

The Ombudsman's final decision

Summary: Ms X complained the Council delayed in assessing her son's needs and issuing his Education, Health and Care plan and failed to secure all of the provision in her son's Education, Health and Care plan. Ms X also complained about the level of communication she received from the Education Other than at School service. We have found the Council at fault which caused injustice to Ms X and her child as her child missed out on some provision and Ms X had to wait longer to challenge her child's final Education, Health and Care plan. To remedy the injustice caused the Council agreed to apologise, make a payment to Ms X for the loss of provision to her child and the distress she experienced.

The complaint

1. Ms X complains the Council:
 - Delayed in assessing her son's needs and issuing his Education, Health and Care plan.
 - Failed to secure all of the provision in her son's Education, Health and Care plan due to the way it considered her request for a personal budget.
 - The level of communication she received from the Education Other than at School Service.

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 an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
3. 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*)

How I considered this complaint

4. As part of this investigation, I considered the information provided by Ms X and the Council. I made enquiries with the Council and considered the information received in response. I sent a draft of this decision to Ms X and the Council and considered comments received in response.
5. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children's Services and Skills (Ofsted).

What I found

Education, Health and Care (EHC) plans

6. A child with special educational needs 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. The EHC plan is set out in sections. We cannot direct changes to the sections about education, or name a different school. Only the tribunal can do this.

Timescales and process for EHC assessment and review

7. Statutory guidance 'Special educational needs and disability Code of Practice: 0 to 25 years' ('the Code') sets out the process for carrying out EHC assessments and producing EHC plans. The guidance is based on the Children and Families Act 2014 and the SEN Regulations 2014. It says the whole process from the point when an assessment is requested until the final EHC plan is issued must take no more than 20 weeks (unless certain specific circumstances apply).
8. An EHC plan must be reviewed and amended in sufficient time prior to a child or young person moving between key phases of education, to allow for planning for and, where necessary, commissioning of support and provision at the new institution. The review and any amendments must be completed by 15 February in the calendar year of the transfer at the latest for transfers into or between schools. The key transfers are:
 - early years provider to school
 - infant school to junior school
 - primary school to middle school
 - primary school to secondary school, and
 - middle school to secondary school
9. The council has a duty to secure the specified special educational provision in an EHC plan for the child or young person (Section 42 Children and Families Act). 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*)

Education Other than at School (EOTAS)

10. Councils have a duty to provide educational provision which meets the needs of children and young people who, for whatever reason, are unable to attend a mainstream or special school.

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11. For children and young people with an EHC plan, the EOTAS provision must be included in section F of an EHC plan which should detail the package of education being provided.

What happened

12. There has been extensive correspondence between Ms X and the Council since September 2021. In this section of the statement I summarise key events only and do not refer to every single contact and communication.
13. Ms X's son Y has special educational needs. In August 2020 he received an EHC plan. This specified Y needed, "*An individualised timetable based on activities led by his interests. Learning within outdoor provision including animals and physical activity with climbing but not within a classroom-based provision or educational setting.*"
14. In July 2021, the Council held an annual review of Y's EHC plan. Y was due to transition into secondary school in September 2021. Following the annual review the Council decided to amend Y's EHC plan.
15. In September 2021, Y moved onto a package of EOTAS. This included tutoring with Provider A on a one to one basis and a visit to a farm each week. Prior to this, when Y was at primary school, he received equine therapy and climbing which were commissioned by his primary school as part of his EHC plan provision.
16. In October 2021, the Council sent Ms X a draft EHC plan following the annual review. Ms X said she was unhappy with the content of the EHC plan and did not think it was fit for purpose. In November 2021, the Council held a meeting with Ms X to review the draft EHC plan. Ms X asked the Council for a personal budget for Y's equine therapy and climbing (totalling three hours per week) as he was not currently receiving this and previously had been. The Council also agreed it would need to re-assess Y's needs.
17. On 12 November 2021, the Council started to re-assess Y's needs. In December 2021, the Council held a meeting with Ms X. The Council told her there were ongoing delays with obtaining an Educational Psychologist report for Y. The Council agreed to keep Y's current timetable with Provider A in place while it held discussions with Provider A and another provider about the possibility of Maths and English tutoring for Y.
18. In January 2022, the Council told Ms X it could not agree to her request for a personal budget. The Council had concerns that the climbing and equine therapy was not going to be delivered by a Council approved provider. However in February 2022, the Council agreed to delegate the personal budget to Provider A so it could source the climbing and equine therapy activities for Y.
19. In February 2022, the Council received an Occupational Therapy report for Y as part of its re-assessment of his needs. This recommended a programme of Occupational Therapy where he would see an Occupational Therapist weekly. Following the report the Council put the Occupational Therapy in place for Y.
20. In March 2022, the Council held an education review meeting for Y. The Council looked at the possibility of providing home tuition for Y, however accepted this needed to be a gradual approach for Y to adjust to the tutor.
21. The Council received the Educational Psychologist's report it commissioned as part of Y's re-assessment on 4 April 2022. The Council sent Ms X Y's draft EHC plan on 8 April 2022.

