

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Hampshire County Council
(reference number: 19 010 890)**

24 March 2021

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mrs Y	The complainant
Z	Her son

Report summary

Education – Special Educational Needs and Alternative Provision

Mrs Y complained the Council delayed issuing an amended Education, Health and Care Plan (EHC Plan) for her son, Z, and failed to provide him with suitable education while it found a new placement.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

In addition to the requirements set out above, and to remedy the injustice caused to Mrs Y by its faults, the Council has agreed it will, within four weeks from the date of this report, pay Mrs Y:

- £100 to acknowledge the opportunity she lost to appeal the Council's decision of 14 May 2019 to keep Z's EHC Plan in place;
- £200 to acknowledge the opportunity she lost to appeal the provision made for Z in an amended EHC Plan from July 2019 to May 2020 and to reflect her time and trouble caused by this delay;
- £200 for each school month of inadequate SEN provision for Z from April 2019 to July 2019 (three school months), making a total of £600, to be used for the benefit of Z's education;
- £550 for each school month of education Z missed from September 2019 to the start of January 2020 (three school months), making a total of £1,650 to be used for the benefit of Z's education; and
- £750 to acknowledge her time and trouble in trying to get the Council to fulfil its statutory responsibilities and the distress and uncertainty caused to her and Z by its failure to do so.

It has also agreed to apologise to Mrs Y for its failings in the completion of the annual review process and amendment of Z's EHC Plan, and provision of a suitable education for him.

The Council should reflect on the service improvements it agreed to make further to our decisions in June and October 2020 on three other complaints about its provision of SEN services, in particular delays with annual reviews and amendment of EHC Plans. And, within three months of the date of this report, provide us with:

- confirmation of the steps it has taken to remind officers the statutory guidance allows parents to give their views and make representations about a draft amended plan. And where a parent suggests changes the council agrees, it should amend the draft and issue the final EHC plan as quickly as possible and within the statutory deadlines;
- an update of the number of any outstanding EHC assessments, annual reviews and draft amended plans and the timetable for finalising this work;

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- confirmation the Director of Children’s Services and the Lead Member for Children’s Services have reviewed whether the resourcing of the SEN team is now sufficient to allow it to carry out its current workload within the statutory timescales; and
 - confirmation the Director of Children’s Services and the Lead Member for Children’s Services have reviewed the details of the SEN Recovery plan.

The complaint

1. Mrs Y complained the Council:
 - delayed issuing an amended Educational, Health and Care Plan for Z; and
 - failed to ensure Z received suitable education and his special educational provision while it reached a decision regarding his school placement.

Legal and administrative background

The Ombudsman's role and powers

2. We investigate complaints about 'maladministration' and 'service failure'. In this report we 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. We 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. 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 report with Ofsted.

Education, Health and Care Plan; annual review process

4. A child with special educational needs may have an Education, Health and Care Plan (EHC Plan). This sets out the child's needs and arrangements for meeting them. Councils are responsible for making sure these arrangements are put in place and the child's needs are met.
5. The SEND Code of Practice issued by the Department of Education, provides statutory guidance for councils.
6. The guidance says councils must review EHC Plans at least every 12 months and sets out the process they must follow for these annual reviews.
7. Within four weeks of the review meeting, the council must decide whether it will keep the EHC Plan as it is, amend or cease to maintain the plan, and notify the child's parent. If it needs to amend the plan, the council should start the process of amendment without delay.
8. The council must send the draft amended EHC Plan to the child's parent or young person and give them at least 15 days to give views and make representations about the content.
9. Following representations from the child's parent or young person, the council must issue the amended EHC Plan as quickly as possible and within eight weeks of the issue of the draft amended plan. It must also notify the child's parent of their right to appeal to the Tribunal and the time limit for doing so. The Special Educational Needs and Disability Tribunal is responsible for handling appeals against local authority decisions about special educational needs. Perhaps it could be in brackets at the end of this paragraph.

Alternative educational provision

10. The Education Act 1996 says if a child of compulsory school age cannot attend school for reasons of illness, exclusion from school or otherwise, the council must make arrangements to provide suitable education either at school or elsewhere such as home. This is known as alternative provision.

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11. The term “suitable education” is defined as efficient education suitable to the child’s age, ability and aptitude and any special educational needs they may have. The education to be arranged by the council should be on a full-time basis unless, in the interests of the child, part-time education is considered more suitable, for reasons of their physical or mental health.
 12. There is no statutory requirement as to when suitable full-time education should begin for pupils placed in alternative provision for reasons other than exclusion. But councils should arrange provision as soon as it is clear an absence will last more than 15 days.

