

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

**Investigation into a complaint about
West Northamptonshire Council
(reference number: 21 018 799)**

15 February 2023

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

Mr and Mrs X	The complainants
J	Mr and Mrs X's child
S	J's sibling

Report summary

Education and Children's Services - Special educational needs (SEN) provision and education, health and care (EHC) plans

Mr and Mrs X complained the Council failed to support their child, J's, special educational needs and did not provide them with an appropriate educational placement for two years.

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*)

To remedy the injustice caused to J and Mr and Mrs X we recommend the Council:

- pay Mr and Mrs X £5,125 to be used for J's benefit to recognise the impact of the lost education on J and the effect on J's wellbeing;
- pay Mr and Mrs X £1,000 to recognise the distress and harm caused to J by the Council's failure to provide an appropriate school; and
- pay Mr and Mrs X a further £1,000 to recognise the frustration, distress, uncertainty and eroded trust in the Council caused to them.

To ensure the same faults do not happen again we recommend the Council:

- provide us with the confirmation of the approved budget for the specialist units and special school it has planned, to meet its sufficiency duty to provide educational provision for children with SEN;
- share the learning from this complaint with all staff members who are responsible for reviewing, amending, finalising and issuing EHC plans;
- remind relevant staff of the Council's powers and responsibility to name an appropriate school, or parental preference school in a child's EHC plan – especially where drift and delay is likely in finding an appropriate school placement; and
- remind relevant staff of the Council's duty to ensure special educational provision is being provided where it has delegated the provision to another body.

To put things right for others affected by the same issues we recommend the Council:

- review the consultation process for each of the eight children who are without an appropriate school placement and ensure the Council has taken all available action to secure an appropriate placement for each child. If the Council identifies any fault in its actions leading to injustice it should remedy it in line with our [guidance on remedies](#); and
- write to each of the eight children's parents or guardians. It should inform them that our investigation into a complaint from another family identified fault by the Council for failing to provide an appropriate school placement for a child. It identified their child may also have been affected by the fault and therefore it has reviewed their child's case to see if they were similarly affected. It should tell them the finding of that review and signpost the parent or guardian to us if they remain dissatisfied.

The Council has accepted our recommendations to remedy the complaint.

The complaint

1. Mr and Mrs X complained about the way the Council supported their child, J's, special educational needs. Mr and Mrs X complained the Council failed to:
 - review and amend J's Education, Health and Care plan since 2018;
 - provide a suitable educational provision for J since March 2020;
 - identify and provide an appropriate school place for J; and
 - provide an appropriate remedy or make the change it identified after it upheld Mr and Mrs X's complaint about the same.
2. Mr and Mrs X stated this caused J significant physical and mental distress and they missed two years of education. It also caused J's sibling and Mr and Mrs X distress and frustration.

What we have and have not investigated

3. We investigated matters from March 2019 until the end of July 2022.
4. We have not investigated events after July 2022. This is because Mr and Mrs X had the right to appeal to the special educational needs and disability (SEND) tribunal about J's EHC plan from July 2022. The law says we cannot normally investigate a complaint when someone can appeal to a tribunal about the same matter. (*Local Government Act 1974, section 26(6)(a), as amended*)
5. Mr and Mrs X started court action in relation to J's education from September 2022. The courts have said that where someone has used their right of appeal, reference or review or remedy by way of proceedings in any court of law, the Ombudsman has no jurisdiction to investigate. (*Local Government Act 1974, section 26(6)(a), as amended*)

Legal and administrative background

The Ombudsman's role and powers

6. 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*)
7. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
8. 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 decision with Ofsted.

