

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

**Investigation into a complaint against
Essex County Council
(Reference number: 16 014 971)**

3 November 2017

The Ombudsman's role

For 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 X	The complainant
B	Her son

Report summary

Education and Children's Services - alternative provision, special educational needs and Education, Health and Care (EHC) Plans

Mrs X complains the Council failed to provide her son with a suitable alternative education following his exclusion from school in 2014.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused to Mrs X and B by the Council's failure to deliver a suitable alternative education, we recommend within three months of our report the Council:

- Apologise to Mrs X for its failings.
- Pays Mrs X £2,400, this is £1,200 a term from the date we consider the Council should have acted to ensure the education B received was suitable. It should be used for B's educational benefit to meet the cost of education provision or items that support education and training for B, outside of that identified in the EHC Plan. The Council and Mrs X should agree how the money is used.
- Pays Mrs X £500 to recognise the extra strain she was placed under and to recognise her time and trouble in consistently complaining to the Council about the suitability of B's home education.
- Reviews its procedures to ensure it monitors the suitable alternative education put in place for those out of school.

To remedy the injustice caused to B by the Council's delays in the EHC Plan process we recommend within three months of our report the Council:

- Pays Mrs X a further £900, to be used for B's educational benefit as above. This is to recognise B has missed a significant period of special educational needs provision that B could have expected to receive from November 2015 at the latest, had the Council completed its transfer of B's EHC Plan without delay.
- Improves its procedures to ensure it acts on changes in the circumstances of children with Special Educational Needs (SEN) and holds emergency reviews where necessary.
- Takes action to ensure it completes the EHC Plan transfer process within the required 18 weeks.

The Council has agreed to our recommendations.

The complaint

1. Mrs X complains the Council failed to provide her son with a suitable alternative education following his exclusion from school in 2014.

Legal and administrative background

The Ombudsman's role

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. We cannot investigate complaints about what happens in schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b)*)
4. The law says we cannot normally investigate a complaint when someone can appeal to a tribunal. However, we may decide to investigate if we consider it would be unreasonable to expect the person to appeal. The Special Educational Needs and Disability Chamber of the First Tier Tribunal is a tribunal that considers special educational needs. (*Local Government Act 1974, section 26(6)(a), as amended*)

Duty to arrange alternative education

5. Under section 19 of the Education Act 1996, if a child of compulsory school age (between 5 and 16 years old) cannot attend school for reasons of illness, exclusion from school or otherwise, the council must arrange to provide 'suitable education'. This can either be at school or elsewhere.
6. The term 'suitable education' is defined as efficient education suitable to the child's age, ability and aptitude and to any special educational needs they may have.
7. The education arranged by the council must be full time, unless, in the interests of the child, the council considers part time education more suitable. This would be for reasons relating to the child's physical or mental health.

Statements of Special Educational Needs (SEN) and Education, Health and Care Plans (EHC Plans)

8. A child with special educational needs may have a Statement of Special Educational Needs (a Statement). The Statement or EHC Plan sets out the child's needs and what arrangements should be made to meet them.
9. From September 2014 to April 2018, all children with Statements will transfer to an EHC Plan. This is a legal document which sets out a description of a child's needs (what he or she can and cannot do). It says what needs to be done to meet those needs by education, health and social care.
10. Statements remain in force until the council has completed the EHC Plan. When transferring a child from a Statement to an EHC Plan, the council must finalise the EHC Plan within 18 weeks of the transfer review.
11. The council must ensure the special educational provision specified in the Statement or EHC Plan is provided to the child. (*Education Act 1996, section 324(5)(a)(i) and Children and Families Act 2014, section 42*)

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12. The council must review all Statements and EHC Plans at least yearly. The Annual Review looks at the progress the pupil has made over the last 12 months and whether the Statement or EHC Plan needs any amendments. The 2001 and 2014 Special Educational Needs Codes of Practice say where a school identifies a pupil with a Statement or EHC Plan is at serious risk of disaffection or exclusion, or when their special educational needs change, an interim or early review should be called.
 13. If the council decides to issue an EHC Plan it must first issue a draft for the parents or young person to consider. The council does not have to provide exactly what the parents request but it should be able to explain why the EHC Plan meets the needs of the child.
 14. We cannot change a Statement or EHC Plan if a parent disagrees with a council's decision; only the Special Educational Needs and Disability First Tier Tribunal (the Tribunal) can do that.
 15. If someone has appealed to a tribunal, we cannot investigate a complaint about the matters subject to that appeal. We can look at any delay in the assessment and creation of an EHC Plan as well as any failure by the council to deliver the provision within an EHC Plan.