How we considered this complaint

13. We produced this report after speaking to Mrs Y and considering all the information she and the Council provided about her complaint.
14. We gave Mrs Y and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

What happened

15. Z has been diagnosed with autism and attention deficit hyperactivity disorder (ADHD) and has an EHC Plan. As at 2019 his plan identified a need for 25 hours of one to one support each week to be provided by his mainstream primary school.
16. On 1 April 2019 the school and Z’s parents met for the annual review of his plan. The school returned the annual review documents to the Council on 3 April. Mrs Y and her husband felt mainstream schooling was no longer the right environment for Z. They said his anxiety levels had greatly increased and asked for a change in his placement. They wanted Z to go to a special school and named their preferred choice. The school said Z was finding it increasingly difficult to access the classroom, his behaviour was unpredictable, and he was refusing to come to school. The school was finding it increasingly difficult to meet Z’s needs. It asked for an increase in hours to ensure Z’s safety and that of his peers and staff members.
17. Mrs Y contacted the Council on 3 May. She explained the severity of Z’s current situation, the increase in his distress and violent outbursts. She felt he was no longer able to cope with a mainstream school and needed a placement at a special school. She named her preferred new school. She contacted the Council again on 8 May with details of recent incidents at school and how Z’s mental health was deteriorating very quickly. He was becoming very anxious about going to school.
18. On 14 May the Council wrote to Mrs Y about the annual review. It told her it intended to maintain Z’s EHC Plan and the special educational provision in it. It also said it was considering the request for a change of placement and would let her know whether it intended to amend the Plan. And the delay in responding to the annual review was due to a backlog of work.
19. On 28 May the Council agreed to the school’s request to increase Z’s support hours to 32.5.

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20. In June the Council agreed to put Z's case to its Social Emotional and Mental Health (SEMH) Panel. On 5 June the Council wrote to a number of schools, including Mrs Y's preferred choice, with a copy of Z's unamended EHC Plan asking whether they would consider admitting him as soon as possible or in September 2019.
 21. At the SEMH Panel meeting in July it was decided a SEMH placement was appropriate for Z. But the Council had not yet been able to find a suitable available placement for him.
 22. On 15 July Mrs Y wrote to the Council explaining what Z would need from a new placement and that he was unable now to attend his current school because of his complex difficulties. On 16 July the school told the Council Z had not attended that month. On 17 July it forwarded information confirming Z was seen by Children and Adolescent Mental Health Services (CAMHS) on 1 July as he was refusing to come to school.
 23. On 5 August Mrs Y told the Council she understood it was not yet able to name a new placement for Z, but he was not currently receiving an education. She asked the Council for its proposals for providing Z with a full-time education suitable for his needs, and a copy of the draft amended EHC Plan. In response the Council said it did not have a draft EHC Plan to share as it was still trying to find a placement for Z at a special school.
 24. By September the Council had still not found a suitable placement for Z. It had been told by Z's school he was not attending as his anxiety was too extreme for a mainstream setting. On 9 September Mrs Y contacted the Council about her concern at the time it was taking to find a placement for Z. It was five months since the annual review and Z was currently not receiving an education.
 25. The Council replied on 25 September. It said Z's case would be presented to the SEMH Panel on 4 October. Although her preferred school was full at the moment, Z's school had offered a reduced timetable or home tutoring visits by a member of its staff, but Mrs Y had declined these offers because Z was too anxious to engage. It told her it would publish an amended plan after the SEMH Panel meeting.
 26. Mrs Y complained to the Council in October. She said it was obstructing her right to appeal by not naming a school or instructing one to accept Z. She had asked for a home tutor specialising in autism, but this had not been provided. The Council knew Z was not receiving an education. She also complained about the Council's failure to complete the annual review process, it should have named a school by May 2019. She asked the Council to provide Z with a specialist home tutor two to three hours a day as a temporary measure.
 27. The Council responded to Mrs Y's complaint in November. It said she had declined the school's offer of a reduced timetable or visits by a staff member to provide home tutoring because Z was too anxious to engage. She has been told by a member of the SEN team the school could arrange an independent tutor and suggested she speak to the school about this. It did not uphold the complaint it had failed to provide Z with a suitable education.
 28. It accepted it had not completed the annual review process within the required timescale. It said this was due to an increased workload and the difficulty in securing a new placement. It was not able to amend the plan by naming a school until it could find a new placement. It accepted this delayed her right of appeal.

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29. The Council secured a place for Z at a special school from January 2020. Mrs Y told it her complaint was now partially resolved, but the amended plan had still not been completed.
30. In its response the Council said:
- Mrs Y had made a number of comments and requests for changes to the draft amended plan. These, together with its increased workload, were delaying the completion of the final plan; and
 - if Mrs Y agreed to withdraw her comments and requests, the final amended plan, naming the new school, could be issued more quickly. Otherwise it would take several months to complete it.
31. Mrs Y replied saying she had not made any comments or requests for changes to the draft amended plan as she had still not received this. The Council responded on 28 February 2020. It said there had been a misunderstanding in its previous letter. The changes referred to were the amendments proposed in the annual review. It apologised for the confusion and said the draft amended plan had now been issued.
32. Mrs Y referred her complaint to us in February 2020. The Council issued the final amended plan, naming the new school, in May 2020.