Education, Health and Care plans

9. A child with special educational needs (SEN) may have an Education, Health and Care (EHC) plan. This sets out the child's needs and what arrangements should be made to meet them. The EHC plan is set out in sections. We cannot direct changes to the sections about education, or name a different school. Only the tribunal can do this.
10. The child's parent can request a particular school to be named on the EHC plan. The council must name that school in the plan unless:
 - it would be unsuitable for the age, ability, aptitude or SEN of the child; or
 - the child's attendance there would be incompatible with the efficient education of others, or the efficient use of resources.
11. A council can name a maintained school in a child's EHC plan if it believes it is an appropriate placement for that child. The school must admit a child if it is named on their EHC plan.
12. EHC plans must be reviewed every twelve months. Within four weeks of a review meeting, a council must notify the child's parent of its decision to maintain, amend or discontinue the EHC plan. If it decides to amend the plan, it should start the process of amendment '*without delay*'.
13. Following comments from the child's parent or the young person, if the council decides to continue to make amendments, it must issue the amended EHC plan as soon as practicable and within eight weeks of the date it sent the EHC plan and proposed amendments to the parents.

The SEND Tribunal

14. There is a right of appeal to the Special Educational Needs and Disability (SEND) Tribunal if a parent disagrees with the special educational provision or the school, or type of school named in their child's EHC plan. The right of appeal is only engaged when the final amended plan is issued.

Duty to secure provision

15. The council has a duty to secure the specified special educational provision in an EHC plan for the child or young person. (*Children and Families Act 2014, Section 42*) The courts have said this duty to arrange provision is owed personally to the child and is non-delegable. This means if a council asks another organisation to make the provision and that organisation fails to do so, the council remains responsible. (*R v London Borough of Harrow ex parte M [1997] ELR 62, R v North Tyneside Borough Council [2010] EWCA Civ 135*)
16. We recognise it is not practical for councils to keep a '*watching brief*' on whether schools are providing all the special educational provision for every pupil with an EHC plan. Councils should be able to demonstrate due diligence in discharging this important legal duty and as a minimum have systems in place to:
 - check the provision at least annually via the review process; and
 - investigate complaints or concerns that provision is not in place at any time.
17. Councils have a duty to keep under review whether the educational provision it makes for children with special educational needs in its area is sufficient. (*Children and Families Act 2014, Section 27*)

COVID-19 impact

18. In March 2020 the country was impacted by the COVID-19 pandemic and all schools closed to pupils, except the children of key workers and certain other groups of children. The government advised councils to complete a risk assessment in conjunction with the school to establish if a child with an EHC plan would be safer in a school setting than not. This measure was about safety rather than education. (*Coronavirus (COVID-19): guidance on vulnerable children and young people*)

How we considered this complaint

19. We produced this report after examining relevant documents.
20. 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.

What we found

What happened

21. J is a child of primary school age who lives at home with their sibling, S, and their parents Mr and Mrs X. J has Autism Spectrum Disorder and significant difficulty in communicating their wishes and needs.
22. The Council produced an EHC plan in March 2018 in preparation for J beginning primary school. The EHC plan set out what provision J needed to meet their needs and named the school they would attend. J began attending that school (School A) in September 2018.
23. School A held an annual review of the EHC plan in October 2019 and submitted the paperwork to the Council. It recommended the EHC plan should be maintained. The Council did not respond.
24. School A conducted another annual review meeting in January 2020. It told the Council J still needed an EHC plan but recommended some amendments to the outcomes J was aiming to achieve. The Council did not respond.
25. In March 2020 the country was impacted by COVID-19 and all schools closed to most pupils. Mrs X states School A did not allow J to attend. The Council did not complete a risk assessment with School A to consider if J should continue to attend during the COVID-19 lockdown.
26. The Council wrote to Mr and Mrs X in May 2020, referencing the January 2020 annual review meeting and said it would maintain the EHC plan.
27. In May 2020 the Council received two safeguarding referrals for J and their family. The concerns related to J's behaviour at home and the impact on their mental health and their sibling. A Council social worker contacted School A and requested J be allowed to return to school despite the lockdown. J returned for three days a week at the end of May. Both School A and Mrs X stated J had made good progress before lockdown and the lack of routine had a huge impact on J's wellbeing.
28. J returned to school full time in September 2020.
29. School A was concerned about J's needs and wellbeing and commissioned an independent educational psychologist's (EP) report. In April 2021 the report said J showed clear signs of distress when they were upset that made them particularly vulnerable, and so was often isolated in a separate room at school and therefore

