternative provision was closely linked to the appeal issues. The Council agreed to apologise, make payments to recognise Y's and Mrs X's injustice and carry out some service improvements.

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## **The complaint**

1. Mrs X says the Council failed to arrange suitable education for Y when he was unable to attend his school. She says Y lost much education. She had to spend much time trying to support him and communicating with the Council. Mrs X funded privately some educational provision she identified as suitable for her son.

## **The Ombudsman's role and powers**

2. 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 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)
3. The courts have established that if someone has appealed to the Tribunal, the law says we cannot investigate any matter which was part of, was connected to, or could have been part of, the appeal to the tribunal. (R (on application of Milburn) v Local Government and Social Care Ombudsman [2023] EWCA Civ 207)
4. This means that if a child or young person is not attending school, and we decide the reason for non-attendance is linked to, or is a consequence of, a parent or young person's disagreement about the special educational provision or the educational placement in the EHC Plan, we cannot investigate a lack of special educational provision, or alternative educational provision.

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5. The period we cannot investigate starts from the date the appealable decision is made and given to the parents or young person. If the parent or young person goes on to appeal then the period that we cannot investigate ends when the tribunal comes to its decision, or if the appeal is withdrawn or conceded.
  6. When considering complaints we make findings based on the balance of probabilities. This means that we look at the available relevant evidence and decide what was more likely to have happened.
  7. 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)
  8. 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 have and have not investigated**

9. I have not investigated anything that happened from the second week of March 2024, when Y's final Education Health and Care (EHC) Plan was issued. This is because in July 2024 Mrs X appealed Sections B, F and I of Y's EHC Plan. As explained in paragraphs three to five of this decision we cannot investigate lack of alternative provision from the date of issuing Y's final EHC Plan as the Council's duty to arrange alternative provision was dependant on its position on the content of Section I. The matter was, therefore, too closely linked to Mrs X's appeal to the Special Educational Needs and Disabilities (SEND) Tribunal for us to be able to investigate.

## **How I considered this complaint**

10. I spoke with Mrs X and considered the information she provided.
11. I made enquiries with the Council and considered the information it provided.
12. I referred to our Focus Report "[Out of school, out of sight? Ensuring children out of school get a good education](#)" issued in July 2022 and updated in August 2023.
13. Mrs X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

## **What I found**

### **Legal and administrative framework**

14. 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.
15. Once a council has identified a child needs alternative education, it must arrange this as quickly as possible. 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)
16. 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

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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)

17. 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**

18. Y attended primary mainstream academy (the School). In the second part of the summer term of 2023 Y’s difficulties at school increased and he stopped attending. The School offered a part-time timetable trying to gradually bring Y back to school.
19. In September 2023 the School continued with the part-time timetable, but after the first few days Y stopped engaging with the School’s offer. At the same time Mrs X applied for an EHC needs assessment for him.
20. Mrs X found alternative provision with the outdoor learning facilities for Y (Provider 1) and provision to support Y’s social, emotional and mental health needs (Provider 2) and placed Y on the waiting lists for both. She asked the School to fund this provision when it became available.
21. In mid-October 2023 the Council’s Health Related Education Team took part in the meeting with the School and Mrs X to discuss Y’s education. A few days later the School said they would fund Provider 1 for a month from the beginning of January 2024. Mrs X kept contacting the Council about alternative provision for Y.
22. Y attended Provider 1 for a few hourly sessions from mid-November 2023 and he engaged well. Mrs X received and accepted an offer of a place for Y at Provider 2 from December 2023.
23. In December 2023 Y’s sessions at Provider 1 increased to two hours. He also started accessing support from Provider 2.
24. Mrs X complained to the Council about the lack of alternative provision for Y in mid-December 2023. Mrs X chased the Council’s response six weeks later. The Council responded at the end of February 2024. Mrs X was not happy with the Council’s response and asked for the complaint to be considered at stage two.
25. The Council issued Y’s final EHC Plan at the beginning of March 2024. Mrs X appealed Sections B, F and I of Y’s EHC Plan four months later.
26. At the end of March 2024 the School told Mrs X they would fund Provider 1 and Provider 2 until the end of July 2024 as the Council provided some extra funds for this purpose.
27. In its stage two response to Mrs X’s complaint the Council said the School had applied for funding for alternative provision for Y but could not provide Mrs X with any details. The Council clarified some statements from its stage one complaint response. It failed to address Mrs X’s concerns about leaving Y without education for many months from September 2023.
28. From November 2023 until the end of the first week in March 2024 Y attended 13 sessions at Provider 1. The School funded five of them and Y’s parents the remaining eight. Mrs X paid £594 for the cost of provision and £245 for transport.

