

The Ombudsman's final decision

Summary: Ms C complained about the Council's failure to ensure her child was provided with a suitable education when she was unable to attend school for health reasons. We find there were several faults in the Council's actions in this matter, leading to injustice for Ms C. A remedy has been agreed.

The complaint

1. The complainant, whom I shall call Ms C, complained the Council failed to arrange education for her child, B, from 23 March 2019 when she became too unwell to attend school due to anxiety. Ms C reports that in addition to lack of education this caused B's mental health to suffer because of uncertainty, and the family has been caused considerable stress and worry, as well as financial expenditure on online tuition, plus time and trouble seeking to have the matter satisfactorily resolved.

What I have investigated

2. I have exercised discretion to investigate the Council's action in respect of the provision of education for B since April 2019. While Ms C did not complain to the Ombudsman until September 2020, there is evidence Ms C was trying to reach agreement with the Council in the preceding period, and the impact of Covid-19 restrictions during this time was also an appropriate consideration.

The Ombudsman's role and powers

3. 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*)
4. If we are satisfied with a council'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*)
5. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council/care provider has done. (*Local Government Act 1974,*

sections 26B and 34D, as amended). In this case, as set out above, I have exercised discretion to investigate.

6. 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. (*Local Government Act 1974, section 26(6)(a), as amended*)
7. We cannot investigate a complaint if someone has appealed to a tribunal. (*Local Government Act 1974, section 26(6)(a), 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.

How I considered this complaint

9. I considered all the information provided by Ms C about her complaint. I made written enquiries of the Council and took account of the information it provided in response.
10. Ms C and the Council had an opportunity to comment on my draft decision.

What I found

Legal and administrative information

11. The Education Act 1996 (Section 19) provides the basis for statutory guidance. This states that education authorities must make suitable educational provision for children of compulsory school age who are absent from school because of illness, exclusion or otherwise. The provision can be at a school or otherwise, but must be suitable for the child's age, ability, and aptitude, including any special needs.
12. Statutory guidance, 'Alternative Provision', published in January 2013, sets out that such provision should start as quickly as possible and enable pupils to achieve on a par with mainstream children. Further statutory guidance, 'Education for children with health needs who cannot attend school' published in May 2013, states that, while there is no legal deadline to start provision, it should be arranged as soon as it is clear a child will be absent for health reasons for more than 15 days. It also states that some forms of provision, such as one-to-one provision, which is intensive, need not be full-time.
13. The Council's policy in relation to the education of pupils with medical needs includes the following:

"The school's co-ordinator for children with medical needs will take an active and continuing role in their educational, social and emotional progress. The school will at all times aim to work in partnership with parents to ensure the best possible outcomes and a return to school as soon as possible. Where a child's health condition requires an extended period of absence from school, the school may need to seek the assistance of the Springboard Service. Staff at the service, including hospital tutors, will support pupils who are temporarily unable to attend classes on a full-time basis. These pupils may be:

 - (a) Children who have been deemed by a medical practitioner as being too ill to attend the school for more than 15 days or who have conditions which lead to recurrent absences from school which becomes significant in the longer term;
 - (b) Pupils with mental health problems who are unable to attend school.

.... The aim of Springboard will be to support the school in its work to reintegrate pupils into full time education at the earliest possible opportunity. In the greatest number of cases this means a return to mainstream education....The school will do all that it can to fully implement Croydon's policy on the education of children and young people with medical needs".

14. The Council commissions Springboard to provide services for schools in cases of education other than at school.

What happened in this case

B stops attending school

15. Ms C's child, B, was diagnosed with autistic spectrum disorder in February 2019. when she was in Year 9 at school. From 25 March 2019 she was unable to attend school due to anxiety. In light of this, on 9 April 2019 Ms C complained to her MP that she was worried about B's education. She referred to the fact that B had been out of school since 25 March.