How we considered this complaint

16. We have produced this report following the examination of relevant files and documents.
17. We gave the complainant 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.
18. 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.

What we found

What happened

B's exclusion from School

19. Mrs X is the mother of B who has severe learning difficulties. B began attending a school for children with severe learning difficulties, the School, in October 2010. In March 2014 B's Statement was reviewed. The Council identified no change in B's needs and proposed no changes to B's Statement.
20. In mid June 2014 the School called Mrs X and said it was struggling with B's behaviour. Mrs X went to the School and took B home. B did not return to the School the next day. A Social Worker from the Council called the School to check if it had excluded B. The School said it had not and it had expected B to return.
21. The School met with Mrs X a few days later. Mrs X said the School was not meeting B's needs and she wanted him to socialise with other children. The School reiterated its strategy for B and Mrs X agreed for B to return the next day. However, Mrs X then left the meeting before it ended. Following the meeting Mrs X wrote to B's Head Teacher and said she would not allow B to return to the School.

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22. The School wrote to Mrs X in early July 2014 to confirm it had not excluded B. Mrs X attended another meeting with the School at the end of July. At the meeting Mrs X and the School agreed a plan of how to communicate with each other about B's education and for B to return following the summer holidays.
 23. B returned to the School in September 2014 however B's behaviour again began to decline. The School met with Mrs X in late October 2014. The School said B could not currently access education at the School as he posed a danger to himself and others. The School temporarily excluded B and said it would review matters following the exclusion. While B was temporarily excluded the School was responsible for his education.
 24. The School wrote to Mrs X confirming it had excluded B until late November 2014. B did not return to the School following the exclusion.
 25. The Council arranged a Planning Alternative Futures for Hope meeting (known as PATH) five days after B's exclusion. At the meeting the Council agreed to approach a care provider to educate B at home for two mornings a week up until Easter 2015 when the Council would review B's educational provision again.

B's education at home from the Care Provider

26. The Council identified a care provider and they met B at the end of December 2014. The Care Provider began working with B at home on 5 January 2015. B's timetable was for two four-hour sessions a week with a plan to increase to full time in the future. The Care Provider met with the School on 21 January 2015 and the School agreed to provide educational resources to support B's provision.
27. B's Annual Review of his Statement was due at this time; however the Review did not take place.
28. On 23 February 2015, Mrs X complained to the Council about B's education. She said:
 - The Council had not responded to her request for an EHC Plan and B's Statement was out of date.
 - The School had unlawfully excluded B and made no attempt to help him return.
 - The School had not provided any resources to the Care Provider and B was not receiving a suitable alternative education.
29. The Council met with Mrs X at the beginning of March 2015 to discuss her complaint. The Council then asked an independent Head Teacher from another school to visit B and Mrs X and carry out a review of the education B was receiving.
30. The Council said:
 - It had received no formal request to transfer B's Statement to an EHC Plan from the School or Mrs X until now. It agreed to reassess B.
 - It would liaise with Mrs X over B's medical appointments and include the most current assessments.
 - It was satisfied B was receiving a suitable alternative education.
31. Mrs X called the Council twice in March 2015. She said she was still not happy with the education B was receiving.

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32. At the end of April 2015 the Council appointed an independent Head Teacher to meet with B and Mrs X. The Head Teacher concluded:
- B needed a thorough assessment as his needs could not be met by routinely available educational provision.
 - B's EHC Plan should include Speech and Language, Social Care and Educational Assessments.
 - The Care Provider had the potential to be suitable but this would need input from the School and the Provider's staff would need to be trained.
 - The Council should put significant checking and evaluation in place.
33. Following this, the School visited B to see the provision in place. The School then put in place an extra morning's provision and recorded B's progress.
34. On 12 May 2015 Mrs X emailed the Council to complain B's education was no further forward. She said B still did not have an EHC Plan or a suitable alternative education in place. The Council agreed it needed to assess B and had waited too long for information from B's hospital. The Council agreed to resolve the identified issues.
35. The School and the Council met on 21 May 2015 to discuss B's programme and how they could improve B's educational outcomes. They agreed an EHC Plan transfer meeting for 16 July with the aim of an EHC Plan that would reflect the most recent information and for B to return to full time education.
36. At the beginning of June 2015 the Care Provider took part in sensory integration training. Mrs X called the Council two weeks later to say B's new hospital reports were available for the EHC Plan. She again said the Care Provider remained reluctant to do activities with B.
37. On 25 June 2015 the School emailed the Council following its monitoring of the Care Provider. It said the Provider was not a viable long term option to meet B's needs and the education was not effective. The School proposed using a member of its own staff to fill the post from September 2015 alongside another member of support staff.