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## Analysis

29. In our Focus Report [“Out of school, out of sight? Ensuring children out of school get a good education”](#) we set up what we would expect from councils when a child of compulsory school age stop attending their school. We expect the council to:
- consider the individual circumstances of each case and be aware that the council may need to act whatever the reason for absence (except for the minor issues schools deal with on a day-to-day basis) – and even when a child is on a school roll;
  - consult all the professionals involved in a child’s education and welfare, and take account of the evidence when making decision;.
  - consider enforcing attendance where a child has a suitable school place available, and where there is no medical or other reason that prevents them attending;
  - keep all cases of part-time education under review with a view to increasing it if a child’s capacity to learn increases;
  - work with parents and schools to draw up plans to reintegrate children to mainstream education as soon as possible, reviewing and amending plans as necessary;
  - put the chosen action into practice without delay to ensure the child is back in education as soon as possible;
  - where councils arrange for schools or other bodies to carry out their functions on their behalf, the council remains responsible. Therefore, retain oversight and control to ensure your duties are properly fulfilled.
30. The Council found out about Y’s school non-attendance at the beginning of September 2023 at the latest as this is when Mrs X asked for an EHC needs assessment for Y. The Council knew the School had introduced part-time timetable for Y from the second part of the summer term of 2023 and Y was not engaging with it. Although the Council’s education team took part in the meeting held to discuss Y’s education in mid-October 2023, it failed to follow it up by taking decision on whether there should be any action to ensure Y received suitable education when out of school. This was despite Mrs X’s requests and reminders.
31. The Council’s failure to act by deciding whether it had a duty to make alternative arrangements for Y’s education when he could not attend the School is fault. Based on the circumstances, on the balance of probabilities, I consider that if not for the Council’s failure it would have decided to make alternative arrangements. This is for the following reasons:
- there is no evidence the Council’s queried Mrs X’s claim Y could not attend the School because of his special educational needs;
  - Y engaged with educational provision arranged by Mrs X so he was able to access some education;
  - in October 2023 the School agreed to fund Provider 1 for a month and from the end of March 2024 the Council agreed to fund Provider 1 and Provider 2 for Y. By doing so the Council accepted that although Y had a place at the School, he could not access it.

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32. The Council's failure to consider its duty to make arrangements for alternative provision for Y caused injustice to Y and Mrs X. It meant that Y missed education in October and the first part of November 2023 as this was before Mrs X got a place at Provider 1. Mrs X spent much time contacting the School and the Council and participated in meetings, trying to ensure delivery of education for Y. Mrs X also spent time contacting the providers from the list the Council gave her. The Council's failings also meant that Mrs X's finances were affected by her privately funding Provider 1 and securing transport.
33. As explained in paragraph 14 of this decision the child is entitled to full-time education, so education equivalent to that which the child would get at school, unless it is not in the child's best interest. Considering education Y received from Provider 1 and how gradually it was increasing it seems more probably than not that at the time Y could not engage with more education. I considered this when recommending remedies.
34. Until March 2024 Y did not have an EHC Plan, therefore the Council's duties did not extend to any special educational provision. Therefore in my recommendations I did not include reimbursing the cost of provision delivered by Provider 2 as this intervention was mainly to address Y's social, emotional and mental health difficulties.

### **Agreed action**

35. To remedy the injustice caused by the faults identified, we recommend the Council complete within four weeks of the final decision the following:
- apologise to Mrs X and Y for the injustice caused to them by the faults identified. We publish [guidance on remedies](#) which sets out our expectations for how organisations should apologise effectively to remedy injustice. The Council should consider this guidance in making the apology I have recommended;
  - pay Mrs X £450 to recognise the loss of Y's education in October and the beginning of November 2023 and £839 to refund the cost of educational provision arranged for Y by Mrs X between mid-November 2023 and March 2024, excluding the month when this provision was funded by the School;
  - pay Mrs X £500 to recognise the distress caused to her by the Council's failings. The Council will pay Mrs X £1,789 in total.
- The Council will provide the evidence that this has happened.
36. We also recommend the Council within three months of the final decision:
- review its processes in place for children on part-time timetable or not attending school to ensure there are mechanisms to make timely decisions on the Council's alternative provision duty following the test set up in paragraph 29 of this decision;
  - remind the front-line special educational needs (SEN) staff and their managers of the Council's duties for children who are not attending their school. The SEN staff will review our Focus Report ["Out of school, out of sight? Ensuring children out of school get a good education"](#).
- The Council will provide the evidence that this has happened.

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## **Final decision**

37. I uphold this complaint. For the reasons explained in the Analysis section I found fault with the Council for not considering whether it should have arranged alternative provision for Y from the end of September 2023 until the beginning of March 2024. I did not investigate anything that happened from the second week of March 2024 as Mrs X appealed Section I of Y's EHC Plan and the matters complained about were too closely linked to the appeal issues. The Council's fault caused injustice to Y and Mrs X. The Council has accepted my recommendations, so this investigation is at an end.

## **Investigator's final decision on behalf of the Ombudsman**