

The Ombudsman's final decision

Summary: The Council failed to meet its legal duty to secure the provision in Ms Z's Education, Health and Care plan (EHC plan). This caused her to miss out on provision she was entitled to receive between January and May 2022. Ms Z also missed education earlier between May and December 2021. However, this could not be remedied by the Ombudsman as it is outside of our jurisdiction to investigate. The Council has already accepted fault and offered Ms Z £1200. We recommend the Council increase the remedy for missed provision to £2,500, in addition to paying Ms Z's mother, Ms X, £300 to reflect the frustration and distress caused to her. The Council did not delay in producing Ms Z's EHC plans, or fail to consider her views as an independent adult, during this complaint period.

The complaint

1. Ms X complained that between 7 May 2021 and 12 August 2022, the Council:
 - a) delayed in producing her daughter's EHC plans;
 - b) failed to secure the provision in her daughter's EHC plans, and as ordered by the SEND Tribunal; and
 - c) failed to properly consider her daughter's views as an independent adult when making decisions about her education and other provision in her EHC plan.
2. Ms X said the Council's actions have caused her daughter to miss out on education and suffer deteriorating mental health. She said the Council's actions have also affected her own wellbeing and put her to avoidable time and trouble.

What I have and have not investigated

3. I have not investigated Ms X's complaint that the health provision in Section G of Ms Z's EHC plan dated 7 May 2021 was not secured. I have only investigated whether the Council provided what was in Section F of that plan.
4. This is because the duty to secure the provision in Section G was the responsibility of the health bodies, not the local authority. The Ombudsman can only investigate bodies within its jurisdiction. I have told Ms X it is open to her to make a complaint to the health bodies about this section of her complaint.
5. I have investigated whether some health provision was met in Ms Z's EHC plan dated 9 May 2022. This is because the SEND Tribunal ordered that health

provision to be placed in Section F. Therefore the duty to secure that provision was the responsibility of the Council.

The Ombudsman's role and powers

6. 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*)
7. 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*)
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. The courts have established that if someone has lodged an appeal to a SEND Tribunal, the Ombudsman cannot investigate any matter which is 'inextricably linked' to the matters under appeal. This means that if a person disagrees with the placement named in an EHC plan we cannot seek a remedy for lack of education after the date the appeal was engaged if it is linked to the disagreement about the school place named. (*R (on the application of ER) v Commissioner for Local Administration (Local Government Ombudsman) [2014] EWCA Civ 1407*).
10. 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*)
11. 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

12. I considered the information provided by Ms X and the Council.
13. I considered the relevant law and guidance as set out below.
14. I considered our [Guidance on Remedies](#).
15. I considered all comments made by Ms X and the Council on a draft decision, before making a final decision.

What I found

Law and guidance

Education, Health and Care Plans (EHC plans)

16. A young person with special educational needs may have an EHC plan. This sets out their needs and what arrangements should be made to meet them.
17. The EHC plan is set out in sections. The Ombudsman cannot direct changes to the sections about education or name a different educational setting. Only the SEND Tribunal can do that.
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19. Councils are responsible for making sure that arrangements specified in the EHC plan are put in place. We can look at complaints about this, such as where support set out in the EHC plan has not been provided, or where there have been delays in the process.
 20. There is a right of appeal to the SEND Tribunal about the content of the final EHC plan. An appeal right is only engaged once a decision not to assess, issue or amend a plan has been made and sent to the parent or a final EHC plan has been issued.
 21. Where the Tribunal orders a council to amend an EHC plan, the council shall amend the EHC plan within five weeks of the order being made.

EHC plan timeframes

22. The statutory guidance, the SEND Code of Practice, says:
 - EHC plans must be reviewed as a minimum every 12 months;
 - Within four weeks of the review meeting the council must decide whether it proposes to keep the EHC plan as it is, amend the plan or cease to maintain it, and notify the child's parent or young person and the educational setting;
 - If the plan needs amending, councils should start the process of amendment without delay;
 - If amending the plan, councils must send the child's parent or the young person a copy of the existing plan and a notice providing details of the proposed amendments, and they must be given at least 15 calendar days to comment on the proposed changes; and
 - Councils must issue the amended EHC plan as quickly as possible after receiving comments and within 8 weeks of the original amendment notice. [recent caselaw has interpreted this particular timeframe slightly differently but this is the timeframe which was in force at the time of this complaint].

Education other than at school (EOTAS)

23. Section 61 of the Children and Families Act allows councils to arrange for special educational provision to be made otherwise than in a school. I refer to this as EOTAS in this decision statement.

What happened

24. Ms X's adult daughter, Ms Z, has had an EHC plan since 2020. Ms Z has been diagnosed with several conditions including a neurodevelopmental disorder and complex mental health issues.
25. On 7 May 2021 the Council issued a final EHC plan for Ms Z as ordered by the SEND Tribunal. This said she would continue to attend her mainstream sixth form college, which I refer to as School A.
26. It also listed in Section F of the EHC plan, several forms of special educational support Ms Z would receive to assist her in studying her A-Levels. This included support for Ms Z's sensory needs, interoceptive awareness, emotional regulation and additional resources including documents in large font, A3 paper and a touch screen laptop.
27. A scheduled annual review of Ms Z's EHC plan was held by the school shortly after this, on 27 May 2021. It noted Ms Z had reduced attendance but did not recommend a change of placement. However shortly after this, Ms Z stopped attending School A completely due to a decline in her mental health.

