DRN-3516965

The complaint

Mr and Mrs S are unhappy that Amtrust Europe Limited has declined their legal expenses claim. They believe the policy indirectly discriminates against their son's disability.

All references to Amtrust include its agents.

What happened

Mr and Mrs S have a son with special education needs and disability (SEND). Their son had progressed well at his school and all parties agreed that he would benefit from a more challenging environment and a more able peer group, to enable him to develop his social communication and interaction skills. Where there was disagreement was over which school was now the one that Mr and Mrs S's son should attend. In April 2020 the local education authority (LEA) issued an Education Health and Care Plan (EHCP) which named a particular school. Mr and Mrs S wanted their son to go to another school.

Mr and Mrs S submitted a claim on their legal expenses cover to Amtrust on 14 July 2020. They wanted Amtrust to fund their appeal to the First-tier Tribunal Special Educational Needs and Disability. Their appeal was under section 51 of the Children and Families Act 2014 against the contents of section I (educational placement) of their son's EHCP. Information was requested on 20 July and Amtrust confirmed that fees already paid wouldn't be covered unless it had been necessary to start court proceedings prior to its consent. Mr and Mrs S provided the information on 3 August and on 11 August Amtrust sent an email to confirm what was covered under the policy.

There was some discussion over whether there'd be cover due to the council not having a policy but had instead guidance. The claim was sent to Amtrust's panel solicitors for assessment on 28 August. They received the legal assessment on 8 September which stated there was prospects of success in the claim. There was agreement the claim would go ahead.

The terms of work were sent to Mr and Mrs S's solicitors on 10 September and on 14 September Amtrust received a reply stating that the hourly rate it was offering wouldn't be accepted. To check whether the hourly rate could be increased, the claim was sent to the underwriter for a decision.

During that process Amtrust determined that the claim fell outside of the funding scope. This was because Mr and Mrs S were trying to have the school they wanted their son to attend added to the EHCP whereas the policy only provided cover where the Local Authority are in breach of a published admissions policy. It said the EHCP process is separate to this. On 23 September, Mr and Mrs S were informed the claim wasn't covered. Their solicitors disputed this and said unless there was a policy exemption, the claim should be covered but Amtrust didn't agree.

A complaint was raised, and Amtrust issued a final response letter on 11 December. It offered £100 compensation for providing incorrect information in relation to whether the claim was accepted or not and the distress and inconvenience that would have been

caused. Because Mr and Mrs S remained unhappy, they asked our service to investigate things. To resolve the complaint, they'd like full reimbursement of their legal costs plus 8% interest per annum, an apology for the distress and inconveniences caused, financial compensation to recognise the impact this had on them and a full review of Amtrust's policy terms.

The investigator didn't recommend the complaint be upheld. She thought Amtrust had applied the policy terms fairly and the compensation it had paid for its error was reasonable. Mr and Mrs S and their representative disagree. They believe the investigator has misunderstood the SEND process and the LEA's role in it. They explained that there is a different admissions policy and statutory framework for children who have an EHCP compared to those who do not have an EHCP. The LEA is solely responsible for admission of children who have EHCPs to a special school. The LEA makes the decision on placement following a recommendation from a provision panel. In accordance with the provision panel's decision, the LEA determined that Mr and Mrs S's son should attend an LD school (a school for children with learning difficulties). They point out the school Mr and Mrs S wanted their son to attend is also an LD school. They think that an EHCP is a conduit for a child or young person with a disability to attend a particular school, in the same way that the application process for maintained schools is the conduit for admission to a state-maintained school when a child or young person has no EHCP. As such, to agree to indemnify a family appealing against an admission decision when attending a mainstream school, whilst refusing to indemnify a family of a child or young person with a disability against an admission decision when attending a special school is discriminatory against the child and their family.

They say that it has been shown by the decision of the tribunal – which allowed the appeal – that the LEA has failed to follow its own policies and indeed the statutory framework in place. They say Mr and Mrs S have not requested the LEA changes its policy but rather adheres to the admissions policy it has and the statutory framework which underpins it, which has been upheld by the tribunal. They say the investigator has failed to say on what basis Mr and Mrs S's claim is not related to admission nor has she explained which of the exemptions would apply to this case.

Finally they state the action being taken by Mr and Mrs S was to appeal against the decision of a LEA arising out of the LEA's failure conform to its published admissions policy (and statutory framework) which led to their child being refused entry at the state school of their choice. This is precisely the action that is covered by the wording of the policy.

My provisional decision

I issued a provisional decision on 5 May 2022. In it I said:

Before I consider the complaint, I want to explain that it's not our role to say whether in making this decision Amtrust has acted unlawfully or not – that's a matter for the Courts. Our role is to decide what's fair and reasonable in all the circumstances. In order to decide that, however, we have to take a number of things into account including relevant law, such as the Equality Act 2010, and what we consider to have been good industry practice at the time.