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- was not learning. It stated J self-harmed at school when upset. The EP found J needed one-to-one support in a small, quiet room with no other children or a couple of quiet peers.
30. School A conducted an annual review meeting of J's EHC plan in June 2021. The review recorded J was injuring themselves daily while attending school through self-harm. It stated J was struggling to access any learning and had regressed in their personal care. School A said it could not provide the support J needed and recommended the Council offer an alternative provision. It sent the review and the EP report to the Council.
31. The Council sent Mrs X a draft amended EHC plan in September 2021. It added to the provision J required to meet their SEN. It stated *'both parents feel that reduced class size and more focused one to one support would allow [J] to take more part in [their] learning, however, both fully understand this is not possible for [School A] and as a result this is having a profound impact on [J]'s mental health, driving [them] to self-injury on a daily basis at school and [impact on their] ability to grow, develop or access any form of sustained education.'* The EHC plan still named School A as the educational placement.
32. The Council asked Mrs X to provide her comments on the draft within 15 days. Mrs X responded the following day and asked for a meeting to discuss the amendments.
33. School A met with the Council and Mr and Mrs X to discuss their concerns for J. School A reported J was spending all day in a room alone in school because they were distressed. It did not have enough staff members to work with J on a one-to-one basis. School A said it was not meeting J's needs *'in any way, shape or form'*. School A requested additional funding from the Council to employ a support assistant to work with J on a one-to-one basis while a suitable alternative was found. The Council agreed. The Council did not finalise the amended draft plan.
34. Mrs X complained to the Council in September 2021. She said the Council had failed to:
- provide the EHC plan in line with the timescales set out in the guidance;
 - respond to School A not being able to meet J's needs; and
 - respond to J self-harming as a result.
35. The Council responded to Mrs X's complaint in October 2021. It said:
- it had not met the deadline for issuing an amended EHC plan for J after the annual review and apologised;
 - its communication to Mrs X had been insufficient and apologised; and
 - the EHC officer would contact Mrs X on a weekly basis to update her on the progress in securing a school place for J.
36. The Council told us that between September 2021 and February 2022 it did not provide weekly updates to Mr and Mrs X, but made contact when there was information to share. Despite our requests the Council did not provide documentary evidence to support this.
37. The Council met with Mrs X and School A in February 2022. School A reported J was not accessing the curriculum and was not meeting the targets set in their EHC plan. The Council provided an update on the consultation process with other schools and said it was waiting for responses.

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38. In March 2022 School A held an annual review meeting for J's EHC plan. It referred to the amendments it suggested in May 2021. It stated a support assistant had started working with J, but J still struggled to access the classroom.
39. Mrs X complained to the Council again in March 2022. She said:
- the Council had not, and was not providing weekly updates as it stated it would in its earlier complaint response; and
 - J still did not have an appropriate school placement and had not received an education since April 2021.
40. The Council replied to Mrs X's complaint in April 2022. The Council:
- apologised it had not maintained weekly contact as agreed but stated it had provided regular updates by email; and
 - apologised that J was still without an appropriate school placement and stated it continued to look for one.
41. Mrs X's solicitor wrote to the Council in April 2022. They said there was no support assistant in place for J at school and asked the Council to:
- name School B on a temporary basis in J's EHC plan; and
 - confirm how it intended to meet J's needs by the end of April; or
 - decide not to amend the EHC plan and provide the appeal rights to the SEND tribunal.
42. The Council responded in May 2022. It stated School A was an appropriate placement and could meet J's SEN as they were '*receiving learning on a 1:1 basis*'.
43. The Council wrote to Mrs X in May 2022 and proposed changes to J's EHC plan. It asked Mrs X to tell it if she disagreed with the suggested changes or wanted to name a school in the EHC plan.
44. School A wrote to the Council again and reiterated it could not meet J's needs. It stated that J still spent most of their school day in a room alone.
45. After receiving a consultation request in March 2022 School C offered J a place in June 2022. School C was an independent special school in a different council area. Mrs X asked the Council to name School C on J's EHC plan.
46. The Council issued a final amended EHC plan for J at the end of July 2022. It did not name School C and named a type of school J should attend. The Council informed Mrs X of her right to appeal to the SEND tribunal.

