

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

Summary: Ms M's son, B, has been out of school for two years without any education because of delays by the Council amending his Education, Health and Care (EHC) Plan. He should have a special school place. The impact on Ms M and her family has been very significant. We have recommended a symbolic financial payment and urge the Council to secure suitable education for B without further delay.

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## **The complaint**

1. Ms M complains about delay by the Council finding a school place for her son, B. Ms M complains B has been out of education since July 2022. She says B used to enjoy going to school and being outdoors, but he will no longer leave the house. This has had a significant impact on Ms M's family.

## **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 injustice we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)
3. Once 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)
4. 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**

5. I considered information provided by Ms M and the Council. I invited Ms M and the Council to comment on my draft decision.

## **What I found**

6. Ms M's son, B, has an Education, Health and Care (EHC) Plan maintained by the Council.

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7. The Council proposed a special school when it issued B's first EHC Plan, but Ms M wanted him to attend a mainstream school for his early years and KS1 education. B started mainstream primary school in September 2019.
  8. The school held an annual review meeting on 7 December 2021. The papers note the Council had agreed B would transfer to a special school in September 2022.
  9. The Council consulted Ms M's preferred special school in January 2022. However, the school was heavily oversubscribed and unable to offer B a place.
  10. The Council consulted a further eight schools. Only one, an independent special school, was able to offer B a place. Ms M asked the Council to name the school in B's EHC Plan.
  11. The Council's placement panel considered Ms M's request four times between 19 October and 29 November 2022, but would not agree to name the school.
  12. The panel deferred making a decision on two occasions in order to (re)consult schools. On another occasion the panel deferred making a decision to seek advice from the principal educational psychologist. No further advice was received. The panel mistakenly noted there was no indication B needed a special school or a change in provision when the Council had already decided he needed a special school.
  13. Ms M complained to the Council on 20 January 2023.
  14. The placement panel agreed to name the independent special school on 14 March 2023. However, B was unable to join the school as there was no longer a place available for him.
  15. Ms M complained to the Ombudsman on 17 July 2023. The Council had been unable to respond to her complaint due to a backlog of complaints.
  16. B has been out of school since September 2022.

### **Education, Health and Care Plans: the law**

17. An Education, Health and Care (EHC) Plan describes a child's special educational needs and the provision required to meet them. It may also name the school the child will attend.
18. The Council must secure the special educational provision specified in the Plan for the child or young person. The Courts have made it clear the Council's duty to arrange provision is owed personally to the child and cannot be delegated.
19. The Council must review and amend, if necessary, a child's EHC Plan at least once every 12 months. The procedure for reviewing and amending an Education, Health and Care Plan is set out in legislation and Government guidance.
20. The process begins with a review meeting which is usually organised by the school on behalf of the Council.
21. Following the meeting, the school must send a report to the Council and the Council must decide within four weeks whether it intends to make changes to the child's Plan.
22. If it decides to amend the Plan, the Council must notify the parents of the changes it intends to make and invite them to request a particular school. A recent court judgement confirmed this must happen within 4 weeks of the review meeting.
23. Councils must consult with schools before naming them in a child's Plan.

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24. The law says that Councils must name a parent's preferred school in their child's Plan, so long as the school is suitable and the child's attendance would not be an inefficient use of resources.
  25. The Council must issue the final Plan as quickly as possible and within eight weeks of sending the draft Plan.
  26. Parents have a right of appeal to the SEND Tribunal if they disagree with the special educational provision or the school named in their child's Education, Health and Care Plan.

### **Education for children who do not attend school**

27. The Council has a duty, outlined below, to arrange suitable education for children who would not otherwise receive suitable education. The Council is – in effect – a "safety net".
28. The Education Act 1996 says every council shall "make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them." (Education Act 1996, section 19(1))
29. *Suitable education* means efficient education suitable to a child's age, ability and aptitude and to any special educational needs he may have. The Council must consider the individual circumstances of each particular child and be able to demonstrate how it made its decision.
30. 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.

### **What went wrong**

#### **Amending B's EHC Plan**

31. B's school held an annual review meeting on 7 December 2021. The Council did not send a formal 'amendment notice' to Ms M outlining the changes it proposed to make to B's Plan and inviting her to request a new school.
32. Nevertheless, the Council began consultations with other schools. The Council made a decision about which school B should attend in March 2023, sixty-six weeks after the annual review meeting. This was 52 weeks late.
33. Unfortunately, the school the Council decided B should attend was full and could not offer a place. B is still without a school place. This is fault.
34. Where we find fault, we consider the impact on the complainant. We refer to this as the injustice.
35. The Council should have completed the annual review within 12 weeks of the meeting in December 2021. If it had, it is more likely than not the Council would have agreed B should transfer to a special school in September 2022. This was the Council's decision in March 2023 and appears to have been the Council's plan all along. It is also likely there would have been a place available for him at one of Ms M's preferred schools.
36. B should have attended a special school since September 2022. He has not, in fact, attended school at all. This is a considerable injustice.
37. We may recommend a remedy for injustice that is the result of fault by the Council. My recommendations are at the end of this statement.