The Council is advised B is out of school

16. The MP passed the complaint to the Council on 17 April, and it replied to the MP the same day, but made no reference to what it would put in place in terms of education for B.
17. Ms C then approached a councillor and her enquiry was passed to relevant officers at the Council on 8 July. When it responded the Council said it had first been aware that B was out of school when Ms C had emailed it on 30 April saying B had been unable to attend school since 25 March due to anxiety. That was not correct however as the Council had received this information from the MP on 17 April. The Council made a further error in respect of this when, in the first stage complaint response, it said that Ms C had not informed it until 8 May that her child was out of school. These errors were fault.

Referral for alternative provision

18. The Council says that on 3 May 2019 Ms C met with its officers, and following this it liaised with the school which arranged for an educational psychologist to carry out an assessment. On 21 May there was a further meeting at which it was agreed a referral would be made to Springboard for alternative provision from Provider X, which the Council says is a long-term full-time education provision for young people who want to attend school regularly, but whose mental health is such that makes their regular attendance at a mainstream school not possible. The referral was not made until 9 July 2019.
19. The Council has set out the following chronology:
- On 9 July 2019 there was a meeting at which Springboard set out a proposed integration plan for September. The Council says this included some tuition online over the 'end of summer term', but the academic year was almost at a close at this point.
 - On 16 September 2019 the school noted that due to a need for a more careful integration and a slower start, B was still only looking to complete online provision.
 - On 27 September 2019 Ms C advised Springboard she did not want to accept the online tuition offered because she had already paid for an online package, which B was engaging well with.

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- On 24 October 2019 Springboard advised the school that the referral for services had not been progressed due to Ms C refusing what had been offered. The Council says the school should have liaised with Ms C at this point to support next steps.
20. The Council says it has seen evidence held by Springboard to support the above chronology. It has not provided such evidence to me despite requests to do so, and responsibility for this remains with the Council since Springboard is carrying out services on its behalf.
21. In July 2019 Ms C asked the Council to assess B for an Education, Health and Care (EHC) plan. I will deal with this issue separately, later in this statement.

Ms C arranges and pays for online GCSE tuition

22. From September 2019 Ms C arranged and paid for online GCSE tuition for B, on the basis that no suitable education programme had been offered or provided by the Council. She asked for financial reimbursement for this, which was refused. She reports that in September 2020 she was offered a one-hour weekly maths tutorial with a learning support assistant. Around the same time in a response to Ms C's MP the Council said that Ms C had refused services from Provider X, and that the school did not believe B should be at home and did not agree to fund her online courses or a link programme to a college (from which the available offer was only one day a week, in animal care).

The Council's duties in respect of education other than at school

23. The Council's view was that as B remained on the school roll, and did not have an Education, Care and Health plan, she remained the responsibility of her school. However, as noted in the Ombudsman's published focus report 'Out of School...out of mind?':
- “Section 19 of the Education Act 1996 says that 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 local authority must make arrangements to provide 'suitable education' either at school or elsewhere – at home, for example. The term 'suitable education' is defined as efficient education suitable to the child's age, ability, and aptitude and to any special educational needs he or she may have. The education to be arranged by the local authority should be on a full-time basis, unless, in the interests of the child, part-time education is considered to be more suitable. This would be for reasons relating to the child's physical or mental health....
- Local authorities need to ensure children with health problems are not without education for more than 15 working days. So, if a child cannot attend school because of a health problem, after 15 days the council must intervene and provide suitable education for a minimum of five hours a week. The teaching must be of a similar quality to that which the child would receive in school, based on a broad and balanced curriculum. Where a council contracts out the service, it remains accountable for the quality of education. Councils must also regularly review what is being offered and adjust the number of teaching hours if necessary. Children's needs change and their education should reflect this. So, as a child's health improves, the hours can normally be increased”.

