

The Ombudsman's final decision

Summary: The Ombudsman will not investigate Ms M's complaint about the education provision to her child. It is reasonable to expect her to appeal to the Tribunal and we cannot establish any injustice caused by delay or the impact of a lack of provision on Ms M's son until the Tribunal's decision is known.

The complaint

1. Ms M complains about the way the Council has dealt with her son, N's Education Health and Care (EHC) Plan since February 2018. Ms M says there have been delays in finalising the EHC Plan and errors in its content. She complains about the impact this has had on her son's education provision and overall mental well-being. Ms M says she has felt unsupported by the Council and she has had to push to get the help her son needs. Ms M has also complained that specialist provision described in her son's EHC Plan has not been provided since October 2018.

The Ombudsman's role and powers

2. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Tribunal ('SEND')*)
3. 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*)
4. We cannot investigate a complaint if someone has appealed to a tribunal or a government minister or started court action about the matter. (*Local Government Act 1974, section 26(6), as amended*)
5. 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'. We provide a free service, but must use public money carefully. (*Local Government Act 1974, section 24A(6), as amended*)

How I considered this complaint

6. I have considered and discussed the complaint with Ms M, and I have considered the Council's comments in response to my enquiries.

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7. I have written to Ms M and the Council with my draft decision and considered their comments.

What I found

Relevant Law and Guidance

8. A child with special educational needs (SEN) may have an 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 SEND Tribunal can do this.
9. Parents have a right to appeal to the SEND Tribunal if a council refuses to carry out an assessment, or they disagree with the special education provision or the school named in the child's EHC Plan.
10. The Roberts judgement reconfirmed that we cannot investigate a decision because it has been or could reasonably be appealed to a tribunal, and we also cannot consider the consequences of that decision. We are unable to investigate a council's alleged failure to provide alternative education for a child with special educational needs who is out of school, when the alleged failure is or could be subject to appeal. (*R (on the application of ER) v Commissioner for Local Administration (Local Government Ombudsman) [2014] EWCA Civ 1407*)

What happened

11. Ms M's son, N has special educational needs and there has been a history of social services' involvement for ongoing family difficulties since 2007. N has had a SEN Statement since late 2014.
12. In February 2018, the Council sent Ms M the final EHC Plan. Ms M's solicitor lodged an appeal against the education provision in that EHC Plan in early April 2018. In late September 2018, Ms M's solicitor requested a consent order from the SEND Tribunal for amendments to the EHC Plan. The Council agreed to the amendments set out in Ms M's working document. As a result, the Tribunal stated there was insufficient evidence to justify issuing a consent order. The Tribunal hearing scheduled on 25 September 2018 to hear Ms M's appeal was cancelled. The Tribunal directed the Council and Ms M to revert to the Tribunal with a final version of the working document by 8 October 2018. Since then, the case has not been heard at Tribunal while the Council and Ms M have worked on the working document to finalise this as an EHC Plan. The option for Ms M to refer matters back to the Tribunal remains open and ongoing.
13. In January 2019, the Council issued the finalised EHC Plan to Ms M. Ms M raised some concerns with the Council about the content. She said part of the information relating to her son's health was now out of date. She was worried that the named school might not understand some of the specialised provision described in section F (special educational provision required) of the EHC Plan. Ms M says she has spoken to the Council about the inaccuracies and it has since made corrections to the health needs section. The Council issued an amended EHC Plan to Ms M which corrected the content sometime in March 2019.
14. Ms M has said she is unhappy that her son has not been receiving the Occupational Therapy (OT) and Speech and Language Therapy (SALT) support specified in the EHC Plan. She complains that he should have been receiving this support since he returned to college in October 2018.

Analysis

15. Ms M has complained to us about Council fault in the process of amending her son's EHC plan. We do not consider fault in isolation. We must also consider the impact of the fault. In this case, if there was fault in the process, it affected the content of the EHC plan. Ms M can appeal the EHC Plan wording to the Tribunal, SEND. It is reasonable to expect her to do so. We cannot investigate the EHC Plan wording, specifically whether it meets N's needs.
16. The injustice caused to Ms M, and N, by an inadequate assessment process, is an inadequate EHC Plan. We cannot assess this until we know the final EHC Plan following the Tribunal process.
17. Ms M has said she is in the process of taking this matter back to the Tribunal as she considers the Council has not met the deadline of 15 March 2019 to comply with an order issued by the Tribunal. Any actions of the Council associated with the appeal are outside the Ombudsman's jurisdiction for the same reason, and I cannot investigate them. The fact that Ms M has now decided she no longer wishes to appeal the content of the EHC Plan does not alter that Ms M's recourse is to use her right of appeal to the Tribunal and it would be reasonable for her to exercise this right.
18. We cannot assess the adverse impact of any unreasonable delay in the assessment process until the Tribunal finishes. This is because we cannot work out what provision N has missed out on due to any delay. The smaller elements of her complaint about the EHC Plan which are not affected by the Tribunal decision are more suitable to be investigated together with the main aspects of her complaint.

Final decision

19. The Ombudsman will not investigate this complaint. This is because it is reasonable to expect Ms M to appeal and we cannot assess the injustice to her or her son of non-appealable actions until the final EHCP is known.

Investigator's final decision on behalf of the Ombudsman