

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

**Investigation into a complaint against  
Derbyshire County Council  
(reference number: 18 000 932)**

**6 June 2019**

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## 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
Y	Her son

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## Report summary

### Education and Children's Services

Mrs X complained that the Council failed to provide her son (referred to in this report as Y) with an education for five years because he had regularly not been in school and no alternative provision had been made. She also complained that Y had not received the support set out in his Statement of Special Educational Needs (SEN).

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

The fault identified meant that Y missed out on education and SEN provision for the majority of his secondary school years. We welcome that the Council has accepted our findings and agreed to the following recommendations.

The Council will make a payment of £22,500 to Y to reflect the impact of the missed provision. In part, this could be used to fund a shed that would help Y manage his mental health, with the remainder placed in trust for Y.

The Council will recognise the impact to Mrs X from the lack of provision for Y, the distress and uncertainty about how much the provision may have helped Y over an extended period. To reflect this the Council will pay Mrs X £1,000.

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*)

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## The complaint

1. Mrs X complains that:
  - a) the mainstream schools that her son, Y, attended were not right for him;
  - b) staff at a school that Y attended had discriminated against him. She stated they unreasonably insisted he should be accompanied everywhere and he was not allowed to remain on the school site at lunchtimes;
  - c) a school Y attended had incorrectly stated Y was receiving an education somewhere other than the school site, when this was not true as he was at home and receiving no education;
  - d) Y had not received an education from 2009 to 2014 because he had regularly not been in school and no other education was provided to him while he was not in school; and
  - e) Y had not received the special educational needs support that he was entitled to while he was not attending school.

## Legal and administrative background

### The Ombudsman's role and powers

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 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 has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)
4. We cannot investigate complaints about what happens in schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b), as amended*)
5. 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.

### Special educational needs

6. Before September 2014, a child with special educational needs (SEN) may have had a Statement. The Statement sets out the child's needs and what arrangements should be made to meet them. Councils must ensure the special educational provision specified in the Statement is provided to the child. (*Education Act 1996, section 324(5)(a)(i)*)
7. The Special Educational Needs Code of Practice 2001 provides advice to councils on identifying, assessing and making provision for children's special educational needs. The 2001 Code remains in force for those children who still have a Statement and have not yet been transferred to an Education, Health and Care Plan.

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8. We cannot look at complaints about what is in the Statement but can look at other matters, such as where the support has not been provided or where there have been delays in the process.
  9. Parents may appeal to the SEND Tribunal against the provision specified in a Statement, including the named placement, or the failure to name a placement. We cannot change a Statement; only SEND can do that.

### **Annual reviews**

10. The annual review of a Statement considers whether the provision remains appropriate and whether progress is being made towards the targets in the Statement. Schools are responsible for convening a review.
11. The Code says reviews should consider the special educational provision made for the child. Following a review, the school must send a report to the council to consider what changes, if any, should be made to the statement.

### **Alternative education**

12. Parents have a duty to ensure their children of compulsory school age are receiving suitable full-time education. (*Education Act 1996, section 7*)
13. Councils have a duty to make arrangements for the provision of suitable full-time education at a school or elsewhere for children of compulsory school age who, *“by reason of illness, exclusion from school or otherwise may not for any period receive suitable education unless arrangements are made for them”*. (*Education Act 1996, section 19*)
14. Suitable education means efficient education suitable to a child’s age, ability and aptitude and to any special educational needs he may have. (*Education Act 1996, section 16(6)*)
15. Statutory guidance ‘Alternative Provision’ says while there is no statutory requirement as to when suitable full-time education should begin for children placed in alternative provision for reasons other than exclusion, councils should ensure children are placed as quickly as possible.
16. Councils must make reasonable enquiries, when notified by a school that a child has stopped attending, to satisfy itself the child is receiving suitable education. (*Statutory Guidance ‘Children Missing Education’*)
17. Where full-time education would not be in the best interests of a particular child because of reasons relating to their physical or mental health, councils should provide part-time education on a basis they consider to be in the child's best interests.
18. Our Focus Report, [Out of school...out of mind?](#) (2016) gives guidance on how we expect local authorities to fulfil their responsibilities to provide education for children who, for whatever reason, do not attend school full-time. It says councils should:
  - consider the individual circumstances of each case and be aware that, potentially, a council may need to act whatever the reason for absence (with the exception of minor issues that schools deal with on a day-to-day basis) even when a child is on a school roll;
  - consult all the professionals involved in a child's education and welfare, taking account of the evidence in coming to decisions;