Conclusions

Annual review process

33. The Council did not decide within four weeks of the annual review whether it would keep, amend or cease to maintain Z's plan. It should have made this decision by 29 April 2019. It did not make a decision until 14 May 2019. This is fault. We consider this caused Mrs Y injustice by adding to the cumulative impact of the delays on her injustice.
34. The Council told Mrs Y its decision was to maintain Z's current plan and special education provision. It did not inform Mrs Y of her right to ask for a review of this decision. This is fault which caused injustice. Mrs Y lost the opportunity to appeal to a SEN Tribunal.
35. At the same time the Council made its decision to keep the current plan, it told Mrs Y it was considering whether to change Z's placement and amend his plan. In our view, the Council should have made this decision within four weeks of the annual review. It did not do so and this is fault which caused delays in the process of amending the plan. The Council did not agree the increase in support hours until 28 May 2019. It did not start the process of looking for a new placement for Z until early June 2019, two months after the annual review. These delays caused Z to miss out on additional SEN support and avoidable worry and uncertainty for Mrs Y about whether the Council would agree to their requested changes to the plan.

Issue of amended EHC Plan

36. We do not consider the time taken – from 5 June 2019 to January 2020 - to find a place at a special school for Z was the Council's fault. The evidence we have seen shows the Council contacted a number of special schools, including Mrs Y's preferred choices but was told they either could not meet Z's needs or did not have a place available. In our view, the Council was not in a position to make a school accept Z if it did not have the capacity to do so.

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37. But, in our view, if it could not name a particular school, the Council should have issued a draft amended plan naming the type of school. This would have allowed the Council to meet the statutory timescales and given Mrs Y the right of appeal. By waiting until it had found a school place for Z before issuing an amended plan, the Council left Mrs Y and Z in limbo. The injustice caused by the delay in finalising the plan was the loss of appeal rights. And also the missed opportunity by the Council to make alternative educational provision for Z until it was able to name a particular school.
38. A place was found for Z in January 2020. The Council sent Mrs Y a draft amended plan and issued the final amended plan in May 2020. But the annual review was in April 2019. Notice of amendment should have been issued within four weeks of the annual review and the final amended plan within the following eight weeks, by July 2019. So there was a delay from July 2019 to May 2020. This is fault causing injustice. Z had already started his placement but the delay meant his new school did not have an up to date understanding of his needs and how to meet them. Mrs Y did not have any appeal rights until the final amended plan was issued and she was caused avoidable time and trouble chasing the Council about its completion.
39. The statutory guidance allows parents to comment on a draft plan and request changes, which Mrs Y did, and requires a council to consider these. In our view the Council was wrong to tell Mrs Y the final plan would be delayed by several months if it had to consider her representations. And wrong to tell her the plan could be issued more quickly if she withdrew her comments. The Council has now explained Mrs Y had not actually made any comments on the draft amended plan at that stage (as it had not yet been issued) but has acknowledged this suggestion should not have been made. This is fault and Mrs Y was caused injustice by the worry and uncertainty about any proposed changes to the plan, the Council's response to any comments she was entitled to make and the effect on the timescale for the issue of the final plan.

Provision of alternative education

40. It should have been clear to the Council from the annual review information, Z was now struggling with mainstream school and the current level of his SEN support was no longer fully meeting his needs. Both the school and Mrs Y provided the Council with details of the severe problems Z was now experiencing in the mainstream setting. The Council agreed to provide Z with additional help by increasing his one to one support by five hours a week from 28 May 2019. But there is no evidence it considered Z's need for alternative provision. This is fault causing injustice. Z's SEN provision was inadequate from April 2019 to July 2019 and his needs were not fully met during this period.
41. The Council was told in July 2019, before the end of the summer term, Z had not been able to attend school since the beginning of the month. Once Z had been out of education for 15 days the Council had a responsibility for providing him with alternative education.
42. And had the Council issued an amended plan by July 2019, within the statutory guidelines, naming the type of school, it could have set out appropriate alternative education provision for Z until it was able to find a school place.