No evidence of appropriate action taken

24. For the avoidance of doubt the Council was asked to provide a chronology setting out all educational provision offered to B in the period from April 2019 to September 2020, identifying whether the provision was at home or on a site, the number of hours and frequency. Responding, the Council set out the actions

referred to in paragraph 19 above, which refer only to the period ending October 2019, and nothing beyond this. The Council has noted there should have been liaison between itself and the school, and says it does not appear that there was a named officer responsible for this over the past year. The lack of evidence of steps taken by the Council to ensure that any education offered was suitable in terms of quality, quantity, and the needs of the child, is fault.

Information security issue

25. The Council has indicated that some relevant information, which cannot currently be accessed, may be held on the personal emails of one of its officers. This would be fault, and calls into question the Council's information security practices.

The question of funding the online tuition

26. Throughout the 2019/2020 academic year B received her education via the online programme Ms C had arranged and paid for.
27. In November 2020, the Council's education resource panel considered Ms C's request for a package of funding for B to complete her online GCSE tuition programme. The record from the panel meeting sets out the view that the Council was not responsible for funding until an EHC plan was completed, and that as the school had delegated funding it should be able to support B's education. This was an opportunity for the Council to look at whether it had fulfilled its responsibilities in the previous academic year, but there is no evidence that it did so.

The Education, Health and Care plan

28. As noted in paragraph 21 above, Ms C had asked for assessment for an EHC plan for B in July 2019. That request was refused. Ms C had the right of appeal to the SEND Tribunal, but did not exercise that right.
29. In May 2020 a further request for assessment was made, and this was again refused. On this occasion Ms C exercised her right of appeal. However, in July 2020 the submission of advice from an educational psychologist was treated as a new request for assessment and the Council then agreed to assess.
30. The final amended EHC plan was issued in February 2021, naming B's current school until the end of July 2021 and a college from September 2021. Ms C has appealed to the SEND Tribunal in respect of this EHC plan.

Some funding is agreed

31. In December 2020 the Council agreed to fund B's online tuition from September 2020. It says it did so as a gesture of goodwill, having no responsibility to fund provision put in place before the date of the EHC plan.

Analysis

32. When considering complaints, if there is a conflict of evidence, we make findings based on the balance of probabilities. This means that we will weigh up the available relevant evidence and base our findings on what we think was more likely to have happened.
33. As identified in this statement there were several faults by the Council in this matter. Most significantly the Council is unable to evidence that it acted as it should have done to ensure B had an appropriate offer of education and that this was kept under review, and on balance it is more likely than not that it did not take such action.
34. In the circumstances, Ms C took reasonable action to arrange and fund her daughter's GCSE tuition in 2019/20. That incurred costs. In addition, Ms C was

caused distress and inconvenience and was put to avoidable time and trouble in pursuing the matter.

Agreed action

35. In recognition of the injustice arising from the identified faults in this case, I recommended that within four weeks of the date of complaint the Council:
- Refunds Ms C the cost of the online tuition she paid for in respect of the 2019/20 academic year;
 - Considers a claim for verified costs incurred in purchasing materials required to support that tuition, documents that consideration, and provides a refund for any such costs deemed reasonably incurred;
 - Pays Ms C a further £500 in acknowledgment of distress and time and trouble; and
 - Issues her with a formal written apology.
36. In addition, I recommended that within three months of the date of the decision on this complaint the Council:
- reviews lessons learned from the complaint;
 - draws up and implements a plan, with timescales, to ensure so far as possible that the faults identified by this investigation do not recur.
37. The Council should provide evidence of the above actions to the Ombudsman.
38. The Council has agreed to my recommendations.

Final decision

39. I have completed my investigation on the basis set out above.
40. 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](#) final decision with Ofsted.

Parts of the complaint that I did not investigate

41. For the reasons set out on paragraphs 6-8 above I did not investigate the Council's refusal to conduct an EHC assessment in 2019 or in 2020. This is because Ms C had a right of appeal to the SEND tribunal about those decisions. Although she did not exercise that right in 2019, it would have been reasonable for her to have done so, and in 2020 when the second decision to refuse was given, she exercised that right.

Investigator's decision on behalf of the Ombudsman