School consultations

47. The records show the Council consulted 23 schools about J's placement between September 2021 and July 2022.
48. Of the nineteen schools consulted before August 2022, three did not respond. Fifteen schools said they could either not meet J's needs or they had no space. The only school that offered J a placement was School C in June 2022. The Council consulted four other schools after June 2022, but none offered J a place.

Further information

49. In response to our enquiries the Council did not explain why it did not name School C, but stated that it had since agreed to do so.

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50. The Council stated it worked closely with all professionals involved to ensure that J's needs were being met whilst it consulted for a more appropriate setting. It stated it held regular updates with School A to assist it with any further concerns or needs that were raised. Despite our requests the Council did not provide any documentary evidence to support this.
 51. During our investigation the Council told us in August 2022 there were eight children and young people with EHC plans who had been without an appropriate school place for over six months. It said it recognised it had a shortage of special school places and had committed to opening several specialist units and a new special school to meet SEN needs. The Council's actions may have caused an injustice to this group of children and so we decided to investigate further, using our powers under Section 26D of the Local Government Act 1974.
 52. Mrs X stated that J will attend School C, but cannot do so until 2023 due to a lack of space.
 53. Mr and Mrs X instigated court action against the Council in relation to J's education from September 2022.
 54. We issued an earlier draft decision in relation to this investigation to the Council with our draft views and recommendations. Despite repeated requests for its comment, the Council failed to respond until we began the report process. It is disappointing the Council did not take the earliest opportunity to comment on our draft decision or to agree to the recommendations we made.

Conclusions

J's Education, Health and Care plan

55. J's EHC plan was finalised in March 2018. The Council should have reviewed it and decided whether to maintain, amend or cease the plan by March 2019. The Council did not do so until May 2020. The delay was not in line with the legislation and was fault. However, we do not find this caused an injustice, this is because when it reviewed it in 2020 the Council decided to maintain the plan. Mr and Mrs X did not suggest that the EHC plan and provision at that time was not appropriate.
56. School A conducted an annual review in June 2021 and March 2022. The Council issued a draft amended plan in September 2021 but did not finalise it. It issued a final amended plan for J in July 2022. The legislation states the amended final plan should be issued without delay after the annual review. It took the Council 13 months to do so.
57. The Council did not follow the set procedure or timelines for reviewing and amending the EHC plan. That was fault and meant J did not have an EHC plan that appropriately identified their needs between May 2021, when the review should have been completed, and July 2022 when the amended final plan was issued. On the balance of probabilities, this caused J distress and a loss of 14 months of education and personal development. The faults prevented Mr and Mrs X from accessing their appeal rights to the SEND tribunal and caused them frustration and distress.

Suitable educational provision

58. In March 2020 J had an EHC plan when the country went into lockdown. The Council should have worked with School A to establish if J should have stayed in school, in line with government guidance. There is no evidence the Council did so, and this was fault. There were two safeguarding referrals about J's safety and wellbeing while at home in May 2020 which resulted in J returning to school. Both Mrs X and School A stated not attending school had a detrimental impact on J's wellbeing. The Council's failure to consider if J should have remained in school leaves uncertainty about whether they should have been at school continuously from March 2020.
59. School A then stated it could not meet J's needs, and as a result they were isolated, not learning, regressing in their personal development and self-harming. School A told the Council this five times between June 2021 and May 2022, and provided an EP report stating the same.
60. The Council was aware School A was not delivering the provisions in the EHC plan from June 2021, and the Council failed to secure the special education provision. This fault had a significant impact on J's wellbeing and meant that they lost out on education, personal development and spent a significant proportion of their time in a room on their own. This also caused Mr and Mrs X distress.

Identifying an appropriate school place

61. The Council told Mrs X in May 2022 that School A was an appropriate placement and could meet J's needs. The month before it had apologised to Mrs X that J was not in an appropriate school placement. The Council told us it worked closely with School A to ensure J's needs were being met. Despite this, it did not provide any evidence to show:
- the placement was suitable;
 - that it took any action to assure itself J was receiving the provision outlined in their EHC plan; or
 - that it worked closely with School A to ensure J's needs were met.