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43. Mrs Y contacted the Council in August 2019 to ask for its proposals for providing Z with a suitable education while it was looking for a new placement for him, as he was no longer able to attend his mainstream school. There is no evidence to show the Council gave any thought at that stage to the arrangements it should make to provide Z with alternative provision.
44. The Council knew in September 2019 Z had not been able to return to his mainstream school and was not receiving any education. It told Mrs Y the school had offered to make some alternative provision, which she had declined. The Council suggested she contact the school about the possibility of it arranging an independent tutor. But it was the Council's responsibility, not Mrs Y's or Z's mainstream school, to make sure Z received a suitable education. Mrs Y had told the Council she felt two to three hours a day of specialist support at home from a tutor experienced in autism would be appropriate for Z. The Council did not take action to follow this up or monitor the position and did not ensure appropriate alternative provision was in place for Z. It failed to carry out its duty to make sure Z received a suitable education and this is fault.
45. Because of this Z missed out on an education from September 2019 until he started his new school in January 2020. And Mrs Y was left to make whatever provision she could for Z, with no support from the Council, causing her avoidable time and trouble.
46. Where fault has resulted in a loss of educational provision, we normally recommend a remedy payment of between £200 and £600 a month to acknowledge the impact of that loss. The figure is based on the circumstances of each case, to reflect the particular impact on that child.
47. We consider the payment for the period from April 2019 to July 2019 should be at the lower end of the scale because some SEN provision was in place during this time. But we consider the payment for the period from September 2019 to January 2020 should be at the higher end of the scale because the Council did not make any educational provision at all for Z during this time.

Recommendations

48. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
49. In addition to the requirements set out above, and to remedy the injustice caused to Mrs Y by the above faults, the Council has agreed it will, within four weeks from the date of this report, pay Mrs Y:
- £100 to acknowledge the opportunity she lost to appeal the Council's decision of 14 May 2019 to keep Z's EHC Plan in place;
 - £200 to acknowledge the opportunity she lost to appeal the provision made for Z in an amended EHC Plan from July 2019 to May 2020 and to reflect her time and trouble caused by this delay;
 - £200 for each school month of inadequate SEN provision for Z from April 2019 to July 2019 (three school months) making a total of £600, to be used for the benefit of Z's education;

- £550 for each school month of education Z missed from September 2019 to the start of January 2020 (three school months), making a total of £1,650 to be used for the benefit of Z's education; and
- £750 to acknowledge her time and trouble in trying to get the Council to fulfil its statutory responsibilities and the distress and uncertainty caused to her and Z by its failure to do so.

It has also agreed to apologise to Mrs Y for its failings in the completion of the annual review process and amendment of Z's EHC Plan, and provision of a suitable education for him.

Service improvements recommended in recent decisions

50. We issued decisions in June and October 2020 on three other complaints about the Council's provision of SEN services, in particular delays with annual reviews and amendment of EHC Plans. The Council agreed to carry out the following service improvements.
- Within three months of 24 June, provide us with a copy of the business case presented to the Children and Young People's Select Committee in May 2019 and the outcome of this. The Council should also say what, if any, changes were implemented in the SEN team and its procedures and practice as a result of this, provide details of the current numbers and proportion of annual reviews completed on time and its comments on this. And provide details of a recent internal audit of its SEN services.
 - Within three months of 15 October provide a report to the Director of Children's Services, as part of its SEN recovery plan, on the number of annual reviews which have not been completed (including all administrative tasks) within statutory timescales. This will include what actions it will take to address any continuing failure to meet these deadlines. A copy of the report will also be provided to the Lead Member for Children's Services.
 - Identify all cases since January 2018 where a decision has not been communicated on time following an annual review. It will write to affected families to apologise for the delays and set out the actions the Council will take to prevent the same fault occurring in the future.
51. In the case we decided on 22 October we noted the Council accepted there had been a backlog of cases awaiting EHC assessments and EHC Plans. It said this had been reduced significantly and its aim was to have finished all outstanding EHC Plans by the end of September 2020.
52. It also said its service capacity continues to be reviewed due to the high number of requests for EHC assessments. It had recruited 24 additional Special Educational Needs caseworkers. And its Educational Psychology service has increased its capacity to complete statutory advice by employing locums and trainees.

Service improvements following this report

53. The Council should reflect on the above service improvements it recently agreed to make and, within three months of the date of this report provide us with:
- confirmation of the steps it has taken to remind officers the statutory guidance allows parents to give their views and make representations about a draft amended plan. And where a parent suggests changes the council agrees, it should amend the draft and issue the final EHC plan as quickly as possible, and within the statutory deadlines.

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- an update of the number of any outstanding EHC assessments, annual reviews and draft amended plans, and the timetable for finalising this work.
 - confirmation the Director of Children’s Services and the Lead Member for Children’s Services have reviewed whether the resourcing of the SEN team is now sufficient to allow it to carry out its current workload within the statutory timescales.
 - confirmation the Director of Children’s Services and the Lead Member for Children’s Services have reviewed the details of the SEN Recovery plan.

Final decision

54. We have completed our investigation into this complaint. We found fault by the Council. The action we have recommended, as set out in paragraphs 48,49 and 53 is a suitable remedy for the injustice caused.