

## **The Ombudsman's final decision**

Summary: There was delay in finalising an EHC plan in 2021 and 2022 and a failure to respond to a request for statutory reassessment. This caused distress, frustration, time and trouble and delayed a right of appeal by eight months. The Council will apologise, make a symbolic payment and carry out service improvements.

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## **The complaint**

1. Mr X complains about the way the Council has handled annual reviews of his child's Education, Health and Care (EHC) plan. Mr X says there was delay in 2021 and 2022 in completing annual reviews and the Council failed to issue a decision with appeal rights when he applied for a statutory reassessment.
2. Mr X also complains about poor communication by the Council and problems when changing to a digitalised EHC plan format.
3. Mr X says because of the alleged delay:
  - He was put to additional time and trouble which has been difficult to manage alongside work, studying and caring for his children.
  - His appeal was delayed.
  - His child missed out on additional provision during the period his appeal was delayed.
  - His child's behaviour has deteriorated, and he lost the opportunity to seek changes to provision, and additional professional advice, which may have helped address this.
  - The whole situation has caused anxiety and distress.

## **The Ombudsman's role and powers**

4. 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*)
5. 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*)

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6. 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.
  7. 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*)

## **What I have and have not investigated**

8. I have investigated the Council's administration of the EHC plan during 2021 and 2022.
9. I have not investigated matters which Mr X has appealed to Tribunal. When someone has used an alternative legal remedy to the Tribunal about the same matter, the Ombudsman has no jurisdiction to also consider it.
10. As Mr X has an outstanding appeal, it is premature for me to assess the impact of any delayed appeal right on his child's education. I explain this further below.

## **How I considered this complaint**

11. I considered information provided by Mr X and the Council including:
  - Draft and final EHC plans
  - Complaint documents
  - Annual review documents.
12. I have considered relevant law and statutory guidance including:
  - The Children and Families Act 2014 ('The Act')
  - The Special Education and Disability Regulations 2014 ('The Regulations')
  - The Special Educational Needs and disability code of practice: 0 to 25 years ('The Code')
13. I have considered the Ombudsman's Guidance on Remedies.
14. I have also spoken to Mr X by telephone.
15. Mr X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.
16. 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.

## **What I found**

### **Relevant law and guidance**

17. A child with special educational needs 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.
18. The procedure for reviewing and amending EHC plans is set out in legislation and government guidance.

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19. EHC plans must be reviewed at least every twelve months (*Section 44(1) of the Act*).
  20. The annual review process requires information to be gathered from the family, professionals, and the education setting. A meeting must be held, and a report produced for, or by, the Council within two weeks of the meeting. On receipt of the report the Council must make one of three decisions:
    - To amend the plan
    - To keep the plan the same
    - To cease the plan. (*SEND Regulation 20*)
  21. Where a child or young person attends school, Councils can require the school to carry out the review meeting on its behalf.
  22. Within four weeks of a review meeting, a council must notify the child's parent of its decision to maintain, amend or cease the EHC plan.
  23. Where a council proposes to amend an EHC plan, it must send the child's parent or the young person a copy of the existing (non-amended) plan and an accompanying notice providing details of the proposed amendments and give them at least fifteen days to comment on the draft plan.
  24. 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.
  25. In *R(L,M and P) v Devon County Council* [2022] the Judge found the Regulation which requires the Council to notify the parent of its decision within four weeks of the meeting and the Regulation which sets out the process for amending the plan must be read together. This means Councils must both notify the parent of a decision to amend and what the proposed changes are within four weeks of the annual review meeting. Therefore a final amended plan should be issued no later than twelve weeks after the review meeting.
  26. Parents have a right of appeal to the SEND Tribunal if they disagree with the special educational provision or the school named in their child's EHC plan. The right of appeal is only engaged when the final amended plan is issued.
  27. Section 44(2) of the Children and Families Act says a Council must secure a reassessment of the educational, health and care needs of a child if a request is made by the parent or their school unless it has carried out an assessment within the previous six months or it considers it is not *necessary* to make a further assessment. (*SEND Regulation 24*)
  28. The Council must notify a parent whether it is necessary to reassess the child within fifteen days of receiving the request and notify the parent of their right to appeal this decision to the Tribunal (*The Children and Families Act s.51(2)(d)*).

### **Key facts**

29. The Council has maintained an EHC Plan for Mr X's child since 2018.
30. In April 2021 an annual review meeting was held. The Plan was previously updated in April 2020. The Council issued a proposed amended plan in October 2021, six months after the meeting. The final amended plan was issued in November 2021. Mr X did not appeal the contents of this Plan.
31. The next annual review meeting was held in April 2022. Mr X says no-one from the Council attended. In July the Council issued a decision letter stating it

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intended to amend the EHC plan and would aim to finalise it within eight weeks. The final plan was issued in February 2023. This was not accompanied by a decision letter with appeal rights, but this was emailed to Mr X in March 2023.