- choose, based on all the evidence, whether to enforce attendance or provide the child with suitable alternative education;
- keep all cases of part-time education under review with a view to increasing it if a child's capacity to learn increases;
- adopt a strategic and planned approach to reintegrating children back into mainstream education where they are able to do so; and
- put whatever action is chosen into practice without delay to ensure the child is back in education as soon as possible.

## **What we have investigated**

19. We have investigated Mrs X's complaints that Y has not received an education from 2009 to 2014 and that he had not received the special educational needs support that he was entitled to (parts d and e). We explain at the [end of this report](#) why we have not investigated parts a) to c).

## **How we considered this complaint**

20. We would generally expect complainants to bring complaints to us within 12 months of them becoming aware of the issues that they complain of. As a result, we would not usually investigate events that occurred over 12 months before someone raised their complaint.
21. Although Mrs X could have complained sooner about some of the earliest issues she raised, we exercised discretion to consider the complaint back to 2009. This was because:
- Mrs X complained in 2015, but the Council did not complete its complaint process until 2018;
  - the Council had investigated the events that Mrs X complained of back to 2009 and it had found fault and upheld her complaint;
  - the Council was able to provide us with some key documents from 2009; and
  - we considered the issues Mrs X faced with Y were exceptional circumstances that led to the complaint being made late.
22. We produced this report after examining relevant documents provided by Mrs X and the Council and taking into account the findings of the complaint investigation the Council arranged.
23. 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**

### **Background**

24. Mrs X's son, Y, is autistic, has learning difficulties and significant problems with communication. He had a Statement of SEN.
25. Y's attendance at secondary school from September 2009 was around 14%. In 2010, it was 12%. After Y changed school in 2011 his attendance increased to 14%. However, during 2012 and 2013 this reduced to 5%.

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26. Mrs X complained to the Council in 2015 that Y had not received a suitable education since 2009. The Council completed its complaint process in April 2018. It upheld Mrs X's complaint.

### **What happened**

27. We have set out below the key events. This is not meant to be a detailed description of everything that happened.
28. In 2008 Y's behaviour was reported to be disruptive at primary school. The Council's Behaviour Support Service was seeing him as a result. Y was referred for an assessment by an educational psychologist and for a Speech and Language Therapy (SALT) assessment. In October 2008, the SALT assessment found Y's understanding of language was low, he struggled to express himself, and he could not understand facial expressions. It made suggestions for helping Y. It recommended targeted work several times each week. The Council then agreed to assess Y's special educational needs.
29. On 5 February 2009, the Council provided Y with a Statement. It identified that Y had learning difficulties and noted he struggled using and understanding language. It also noted Y struggled to concentrate, was easily distracted and he could be non-compliant and deliberately oppositional.
30. Amongst other things, the Statement set out that Y needed 20 hours of support with a teaching assistant (TA) and a programme of SALT, which should be devised and then implemented on a regular basis.
31. Y was due to start secondary school in September 2009. The Statement named a mainstream school. Mrs X challenged the placement as she felt Y needed a special school. However, Mrs X's challenge came too long after Y's SEN statement had been issued, so it fell outside the time limits for making an appeal. As a result, the Council proposed Y tried the mainstream school. Mrs X agreed.
32. By October 2009, Y had not started attending school. The school noted Y's behaviour had been highlighted as a cause for concern at a transition meeting during the summer. Meetings between school staff and the Behaviour Support Service took place in October. The attendees discussed risk assessments and the need to bring Y into school to meet his TA to build a relationship, but these actions were not taken. The attendees noted the school had sent some work home for Y to do.
33. Y attended school on five occasions in October and November 2009 for around an hour each time. For the remaining time Y was at home.
34. On 28 January 2010, an officer from the Council's Education Welfare Service questioned Y's attendance record. By then Y was attending school for one hour a week and was otherwise working at home. However, the officer noted the school had marked Y as 'category B' for his attendance for the majority of the time since September 2009. This indicated he was being educated elsewhere. The officer expressed concern about who was monitoring the work Y was doing and stated the level of provision was lower than Y's entitlement. She was concerned it would be a struggle to get Y back to attending on a regular basis after such a long period away from mainstream school.
35. The Special Educational Needs Co-ordinator (SENCO) devised a plan to address the concerns about Y's attendance and provision in February 2010. The aim was to encourage Y to return to school over a phased period. The SENCO visited Mrs X and Y at home and provided a work package including multi-sensory learning

