

The Ombudsman's final decision

Summary: the Council did not consider its duty under s19 of the Education Act 1996 to make alternative arrangements for B's education when Ms M said he was too ill to attend school. Further, this appears to be a wider problem as we have investigated a similar complaint before. The Council has accepted our recommendations.

The complaint

1. Ms M complains her son, B, did not receive suitable education when he became too ill to attend school in September 2021.
2. Ms M complains the Council did not obtain the specialist advice she requested to inform B's Education, Health and Care (EHC) Plan.

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. We cannot investigate a complaint if someone has appealed to a tribunal about the same matter. (*Local Government Act 1974, section 26(6)(a), as amended*)
5. 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.
6. 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*)

How I considered this complaint

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

What I found

8. Ms M's son, B, found the transfer to secondary school in September 2021 very difficult and his attendance declined rapidly.
9. In November 2021, B's doctor said he was unfit to attend school.
10. Ms M asked the Council to undertake an EHC needs assessment in November 2021. The Council declined. Ms M appealed to the SEND Tribunal. During the appeal, the Council changed its mind and agreed to carry out the assessment.
11. The Council undertook an assessment and issued an EHC Plan. The Plan says B will attend an independent special school. He joined the school in September 2022.
12. Ms M is unhappy with the Plan and has appealed to the Tribunal. Ms M has appealed section B (the description of B's special educational needs) and section F (the special educational provision required to meet them). The final hearing was scheduled for July 2023.

Ms M's complaint to the Council

13. Ms M complained to the Council on 20 September 2022, shortly before the Council issued B's final EHC Plan. She complained the Council had not obtained the specialist advice she requested to inform B's EHC needs assessment. She was concerned the Plan would not reflect B's needs.
14. The Council responded to Ms M's complaint at the first stage of its complaints process on 4 November 2022. The Council explained why it had not obtained the advice Ms M requested.
15. Unhappy with the response, Ms M asked the Council to respond at the second stage of the complaints process on 15 November 2022. She explained why she disagreed with the Council's response. She also complained the Council had not fulfilled its legal duty to provide education for B for many months.
16. The Council responded by letter on 15 February 2023. The Council offered further explanation for its decisions concerning the advice Ms M had requested for B's EHC needs assessment. The Council acknowledged that B had been out of education 'for some time' but said this was a matter for a different service. The Council said it would ask the Education Welfare Service to respond separately.
17. Unhappy with the Council's response, Ms M complained to the Ombudsman.

Complaint 1: B's education from September 2021

18. Ms M complained the Council failed to make alternative arrangements for B's education when he became too ill to attend school.

What happened

19. Ms M says she telephoned the Council's Attendance Service in September and October 2021 to ask for help because B was refusing to go to school. She says she told the Council's SEN service that B was not attending school when she asked the Council to carry out an Education, Health and Care Needs assessment in November 2021. Ms M says the Council did not offer any help.
20. In response to Ms M's complaint, the Council explained the education welfare service in Croydon is a 'traded service' and operates independently from the Council. The Council explained that schools commission education welfare services themselves. The Council said Ms M should complain directly to the school, not the Council.

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21. This caused me concern.
 22. Schools have a significant role to play, but they are not solely responsible. 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”.
 23. 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)*)
 24. The Government has issued statutory guidance which Councils must follow unless they have good reason. (*Ensuring a good education for children who cannot attend school because of health needs, issued by the Department for Education in January 2013*)
 25. The Local Government Ombudsman has also issued guidance to councils on how we expect them to fulfil their responsibilities to provide education for children who, for whatever reason, do not attend school full-time. (*Out of school... out of sight? Ensuring children out of school a good education, published in July 2022*)
 26. I made further enquiries to find out how the Council fulfils this duty.
 27. I asked how the Council identifies pupils to whom it owes the duty.
 28. I asked whether the Council had satisfied itself B’s school had made suitable arrangements for his education when he was too ill to attend school.
 29. This is important since the Government guidance says Councils must work closely with schools to identify children who need the Council to make alternative arrangements for their education. Councils must consider the individual circumstances of each particular child and be able to demonstrate how they made their decisions.
 30. The Council told me again that education welfare was a traded service and suggested I ask the school for information about B’s case.
 31. The Council said the only involvement it had with B’s case was in May 2022 when an *early help worker* made a referral to the Access to Education team asking for support. The Council met with B’s school, but decided the Access to Education team would not ‘add value’ since there were already 17 professionals involved. The Council invited the school to make a fresh referral once the number of professionals involved had decreased. The Council says the school did not make further contact.
 32. This did not answer my questions, so I asked the Council to send any policies the Council has concerning provision for children who are unable to attend school due to medical or health needs. I asked for information and policies for both parents and schools since there was no information on the Council’s website.
 33. The Council sent two documents. The first, the terms of reference for the “Missing Monday” panel, concerns children who go missing from education. The emphasis is on safeguarding children from harm and making referrals to the Police. The second, “Croydon Council. A staged approach to improving school attendance” sets out a three-stage approach for schools to manage poor attendance. The process culminates in prosecution by the Council.