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22. In June 2022, the Council held an education review meeting for Y. At this time Y was not engaging well with Provider A and tutoring and was only engaging well with his visits to a farm and his Occupational Therapy sessions. The Council arranged for the alternative providers to attend the farm with Y to try to build rapport with him.
23. Ms X provided the Council with comments on the draft EHC plan on 13 July 2022. Ms X disagreed with sections of the plan. The Council issued Y's final EHC plan on 26 July 2022. The special educational provision listed in the plan included an Occupational Therapy programme, education off site at home by a tutor. The plan highlighted the need to building trust with Y in the first instance.
24. Ms X was unhappy with the content of the plan so asked the Council to participate in mediation. Ms X also made a formal complaint to the Council on 15 August 2022. Ms X complained:
- The Council delayed in assessing Y following his annual review and delayed issuing a final EHC plan. Ms X was concerned Y missed out on provision he would have been entitled to sooner.
 - The Council failed to secure the provision in Y's EHC plan as it said Ms X could not use a provider not on its registered list. Ms X said this meant Y missed out on climbing sessions.
 - The Council had not properly secured Y's EOTAS. Ms X said it refused her request for a personal budget and there had been little contact with the EOTAS officer since Y transferred onto this in September 2021.
25. In September 2022, the Council responded to Ms X's complaint. The Council said:
- It delayed in completing Y's EHC plan following his re-assessment and explained this was due to difficulties getting an Educational Psychologist's report. The Council said Ms X was also partly to blame for the delays from issuing a draft EHC plan to a final EHC plan as it took two months for her to send comments back to the Council.
 - The Council explained it had increased the proportion of time Educational Psychologist's have allocated for EHC plan assessments. The Council said it had increased Educational Psychologist capacity by investing in an agency to commission this and carry out over 140 assessments to relieve the pressure on its service. It had approved additional working hours for Council Educational Psychologists who are part-time and was seeking to recruit more Educational Psychologists to its service.
 - It acknowledged that it failed to secure provision for Y specified in his EHC plan. This related to activities led by Y's interests and learning within outdoor provision including animals. The Council said there was poor communication between Ms X and the Council from November 2021 to February 2022 relating to her request for a personal budget which caused this.
 - It refused Ms X's request for a personal budget as the providers she wanted to use were not on its list of approved providers. However, it did then agree to allow Provider A to manage the personal budget and commission these activities Y wanted to do on the Council's behalf.
26. In October 2022, Ms X asked the Council to consider her complaint at the next stage as she was unhappy with the Council's response. Ms X disputed the reasons why the Council declined her request for a personal budget. Ms X said

from November 2021 to February 2022 there was not a funded EOTAS package and Y did not receive the provision in the EHC plan. Ms X also said there was a lack of support from the EOTAS service and she had received no contact from the new EOTAS case worker allocated in September 2022.

27. On 21 October 2022, Ms X asked the Council for a direct payment to fund Y's climbing sessions. Ms X said the tutor from Provider A had not been able to attend these as this caused Y severe distress. As a result, she had been funding these sessions herself.
28. The Council provided its final response to Ms X's complaint in November 2022. The Council said:
 - It declined Ms X's request for a personal budget as it would not approve funding for providers not on its approved list. To find a solution the Council proposed the use of an approved provider to manage the personal budget.
 - It would consider Ms X's request for personal budget payments specifically for climbing.
 - It did not have a personal budget policy but showed its rationale for its decision. The Council said OFSTED previously were concerned about it using unregulated providers.
 - Education review meetings took place on 17 December 2021, 16 March 2022 and 8 June 2022. These meetings were attended and recorded but it could find no evidence that the notes from these meetings were shared with attendees. The Council apologised to Ms X for this.
 - It could not find evidence of Ms X's EOTAS caseworker contacting her but they did receive Ms X's request for a personal budget which they passed on for a decision to be made.
 - Apologised that communications with Ms X had fallen short of the standards the Council aimed for.
 - Apologised that it took too long to provide Ms X with a response to her request for a personal budget and took too long to arrange for Y's provision to be funded in a different way.
29. Following its final response to Ms X's complaint the Council agreed to re-fund Ms X for the climbing sessions she paid for. This totalled £1,444.
30. Following mediation with Ms X on the content of Y's EHC plan. The Council issued an amended final EHC plan.