B's return to School

38. B's EHC Plan transfer review meeting took place on 16 July 2015. On 7 September 2015 B started receiving education from a member of the School's teaching staff and a member of staff from the Care Provider. The Council spoke to Mrs X on 24 September 2015. Mrs X said B's education was more structured. The Council agreed to review the provision at half term.
39. The Council issued the Final EHC Plan on 9 February 2016. The EHC Plan named the School as B's placement but made reference to B's bespoke home education. The Council sent a covering letter with the EHC Plan telling Mrs X of her right of appeal.
40. Mrs X complained again to the Council in March 2016. She said while the Council had reviewed B's education it remained inadequate. There had been no increase in B's hours of education from part time and she wanted an EHC Plan review. Mrs X also said she had been carrying out B's education and wanted the Council to pay her for this. The Council said it had regularly reviewed B's hours of learning with Mrs X since September 2015 and any disagreement with the content of the EHC Plan was appealable to the Tribunal. It did not uphold Mrs X's complaint and referred her to us if she remained unhappy.

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41. The School met with Mrs X in early June 2016 and proposed B return to the School part time from September 2016. Mrs X agreed and B returned to the School four mornings a week from September 2016. Throughout the term Mrs X continued to ask the Council for B to return to full time education and to pay her for educating B at home. The Council said B's education remained under review and it would not pay Mrs X for B's time at home.
42. There was an Annual Review of B's EHC Plan in January 2017. The School reported B had made excellent progress and it would look to increase B's hours after half term. Mrs X remained unhappy and complained to us.

Analysis

B's exclusion from School

43. When Mrs X took B home from the School in mid June 2014 she says she was told not to bring him back. The School clarified on several occasions that it had not excluded B and it was expecting B to return. Mrs X then wrote to the School saying she did not want B to return as she did not feel it could meet his needs. The Council was aware of B's absence and liaised between Mrs X and the School to agree B's return to the School following the summer holidays. The Council took steps to ensure B returned to education as soon as possible. The Council is not at fault.
44. Shortly after returning to the School in September 2014 B was temporarily excluded. The School wrote to Mrs X and told her of her right to review the decision which she did not use. The Council is not responsible for B's exclusion or education while excluded for a fixed term. However, following the PATH meeting in November 2014 the Council and the School agreed B's special educational needs meant he could not return to the School. The Council then had a duty to ensure B received a suitable alternative education.

Part time education

45. Mrs X says the Council had a duty to provide B with a full time education. The Education Act says the Council could provide B with a part time education if it was in B's interests. Following the PATH meeting the Council decided B's learning difficulties meant B could not cope with a full time education. Information from B's doctor and an Educational Psychologist supported this decision. The Council was entitled to reduce the hours of B's education and is not at fault.

B's education at home from January 2015 to July 2015

46. While the Council was entitled to provide B with a part time education it had a duty to ensure the education was suitable. The Council arranged for the Care Provider to deliver B's education, supported by the School. During this time Mrs X frequently contacted the Council to complain the Provider was not delivering a suitable alternative education.
47. In April 2015 the independent Head Teacher told the Council B's provision was not suitable and what it needed to do to provide B with a suitable alternative education but the provision remained unchanged. In June 2015 the School told the Council the Provider could not meet B's needs.
48. This was the first time B's educational provision had been assessed, and there had been no changes in the provision since the Care Provider started working with B. We therefore conclude B's education was not suitable from January 2015.

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49. The Council failed to ensure B received a suitable alternative education from January to July 2015 during the time it arranged for the Care Provider to deliver his education. The Council did not act on Mrs X's concerns and did not monitor B's progress or put measures in place to work towards the goal of B's return to full time education. This resulted in B missing two terms of education and the full SEN support required by his Statement, which he was entitled to receive. This is fault.

B's education from September 2015

50. In September 2015 the School changed the way it delivered B's education. With a member of the School's teaching staff delivering B's education at home his progress was monitored and all parties reported an improvement.
51. B then returned to the School in September 2016 and the School increased B's education to four mornings. Mrs X is not happy that B remains in part time education. B's reports all show he is making progress towards this goal and the Council remains satisfied the provision is suitable. This appears to be supported by B's learning journal and progress reports from the School. The School remains in dialogue with Mrs X about the ongoing suitability of B's education.