While it agreed to fund additional one-to-one support, it did not review this to ensure it was effective, even when the School stated it was not. This was fault.

62. The Council consulted with 19 schools between September 2021 and April 2022 and did not receive a positive response until June 2022. Once it knew J needed a different placement in June 2021 the Council had three options:
- it had the power to name an 'appropriate' school in J's EHC plan, and the school would have had a duty to admit them;
 - it could have named School C in J's EHC plan in June 2022 as it had offered a place and Mrs X named it as parental preference; or
 - it could have taken any other action to work creatively with any maintained consulted school to make an 'appropriate' placement for J.
63. The Council did not take any of those actions which led to drift and delay which was further fault. It prevented J from being in an appropriate placement sooner.

Complaint response

64. The Council apologised to Mrs X that it failed to meet the EHC plan deadlines and to communicate with her properly in October 2021. It stated it would improve its communication with Mrs X. In April 2022 it acknowledged it had not improved its

communication as it said it would do. It also acknowledged J was without an appropriate school placement. The Council accepted it was at fault but failed to identify or remedy the injustices arising from those faults. It also failed to implement the improvements in communication it said it would. That was fault and caused Mr and Mrs X further frustration and eroded their confidence in the Council.

Council's response to our recommendations

65. In January 2023 the Council said it was actively working with the eight children it identified who had EHC plans, who had been without a school place for over six months in August 2022. It said the children were not yet in school, but they were receiving alternative educational provision. It said for each child there were a different set of circumstances that led to them being without a school place and it did not believe it was necessarily the reason as we identified in this case. As part of our recommendations, we asked it to carry out a review of those eight cases. The Council said it would identify if any injustice had been caused to those children and offer an appropriate remedy.

Recommendations

66. 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*)
67. Mrs X stated she did not want and would not accept an apology from the Council about the matters investigated. We have therefore not recommended the Council apologise for the injustices caused by its faults.
68. To remedy the injustice caused to J and Mr and Mrs X we recommend the Council:
- pay Mr and Mrs X £5,125 to be used for J's benefit to recognise the impact of the lost education on J and the effect on J's wellbeing;
 - pay Mr and Mrs X £1,000 to recognise the distress and harm caused to J by the Council's failure to provide an appropriate school; and
 - pay Mr and Mrs X a further £1,000 to recognise the frustration, distress, uncertainty and eroded trust in the Council caused to them.
69. To ensure the same faults do not happen again we recommend the Council:
- provide us with the confirmation of the approved budget for the specialist units and special school it has planned, to meet its sufficiency duty to provide educational provision for children with SEN;
 - share the learning from this complaint with all staff members who are responsible for reviewing, amending, finalising and issuing EHC plans;
 - remind relevant staff of the Council's powers and responsibility to name an appropriate school, or parental preference school in a child's EHC plan – especially where drift and delay is likely in finding an appropriate school placement; and
 - remind relevant staff of the Council's duty to ensure special educational provision is being provided where it has delegated the provision to another body.

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70. To put things right for others affected by the same issues we recommend the Council:
- review the consultation process for each of the eight children who are without an appropriate school placement and ensure the Council has taken all available action to secure an appropriate placement for each child. If the Council identifies any fault in its actions leading to injustice it should remedy it in line with our [guidance on remedies](#); and
 - write to each of the eight children’s parents or guardians. It should inform them that our investigation into a complaint from another family identified fault by the Council for failing to provide an appropriate school placement for a child. It identified their child may also have been affected by the fault and therefore it has reviewed their child’s case to see if they were similarly affected. It should tell them the finding of that review and signpost the parent or guardian to us if they remain dissatisfied.
71. The Council has accepted our recommendations to remedy the complaint.

Decision

72. We have completed our investigation into this complaint. We found there was fault by the Council causing injustice to J and Mr and Mrs X, and possibly eight other children. The Council should take the action identified in paragraphs 68 to 70 to remedy the injustice caused to J, Mr and Mrs X and the eight other children, and to prevent the same faults occurring in the future.