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28. Ms X said the school was not providing enough support to Ms Z and she was struggling to complete her work independently. The school said it could continue to meet Ms Z's needs for another year and provide what was in the EHC plan if Ms Z attended. However, Ms X and Ms Z said Ms Z needed a different setting.
 29. While Ms Z was not attending School A, the school put in place private tutoring and sent home some of the SEN resources Z required such as pens and A3 paper. However, School A said it could not provide all the SEN support in her EHC plan while she was not attending the school.
 30. A further meeting about Z's future at School A was held on 23 July 2021 which was requested by Ms X. Ms Z was too unwell to attend but passed on her views beforehand. The Council, the school and other professionals attended.
 31. The meeting considered Ms Z's views. She said she still wanted to do her A-levels but did not want only home-based learning. During this meeting, Ms X said the tutors put in place by the school so far had not worked out.
 32. In this meeting, it was agreed that the Council would consult some alternative colleges for Ms Z and the Council would make further enquiries about EOTAS provision. On 6 August 2021, the Council sent consultation requests to four colleges. None could meet Ms Z's needs.
 33. The Council issued its amendment notice and proposed, amended EHC plan on 9 August 2021.
 34. Ms Z's final EHC plan was issued on 25 August 2021 and continued to name School A. It said Ms Z would receive several forms of SEN support and 1:1 assistance from school staff to assist her in accessing education. Ms X disagreed with the Council naming School A and appealed the EHC plan to the SEND Tribunal on 28 September 2021.
 35. In the meantime, the Council put in place tutoring. By October 2021 records show the Council was not aware if Ms Z was accessing this tutoring and chased Ms X for a response about this by email.
 36. By 11 October 2021 the Council had consulted with seven alternative colleges. Most could not meet her needs and a few did not respond.
 37. In late October 2021 the Council spoke with Ms X and she said Ms Z had received none of the provision in her EHC plan since June that year.
 38. In November 2021, the Council told Ms X it would now look into an alternative EOTAS package for Ms Z, starting with a tutoring service that could assist her in completing one A-Level, with a view to her then starting at a college in September 2022. The Council still believed School A could meet Ms Z's needs but consulted with the alternative tutoring service the following month.
 39. By December 2021 School A took Ms Z off-roll. Ms Z had not received any of the provision in her EHC plan by that date and the Council was aware of this.
 40. The Council did not consult any further school placements for Ms X between October 2021 and the date of the upcoming SEND Tribunal and instead consulted tutoring services.
 41. On 2 April 2022, the SEND Tribunal ordered Ms Z's EHC plan to be changed as it said all parties agreed that a school setting was no longer suitable to meet her needs. Therefore, section I was to be left blank.
 42. The Tribunal also decided there was "overwhelming and consistent professional advice" demonstrating that for Ms Z to access education, she required various

forms of SEN, mental health and physical support. Therefore it ordered that all of the following should be included in section F of her EHC plan and be considered as special educational needs provision:

- occupational therapy;
- sensory support;
- mental health support;
- SEN support;
- interoceptive awareness support; and
- emotional regulation support.

43. The Council issued Ms Z's final EHC plan on 9 May 2022 in accordance with the Tribunal's directions.
44. The Council began consulting with providers shortly after the SEND Tribunal including seeking a keyworker to oversee the EOTAS package. Emails from this time show the Council working regularly towards commissioning the provision. By mid-June 2022, Ms Z had not decided all the A-level subjects she wished to study.
45. The Council said it had a quote by late June 2022 from a psychiatrist who said they were available to work with Ms Z and this work began from August 2022. It said Ms Z's occupational therapy including the sensory programme began in June 2022. It said it offered tutoring and specialist learning support but Ms X refused this as she said the provision offered was unsuitable.
46. Ms X made a formal complaint to the Council. She said the provision in Ms Z's EHC plans – the one issued following the 2021 tribunal hearing and one issued following the recent tribunal hearing - had not been met and the Council was in breach of its statutory duties.
47. The Council responded at the final stage of the complaints process on 12 August 2022. It said when Ms Z was on-roll with School A, it could provide all the education and SEN provision in Ms Z's plan. However, Ms X said School A was unsuitable. It then looked for tutors but none could meet the level of specificity in the plan. It acknowledged the lack of provision but said it had made every effort.
48. It said for the period May 2022 to August 2022 following the Tribunal, the level of provision in the plan meant it would need to be provided by more than one provider and Ms Z had not known what subject she wished to study, which contributed to a delay in setting up the educational provision. It said it was working hard to arrange the EOTAS package in full.
49. Regarding the provision Ms Z missed between May 2021 and May 2022, it offered Ms X £900 as a financial remedy. Regarding the distress caused to Ms X and Ms Z during that period it offered her an additional £300. The Council said it would also aim to address the shortfall in education by commissioning additional education during holiday periods.
50. Ms X was unhappy with the Council's response and complained to the Ombudsman. By the time she complained to us in mid-August 2022, Ms Z was receiving the education provision in her plan through a tutor that Ms X had identified, was receiving the SEN support in her EHC plan through a specialist learning assistant and was receiving the mental health support and occupational therapy in her plan.