B's Annual Review and EHC Plan

52. B had an Annual Review of his Statement in February 2014. In November 2014 the Council decided B would not be able to return to the School until at least Easter 2015. At this point B's needs had changed significantly and he was at serious risk of disaffection or exclusion. The Council failed to carry out an early review of B's Statement. Mrs X also asked for an EHC Plan assessment in March 2015 and the independent Head Teacher recommended an assessment in April 2015.
53. The Council did not carry out a review and begin B's assessment until July 2015, 17 months since the Council's last review of his Statement. Following this review and the Council's decision to move B to an EHC Plan, the Council had until November 2015 to issue B's final EHC Plan. The Council did not issue B's final EHC Plan until February 2016. The Council delayed in reviewing B's needs and then delayed in completing B's EHC Plan within the statutory deadline. This is fault.
54. Had the Council carried out the early review in November 2014 or acted on Mrs X's request for an EHC Plan in March 2015, and kept to the required EHC Plan timescales, it is likely the additional provision in B's EHC Plan would have been in place by November 2015 at the latest, not February 2016.
55. The law says we cannot investigate matters which are "*inextricably linked*" to any Tribunal appeal. Therefore we cannot investigate matters such as the content of the EHC Plan. Mrs X had a right of appeal over the content of the EHC Plan if she disagreed with it but chose not to use this. However, we can look at any injustice caused because of the Council's delay to provide the contents of the EHC Plan.
56. B's EHC Plan is a lot more detailed than his Statement. It includes provision for needs not included in the Statement such as:
- Emotional regulation, Sensory and Behaviour Needs.
 - Speech and Language.
 - Attention and Listening Skills.

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57. Because of fault by the Council there was a 10-month delay in B's right to receive this additional provision set out in his EHC Plan.

Conclusions

58. From January 2015 to July 2015 (two terms) the evidence from the independent Head Teacher and the School shows B did not receive a suitable alternative education.
59. From November 2015 to February 2016, due to delay by the Council in transferring B to an EHC Plan, B did not receive the special educational needs support later identified in his EHC Plan.
60. B suffers from severe learning difficulties. Since receiving the provision in his EHC Plan and returning to a structured, monitored education, B has progressed significantly. The independent Head Teacher and the School both recognised the benefit of providing B with a planned structured education in Spring 2015 and the Council failed to provide this until September 2015.
61. During this time there was also an impact on Mrs X. Mrs X says the Care Provider consistently looked to her for support in providing B's education in 2015. She says she found herself designing her own activities and education for B. When staff from the School began educating B at home in September 2015 Mrs X no longer needed to do this. If the correct support had been in place from January 2015 the impact on Mrs X would have been less and she has suffered a disadvantage as a result.

Recommendations

62. To remedy the injustice caused to Mrs X and B by the Council's failure to deliver a suitable alternative education, we recommend within three months of our report the Council:
- Apologise to Mrs X for its failings.
 - Pays Mrs X £2,400, this is £1,200 per term from the date we consider the Council should have acted to ensure the education B received was suitable. It should be used for B's educational benefit to meet the cost of education provision or items that support education and training for B, outside of that identified in the EHC Plan. Its use is to be agreed by the Council and Mrs X.
 - Pays Mrs X £500 to recognise the extra strain she was placed under and to recognise her time and trouble in consistently complaining to the Council about the suitability of B's home education.
 - Reviews its procedures to ensure it monitors the suitable alternative education put in place for those out of school.
63. To remedy the injustice caused to B by the Council's delays in the EHC Plan process we recommend within three months of our report the Council:
- Pays Mrs X a further £900, to be used for B's educational benefit as above. This is to recognise B has missed a significant period of special educational needs provision that B could have expected to receive from November 2015 at the latest, had the Council completed its transfer of B's EHC Plan without delay.
 - Improves its procedures to ensure it acts on changes in the circumstances of children with SEN and holds emergency reviews where necessary.

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- Takes action to ensure it completes the EHC Plan transfer process within the required 18 weeks.
64. The Council has agreed to our recommendations.
65. 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 or Cabinet and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

66. We have found fault by the Council which caused injustice to Mrs X and B. The Council has agreed to take the action identified in paragraphs 62 to 63 to remedy the injustice.