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34. Neither document mentions children who are unable to attend school regularly because of illness or health reasons. Neither mentions the Council's duty in s19 of the Education Act to make alternative arrangements for a child's education.
35. While the Council has responded helpfully to my enquiries, it does not appear the Council has considered its duty under s19 of the Education Act 1996 to make alternative arrangements for B's education.
36. This is fault.
37. Further, the officers dealing with B's absence from school, and responding to my enquiries, do not appear to have been aware of the Council's policy and procedures relating to this duty. The Council sent its policy in response to my draft decision and confirmed it had recently published the policy on its website and circulated a copy to the relevant officers. I welcome the Council's response.
38. Where we find fault, we consider the impact on the complainant. We refer to this as the injustice. We may recommend a remedy for injustice that is the result of fault by the Council.
39. The Council should have assessed whether B was receiving suitable education when Ms M reported concerns in September 2021. The Council should have contacted B's school to find out what arrangements the school had made and decided whether or not they were suitable.
40. B was clearly having a difficult time, and without the assessments the Council should have conducted at the time, it is difficult to say now whether he would have benefitted from alternative education provided by the Council. This uncertainty is a further injustice.
41. From September 2021, when Ms M first reported problems to the Council, until September 2022 when he transferred to an independent special school, the Council failed to consider whether B was receiving suitable education.
42. I understand B was referred to "Springboard", a medical needs tuition service funded by the Council, where he received some tuition from July 2022. The Council does not appear to have been involved in the referral.
43. The Council has a duty to make alternative arrangements for a young person's education if he would not otherwise receive suitable education. The Council remains responsible even if it relies on others, such as a school, to act on its behalf. We drew attention to this in the [report](#) of our investigation of a complaint against Cornwall Council.
44. I have recommended a remedy for the injustice caused by the Council's failure to ensure B received a suitable education when he was too ill to attend school. My recommendations are at the end of this statement.

Complaint 2: advice to inform B's EHC Plan

45. Ms M complains the Council failed to obtain advice she requested to inform B's Education, Health and Care (EHC) Plan. As a result, she does not believe the Plan adequately describes B's special educational needs in section B or the provision required to meet them in section F.
46. Since making her complaint, Ms M has appealed these points to the Tribunal. She made a detailed submission in which she set out evidence to support her view the assessments she requested are necessary.
47. We cannot investigate a complaint if someone has appealed to a tribunal about the same matter.
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48. As Ms M has appealed to the Tribunal about the assessments she requested, we cannot investigate her complaint. The Tribunal will decide whether the assessments are necessary.

Agreed action

49. 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.
50. We can also make recommendations to ensure similar faults do not happen in the future. The Council assured us in August 2021 that it would “learn lessons” following our investigation of a similar complaint. Regrettably, that does not appear to have improved matters for B.
51. I recommended the Council:
- a) apologises to Ms M and B for its failure to consider whether B was receiving suitable education between September 2021 and September 2022;
 - b) offers a symbolic payment of £5,000 to recognise the Council’s failure to ensure B received suitable education.
 - c) refers my decision to the relevant scrutiny committee and develops an action plan to ensure the lessons learned from this and the previous complaint are ‘embedded’. The scrutiny committee should monitor the implementation of the Council’s action plan.
52. I recommended the Council makes the apology and payment within six weeks of my final decision. The Council should refer my final decision to the next meeting of the relevant scrutiny committee and provide evidence (such as the minutes of the meeting) showing the action the Council plans to take.
53. The Council should provide us with evidence it has complied with the above actions.
54. The Council accepted my recommendations.

Final decision

55. I have completed my investigation as the Council accepts my recommendations.

Investigator’s decision on behalf of the Ombudsman