My findings

Complaint 1a) EHC plan delays

51. The Council issued its amendment notice and proposed, amended EHC plan on 9 August 2021. Ms Z's final EHC plan was issued on 25 August 2021. The Council - at this time - had eight weeks from the date of the amendment notice to issue the final EHC plan. The Council took less than eight weeks. The Council was not at fault.
52. The Council issued Ms Z's amended final EHC plan of 9 May 2022 five weeks and two days after the SEND Tribunal ordered it to. The Council had five weeks to issue the plan. This two day delay is not significant enough to warrant a finding of fault and did not cause a significant injustice.

Complaint 1b) Failure to deliver provision from EHC plans

53. From May 2021 to May 2022, Ms Z did not receive all the education and SEN provision in her EHC plan. I have split this twelve month period into sections below.

May 2021 – December 2021

54. Between May 2021 and December 2021 School A remained open to Ms Z to attend and it said it could meet all the provision in Ms Z's plan. However, Ms X and Ms Z said School A was unsuitable and she did not attend the school. Due to non-attendance Ms Z did not receive the education or SEN provision in her plan during this period.
55. However, the reason Ms Z missed education during this time was due to a disagreement between Ms X, Ms Z and the Council over whether the placement at School A was suitable. The May 2022 SEND Tribunal considered this issue specifically and therefore is outside of the Ombudsman's jurisdiction to investigate or remedy, for the reasons set out in paragraph 9 of this decision statement.

January 2022 – May 2022

56. From January 2022, Ms Z's school was no longer available to her as it took her off-roll. At this point, Ms Z had no suitable placement so the Council was under a duty to secure the provision in the EHC Plan.
57. Between January 2022 and her next EHC plan in May 2022, Ms Z received almost none of the education or SEN support in her plan. The Council offered tutoring but Ms Z and Ms X said the tutoring would not meet all the SEN provision in the plan which she needed to access education, and therefore was not suitable.
58. There is no evidence showing the tutoring offered during this time met all the requirements of the EHC plan as Ms Z required several forms of SEN support to access education. The Council failed to secure the provision in line with the EHC plan between January and May 2022. The Council was at fault. This fault caused Ms Z to miss five term-time months of education and SEN provision.
59. I have recommended the Council pay Ms Z a higher remedy than originally offered in recognition of the injustice caused by this fault.

May 2022 – August 2022

60. The Council issued Ms Z's final EHC plan on 9 May 2022, just over five weeks after the Tribunal ordered it to. As set out in paragraph 51, this was not fault.

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61. Between the date of this plan and August 2022 when the Council responded at the final stage of its complaints process, Ms X complained the council had not put in place the May 2022 EHC plan provision quickly enough. The plan said in section F that Ms Z would receive an EOTAS package including tutoring, mental health support, occupational therapy and SEN support.
62. Ms Z had her mental health provision, education and SEN provision in place by August 2022. The occupational therapy began earlier in June 2022. Records from this time do not show any periods of drift or inactivity by the Council in commissioning the provision. The package contained multiple forms of support from multiple providers and Ms Z was not certain on all the subjects she wished to study following the final plan being issued. The Council made the efforts we would expect to see to meet the provision in the plan during this time. The Council was not at fault.

Complaint 1c) Consideration of Ms Z's views as an adult

63. Ms X also complained that the Council failed to consider Ms Z's views as an independent adult. The records I have seen show the Council consistently sought Ms Z's views including through the EHC plan process. Where she could not attend meetings, her views were provided beforehand and were central to the discussions. The Council was not at fault.

Agreed action

64. Within one month of the date of the final decision, the Council has agreed to:
- a) apologise to Ms X and Ms Z for the injustice caused by the faults in this decision;
 - b) pay Ms Z £2,500 to reflect the period between January and May 2022 of term-time education and SEN support that she missed;
 - c) pay Ms X £300 in recognition of the frustration and distress caused to her by the missed provision (where the Council has already paid out the previously offered financial remedy of £1200, the Council should only pay the difference between this and the amounts recommended in this decision); and
 - d) demonstrate that it has begun to plan catch up education for Ms Z, provided that catch up sessions are currently appropriate and accessible to her.
65. The Council should provide us with evidence it has complied with the above actions.

Final decision

66. I have completed my investigation. I have found fault leading to injustice and recommended an apology and a financial remedy. Part of this complaint was outside our jurisdiction to investigate.

Investigator's decision on behalf of the Ombudsman