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and practical science. However, there remained concern that Y was not accessing the agreed school provision.

36. In March 2010, an attendance plan was discussed to try to make sure Y attended school daily for an hour and half, building to 15 hours a week by May 2010.
37. There was an annual review of the Statement in May 2010. This noted there was “potential for support from the speech and language department” which was not yet happening. The review did not address why this provision had not started or consider how it may be provided while Y was out of school. Mrs X repeated her request for a special school, which the Council did not agree to. Y’s TA hours were increased from 20 to 30 a week.
38. Y’s behaviour worsened from September 2010, leading to a number of short-term exclusions. In December 2010, the school felt, despite the increase in TA hours, Y’s variable attendance, mood swings and issues outside school were making his integration into mainstream school difficult.
39. The 2011 annual review stated Y had been known to the SALT service since 2008, but it failed to recognise SALT was not being provided. The Council named a new school. This was a special school which Y started to attend in March 2011.
40. The Council’s Education Welfare Service continued to work with Y and his family. Y briefly attended a training provider and was supported by mental health services.
41. However, during 2013, Y’s behaviour became worse and he was referred to social care teams following issues with drugs. This resulted in the Council considering safeguarding issues around Y and his brother. This did not proceed further as the Council noted Mrs X was already being supported by a multi-agency team.
42. In May 2014, Y’s medication needs had to take priority before educational provision was considered. In November 2014, he was diagnosed with schizophrenia and sectioned under the Mental Health Act. At this point Mrs X was advised by a parent group which resulted in her complaint to the Council.

### **Mrs X’s complaint**

43. Mrs X complained to the Council in December 2015 that it had failed to provide suitable education for Y between 2009 and 2014, when he reached 16 years of age. In particular, that the Council had failed to make sure the provision set out in his Statement had been provided and it had not provided adequate alternative provision while he was not attending school.
44. She also complained the Council had not placed Y in a special school.
45. The Council responded in January 2016. Mrs X asked to escalate her complaint to Stage Two of the complaints process. The Council arranged for an independent person to investigate the complaint. However, in early 2017 after receiving their report, the Council determined it was of poor quality and the complaint needed to be re-investigated.
46. In May 2017, the Council contacted Mrs X to arrange to consider her complaint again. It took until April 2018 for the complaint to be determined.

### **The findings of the Council’s investigation**

47. The Council upheld Mrs X’s complaint that it had failed to make appropriate educational provision for Y.



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48. Y's behaviour was unpredictable and was sometimes triggered by his refusal to take his medication. This impacted on his ability to attend school and created challenges for his family. Whilst Mrs X had a responsibility to make sure Y attended school and had wanted him to attend a different school in 2009/10 and 2010/11, the investigation acknowledged that she encouraged Y to attend school and cooperated with Education Welfare Officers when they became involved.
49. However, the investigation found there had been problems with Y's integration into secondary school. A meeting between Y and staff to build trust had not happened and the risk assessment was not completed, leading to Y being kept at home. It also noted a professionals' meeting should have been convened when Y moved to the special school to consider alternative approaches.
50. There was evidence that some work was provided for Y to do at home. However, the investigation found there was no indication that this work was structured or that Y's work was being supervised away from school.
51. It also noted that the school had incorrectly marked Y as receiving some form of structured education off the school site when this was not the case. The Education Welfare Service would usually have been automatically alerted to unauthorised absence from school. However, because Y's absence was recorded as educated elsewhere by the school, this had not happened.
52. The Council also accepted there was no record of SALT being provided after the initial referral in 2008.
53. The Council found the annual reviews were not successful in establishing how to overcome the issues, placed an emphasis on the Education Welfare Officers to resolve the matters, but did not recognise the problem with lack of SEN provision itself. Although the reviews noted the issues with Y's attendance and lack of progress, there was little evidence that actions were taken to address this. For example, there was no consideration about educating Y in alternative locations where he may be more engaged or consideration of other ways to provide the required SEN support.
54. The Council accepted that Y should have been placed in a special school.
55. The Council apologised to Mrs X that the support provided for Y whilst attending school was not effective and that the services which would have helped him throughout his schooling were not implemented. It also reviewed various areas of policy and practice as a result of the complaint.