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38. But I would first like to highlight significant fault by the Placement Panel that considered which school B should attend. I appreciate placement decisions can be complicated, and it is entirely for the Council to decide how it makes decisions.
39. Nevertheless, any system the Council puts in place must support the Council to comply with its statutory duties and make sound and timely decisions. This was not the case in this instance.
40. Nine months had already passed since the annual review meeting before B's case reached the Placement Panel. The Panel took a further five months to make a decision. The whole process should have taken no more than three months from the date of the annual review meeting. These are very significant delays in the life of a young child.
41. The Placement Panel decided the Council should re-consult schools which had already said they could not meet B's needs or offer him a place. Whether this was in the hope the schools could be persuaded to change their mind, or whether it is an acknowledgement of the significant amount of time that had passed since the schools were first consulted, it proved unsuccessful.
42. Only one school had offered B a place. I have not seen any evidence to suggest the Placement Panel's decision to re-consult schools was made to address B's needs or an attempt to meet Ms M's preference. The Council was no doubt anxious to fulfil its duty to ensure the efficient use of public funds. But it should have done that in the eight weeks following its decision to amend B's Plan at the end of 2021. The Placement Panel contributed significantly to the delay and the education B has missed.
43. Not only was there delay, the Placement Panel does not appear to have properly considered all the evidence. The Panel decided in November 2022 that B did not need a special school, or even a change of placement, despite evidence which shows the Council had decided B needed a special school as early as 2019 and he had made very little progress in mainstream education. The Panel changed its mind following a further annual review in February 2023, yet nothing had changed since the Panel first considered B's case in November 2022.
44. We can also make recommendations to ensure similar faults do not happen again. I shall invite the Council to learn from this complaint and explain how the Placement Panel will support the Council to make sound and timely decisions in the future.

#### **B's absence from school**

45. B's school said it would not be possible to support him in KS2 and they did not want to hold him back in KS1 when his peers moved on. Ms M and the school decided B would not attend from September 2022.
46. The Council says it reminded the school of its duty to provide B's education. However, the school was unable to find tutors who could meet B's needs and Ms M was unable to find therapists to deliver B's therapy at home despite considerable effort. B was without education, and the special educational provision in his EHC Plan, from September 2022.
47. In response to my enquiries, the Council acknowledged its duty to arrange the special educational provision in B's EHC Plan and its duty to make alternative arrangements for his education if he would not otherwise receive suitable education. The Council accepted it was at fault and apologised.
48. The Council said it began the search for tutors to provide alternative education in October 2023. The search proved difficult, however. The Council made a further

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referral in December 2023 which it followed up in January 2024. A tutor visited B in May 2024, but was unable to meet his needs. B has not received any alternative education while he has been out of school

49. The injustice to B is very significant. He had been out of school for over a year before the Council began the search for tutors to provide alternative education. The search was unsuccessful. B has been without education for all this time. And in any event, he should have had a place at a special school.
50. This has also had a significant impact on Ms M and B's sibling. Ms M has looked after B at home for almost two years when he should have been at school. Ms M tells me that B's condition has worsened while he has been out of school and he now rarely leave the house. This has a significant impact on family life.

### **Agreed action**

51. We have published guidance to explain how we recommend remedies for people who have suffered injustice as a result of fault by a council. Our primary aim is to put people back in the position they would have been in if the fault by the Council had not occurred. When this is not possible, as in the case of Ms M and B, we may recommend the Council makes a symbolic payment.
52. Delay by the Council amending B's EHC Plan following the December 2021 annual review meant B has not had the special school place he should have had since September 2022. The Council has yet to identify a suitable school. B has been out of school for almost two years.
53. Delay by the Council arranging alternative education when he was no longer receiving suitable education at school meant that B has not received any education at all while he has been out of school.
54. B has also missed out on the social contact with his peers he would have had at school.
55. I recommended the Council:
  - apologises for the faults I have identified and the impact on Ms M and B;
  - offers a symbolic payment of £16,400 to acknowledge the impact on B's education;
  - offers a symbolic payment of £2,000 to acknowledge the impact on Ms M and B's sister;
  - takes whatever action is necessary to ensure B returns to an appropriate school without further delay, and that he receives suitable alternative education in the meantime. Ms M says B requires the therapies in his EHC Plan even if he does not have a school place. The Council should produce an action plan to address these issues and send us a copy.
56. We can also make recommendations to ensure similar faults do not happen again. The Government issued an Improvement Notice in March 2023 which required the Council, and its partners, to develop a rapid improvement plan. The plan is overseen by the Government, with monitoring visits from the Department for Education and Ofsted. I shall not, therefore, make further improvement recommendations, but I ask the Council to reflect on this complaint and explain how it will ensure the Placement Panel supports the Council to make sound and timely decisions in the future.

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57. I recommended the Council makes an action plan for how it intends to secure B's return to education, and sends us a copy, within two weeks of my final decision; makes the apology and payments within six weeks of my final decision; and explains any changes to the Placement Panel within eight weeks of my final decision.
  58. I recommended the Council presents a copy of my final decision to the next meeting of the Council's Children's, Young People and Education Cabinet Committee and also the SEND Sub-Committee.
  59. The Council accepted my recommendations.
  60. The Council should provide us with evidence it has complied with the above actions.

### **Final decision**

61. I have ended my investigation as the Council accepted my findings and recommendations.

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