Mr and Mrs S's policy covers:

*"**School Admission Disputes***
What is insured
***Instructed Advisers' Costs** to appeal against the decision of a Local Education Authority (LEA) arising out of the LEA's failure to conform to its published admission policy, which leads to **Your** child or children being refused entry at the state school of **Your** choice.*

What is not insured:-
Claims
a) Arising where examinations or other selection criteria are part of the acceptance process
b) Where the process for appealing against the decision to refuse a place at the school has not been adhered to
c) Where the child has been suspended, expelled or permanently excluded from another school"

The policy doesn't define 'published admissions policy'. But I think that a reasonable person having all background knowledge at the time of entering into the insurance contract would reasonably understand this to mean the admission rules published on the relevant authority's website. For this LEA, towards the top of these rules it makes clear that all schools must admit a child with an EHCP which names the school.

The action Mr and Mrs S were seeking their legal expenses for was an appeal against the contents of the EHCP for their son, specifically their appeal concerned their wish for the school named in their son's EHCP to be replaced with the name of their preferred school. That is not the same as an appeal arising out of the LEA's failure to conform to its published admission policy which lead to their child being refused entry at the state school of their choice. Further, from what I can see Mr and Mrs S didn't apply to the school of their choice and therefore their son wasn't refused entry. I appreciate this is because that's not how the system for school allocation works where there is a named school on an EHCP but it does demonstrate that what Mr and Mrs S were trying to do was different from what the insurer was offering to cover. So, I think Amtrust has acted fairly and reasonably by ultimately concluding that Mr and Mrs S's claim is not covered.

Mr and Mrs S's solicitor thinks that it should be covered unless it is specifically excluded. That isn't how insurance policies work. If the claim falls within the cover initially offered under the policy, we would then look to the exclusions to see if cover for the specific issue is excluded. In this case as Mr and Mrs S's claim isn't covered, the exclusions aren't relevant here.

Mr and Mrs S's solicitor have suggested that a wide interpretation of the policy is taken. They have described how an EHCP is a conduit for a child or young person with a disability to attend a particular school, in the same way that the application process for maintained schools is the conduit for admission to a state-maintained school when a child or young person has no EHCP. I have thought very carefully about whether it would be fair and reasonable for me to interpret the policy widely in the way the solicitors suggest. I don't think it would be fair or reasonable. I think the appeal Mr and Mrs S made was very different than an appeal against an LEA's failure to follow its published admissions policy. I have read the tribunal's decision and it rightly involved a very detailed and formal consideration of Mr and Mrs S's child. The nature of the appeals in each case seem to me to be different; different law is considered, by different decision-making bodies and the degree of formality is also different.

Mr and Mrs S's solicitor have said that to agree to indemnify a family appealing against an admission decision when attending a mainstream school, whilst refusing to indemnify a family of a child or young person with a disability against an admission decision when attending a special school is discriminatory against the child and their family. I appreciate why Mr and Mrs S and their solicitor might feel that way but as I have explained above, I think the two appeals processes are different. An insurer is free to decide what cover it is prepared to offer. To offer to cover for a particular appeals process and not another isn't in and of itself unfair. And given the different natures of the appeals process I don't think that by not offering the cover here Amtrust has acted unfairly. Even if I'm wrong and the EHCP does form part of the schools admission policy, I'm satisfied that it is only to the extent that

all schools and academies must admit a child with an EHCP that names the school. That's on its website, when setting out a summary of the admissions rules. And as the LEA was prepared to admit Mr and Mrs S's son to the school named on the EHCP, it has – to this extent – complied with its admissions policy.

I'm also conscious that the contract of insurance is between Mr and Mrs S and Amtrust. And although they say the policy term should cover the dispute they have with the LEA about which school should be named on the EHCP for their son , Mr and Mrs S aren't saying that the policy term indirectly discriminates against them as disabled people. They're effectively saying that they have been indirectly discriminated by association with/on behalf of their son. I don't think it would be fair and reasonable to conclude that indirect disability discrimination – as set out in the Equality Act 2010 - is relevant to this complaint. That's because - particularly in relation to the provision of services - indirect discrimination by way of association hasn't yet been established by the caselaw of England and Wales.

I do, however, think that Mr and Mrs S have reason to feel disappointed that Amtrust didn't make it clear to them that they wouldn't be covered earlier. Amtrust took more than two months to let them know they weren't covered and had in that time told them they were covered. I think in these circumstances its offer of £100 doesn't reflect the distress and inconvenience caused. I think most of the distress Mr and Mrs S suffered was because of the LEA's decision regarding the named school. But at what was an already distressing time, Amtrust's failure to make it clear that they weren't covered would have added to their distress. I think it t would be fair for it to pay £200.

I have also thought about whether Amtrust's change of mind resulted in additional costs to Mr and Mrs S. I think the investigator is right that it probably didn't as they had already started legal action independently before checking whether they were covered. So, it's more likely than not they'd have taken things further anyway. I will, however, consider any evidence from their solicitor that she carried out additional work (which she subsequently charged her clients for) prior to the claim being declined which she wouldn't have carried out if her clients had been informed that they weren't covered earlier.

Response to my provisional decision

Amtrust accepted my provisional decision.

Neither Mr and Mrs S nor their representative responded to my provisional decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As neither party has asked me to consider anything new I see no reason to depart from my provisional decision and confirm it here now.

Putting things right

To put things right I'm going to order Amtrust pay Mr and Mrs S £200.

My final decision

I uphold this complaint in part and direct Amtrust Europe Limited to pay Mr and Mrs S £200

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to

accept or reject my decision before 5 July 2022.

Nicola Wood
Ombudsman