Analysis

Delays in assessing Y and issuing an EHC plan

31. The Council was at fault for the time taken to assess Y and produce an EHC plan. The Council initially held an annual review of Y's EHC plan in July 2021 but before issuing a final EHC plan, decided to re-assess Y's needs in November 2021. As Y was going through a key phase in his education the annual review should have been completed by 15 February 2021. This was fault. If it had been completed earlier it would have allowed more time to identify that Y needed a re-assessment and this could have been completed sooner.
32. After deciding to re-assess Y, the Council then took until April 2022 to issue Y with a draft EHC plan. This was fault. The Council should have issued a final EHC

plan by late March 2022. The Council explained this was due to delays in getting an Educational Psychologist's report for Y.

33. While it took Ms X two months to respond to the draft EHC plan, and I am satisfied this contributed to the delay, the Council should have issued a draft EHC plan to Ms X sooner, especially as Y had not received a final EHC plan following his annual review in July 2021.
34. This caused Ms X injustice as she had to wait longer to receive a final plan and her appeal rights or ability to challenge the content of the plan through mediation were delayed.
35. I do not consider Y missed out on extra provision as a result of this delay. This is because the Council put in place Occupational Therapy once it received the Occupational Therapist's report for Y in February 2022. Y was also in receipt of a EOTAS package at this stage. These were the main differences between the EHC plan Y had in place from August 2020 and the EHC plan issued by the Council in July 2022.
36. The reason for the delay was that it took the Council a long time to get a report from an Educational Psychologist. The Council has outlined steps it has taken to try to increase its capacity to reduce this in the future. This is welcomed.

Personal budget and missed provision as a result

37. The Council decided Ms X could not have a personal budget for equine therapy, climbing sessions and music lessons as the providers who ran these services were not registered with the Council. Prior to receiving an EOTAS package, Y's primary school were providing these services. The EHC plan in place for Y at the time specified he needed learning within outdoor provision such as animals, physical activity with climbing.
38. It was not until February 2022, that the Council decided to arrange for Provider A to manage the personal budget, allowing it to source the provision for Y. As a result, Y did not receive all of the provision he should have. The Council acknowledged in its complaint response that it did not secure all of the provision in Y's EHC plan at this time due to the time taken to decide on how to fund this. While this is welcomed, Y has suffered injustice as he did not receive the outdoor and physical sessions he should have done from the start of the school year until February 2022.

Communication with the EOTAS service

39. Ms X raised concerns about the level of communication she received from the EOTAS service. The evidence shows that there was not contact between Ms X's EOTAS case worker at various times through this process. This is fault.
40. The Council has in its complaint response recognised that its communication fell short of the standards it aimed for and apologised to Ms X. While this is welcomed, Ms X has suffered distress as a result of the level of communication she received from the EOTAS service.

Agreed action

41. Within one month of my final decision, the Council agreed to carry out the following and provide evidence to the Ombudsman it has done so:
 - a) Provide Ms X with a written apology for the above faults.

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- b) Pay Ms X £400 for the distress, time and trouble she experienced from the delays in completing Y's EHC plan, level of communication she received and time taken to resolve her personal budget concerns.
 - c) Pay Ms X £500 for the benefit of Y for the lost provision he had after starting a package of EOTAS until February 2022, when the personal budget issues were resolved.
 - d) Remind the teams involved with this case of the Council's communication standards and take whatever steps necessary to ensure the teams are putting this in place.
42. The Council should provide us with evidence it has complied with the above actions.

Final decision

43. I have completed my investigation and found the Council was at fault which caused Ms X and Y injustice. The Council has agreed to the above actions to remedy the injustice caused.

Investigator's decision on behalf of the Ombudsman