## Conclusions

56. The Council has accepted there was a failure to provide education to Y from 2009 to 2014 and a failure to ensure he received the support set out in his Statement. While the situation was difficult and there were attempts to encourage Y's attendance at school, he attended infrequently and there was no structured alternative provision. This is fault.
57. We consider the annual reviews were wholly ineffective and did not recognise the Council's statutory duty to provide the support set out in the Statement as recommended by the SEN Code. Whilst we cannot consider the school's actions, once the Council received the report from the annual reviews it should have asked for more information about what was being delivered. This would have revealed it was not providing what the Statement required and what Y was entitled to receive. We therefore find fault.

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58. There is no evidence that reviews took place after Year 10. This is fault.
59. There was significant delay in considering the complaint. We acknowledge this was because of the standard of the original Stage Two investigation and the absence of key staff, but the delays were avoidable and this is fault.

### **Did the fault cause injustice?**

60. The failure to provide Y's SEN support, particularly SALT, caused a potentially significant impact to Y. It had been identified in 2009 that Y's behaviour may be related to his difficulties with communication. This is why SALT was included in his Statement.
61. Between 2011 and 2014 Y's school attendance deteriorated significantly. We are satisfied he was caused a disadvantage by this as, whilst not all the issues he faced were due to education and at times it is unlikely he could have engaged with education, the Council had identified he needed the support set out in his Statement.
62. In addition, Mrs X and Y are left with a degree of distress and uncertainty about how much of a difference SALT provision may have helped Y during his school years.
63. We welcome the apology the Council has provided to Mrs X and the actions the Council agreed to take to improve its processes and procedures following this complaint. However, as the impact is significant we consider a financial remedy is appropriate to recognise the damage to Y's education.
64. Our [guidance on remedies](#) says where fault has resulted in a loss of educational provision, we will usually recommend a remedy payment of between £200 and £600 a month to acknowledge the impact of that loss. We have considered the disadvantage Y experienced for the whole of his secondary education (45 months) and whether additional provision now can remedy some or all of the loss.
65. Mrs X explained that following Y's discharge from hospital, he benefits from a place to take 'time out' to manage his mental health. Presently, Y uses a shed in their garden, but this is in a poor state of repair. She proposed that a replacement shed with a chair and music system may be something that would benefit Y.

### **Recommendations**

66. The fault identified meant that Y missed out on education and SEN provision for the majority of his secondary school years. We welcome that the Council has accepted our findings and agreed to the following recommendations.
67. The Council will make a payment of £22,500 to Y to reflect the impact of the missed provision. In part, this could be used to fund a shed that would help Y manage his mental health, with the remainder placed in trust for Y.
68. The Council will recognise the impact to Mrs X from the lack of provision for Y, the distress and uncertainty about how much the provision may have helped Y over an extended period. To reflect this the Council will pay Mrs X £1,000.
69. 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*)

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## Decision

70. There was fault by the Council causing injustice.

## Parts of the complaint we did not investigate

71. We have not investigated point a) of the complaint; the suitability of Y's school. This is because Mrs X had the right to challenge the school named in Y's SEN statement through an appeal process. We expect parents to use their rights of appeal to challenge the content of the SEN statement if they disagree with it.
72. Points b) and c) refer to actions taken by the schools that Y attended. We have no jurisdiction to consider complaints about schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b), as amended*)