32. Mr X says his child's behaviour deteriorated during 2022 and he considered additional professional advice was required from an occupational therapist, speech therapist and educational psychologist to assess why this was happening and what strategies were needed. Mr X says there were weeks and weeks of his child coming home with bruises and it was stressful and distressing. Mr X says he had asked school to obtain additional advice several times, but when the School asked the Council, the Council told the School it needed to submit additional paperwork such as a sensory information form.
33. Mr X told me the School agreed with him there was a need for more specialist input.
34. Mr X says his caseworker at the Council was off sick, so communication was poor. He says the Council ignored his request for an assessment of his child's sensory needs.
35. In December 2022, Mr X requested a statutory reassessment of his child's needs under Section 44(2) of The Children and Families Act 2014. This would have involved the Council obtaining new reports from professionals. Mr X says he did not receive a written decision from the Council with appeal rights in response to this request.
36. Mr X said due to the delay in issuing the final plan, or a decision about his request for reassessment, he could not bring an appeal until Spring 2023. Mr X told me he had previously sent five emails asking for a decision he could appeal.
37. Mr X says while a final EHC plan was issued in February 2023 to provide him with a right of appeal, this did not include the additional professional assessments and advice he considered were necessary. Mr X submitted an appeal to the SEND Tribunal about the contents of the Plan.
38. Mr X said when the Council moved to a digitalised version of the EHC plan in 2022/23 it was not based on the most recent version of his child's plan and did not include changes agreed at the annual review meeting. It was also not an amendable copy. This meant when he wanted to make corrections, he could not do so using a computer, the only way for parents to make changes was to print off the plan and make changes by hand or to comment line by line. Mr X says the Council could not provide him with a 'working document' version to make his amendments. Mr X also had concerns that the School could access the digital version and make changes at any time.
39. Mr X says as the School and Council were working from different versions of the EHC plan this caused confusion. There was additional time and trouble getting the Council to accept it was using an outdated version of his child's plan.
40. The Council accepted during the local complaints process it had failed to complete the annual reviews in 2021 and 2022 on time and that there had been poor communication at times due to staffing issues. It offered Mr X an apology for this. The Council said it did not provide a 'working document' at draft plan stage, this was a process to agree plan amendments during an appeal.
41. The Council said it had not made changes to the EHC plan without using the draft plan process and allowing Mr X to comment. It said it had changed the format but not the content of the final Plan.

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42. In March 2023, Mr X was allocated a new case officer. Mr X said communication did then improve. The new officer took his request for additional professional advice seriously, acknowledged his concerns about previously agreed changes being omitted from the plan, and called a review. Mr X says an amended final plan was issued in May 2023, which was within timescales, however he is continuing with his appeal to address parts of the plan where there remains disagreement.

## **Analysis**

### **Fault**

43. Mr X and the Council appear to be at cross-purposes about whether he was given the opportunity to comment at draft stage. As I understand the complaint, Mr X is saying changes were discussed and agreed at annual review but then not incorporated into the amended version sent. In essence the Council had ignored the views of the School and Mr X from the annual review meeting about changes that were required.
44. As I understand it this matter has now been resolved by the issue of a further amended final plan in May 2023.
45. Mr X was also not saying he needed a 'working document' as would be used during an appeal, more than he wanted an electronic copy of the draft plan on which he could easily note his proposed changes. It is not for the Ombudsman to tell the Council what format EHC plan to use, but if the new digital format means families will not be able to make comments or suggest changes quickly and easily, this is feedback the Council should be willing to take on board. While Mr X is not claiming he requires any reasonable adjustments due to disability, this may be an issue for other parents.
46. I acknowledge Mr X will have experienced unnecessary frustration and time and trouble getting the plan amended again in May 2023 with information that was available to the Council in April 2022.
47. Mr X is still awaiting the outcome of additional professional assessment of his child and still disagrees with some elements of the EHC Plan. However, as Mr X has used an alternative legal remedy to the SEND Tribunal about this matter, it is no longer within the jurisdiction of the Ombudsman. The Tribunal will decide whether further changes to the Plan are needed and has case management powers to seek additional evidence if required.
48. The Council took seven months to amend the plan following the April 2021 review meeting. This is fault. The law and guidance say this should take no longer than twelve weeks. The Council has acknowledged this delay in its complaint response and apologised. As Mr X did not appeal in 2021 and his child remained in the same school, there is no evidence delay in 2021 caused significant injustice in terms of delayed provision. I acknowledge Mr X will have been put to extra time and trouble and been frustrated by the delay.
49. The next review meeting was held in April 2022. Again, if the Council wished to amend the Plan it should have completed this within twelve weeks. It took ten months. This is fault and excessive delay.
50. Mr X's appeal rights were delayed by eight months in 2022/23. This is an injustice. It is premature to assess the impact on Mr X's child's education of this delay. This will depend on the outcome of the Tribunal, for example if the Tribunal orders that additional special educational provision is required.

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51. Mr X made a formal request for a statutory reassessment in December 2022. The Council appears to have decided to conduct a review, not a reassessment. The Council failed to provide Mr X with a formal decision about his request for reassessment within 15 days. This is fault. Mr X lost a right of appeal in December about the reassessment decision.

### **Injustice**

52. When someone has suffered because of fault, we try to put them back in the position they would have been if that error had not happened. Where that is not possible, we may recommend a financial payment to acknowledge the impact of faults. This is often a modest, symbolic amount.
53. The Council has apologised for the delay in processing the annual reviews and for elements of its communication with him but has not offered any additional remedy for Mr X's time and trouble or distress. It has also not apologised for failing to issue a decision on his request for reassessment or acknowledged the loss of his appeal rights in 2022 at a time when his child was really struggling.
54. Usually, I would recommend a Council issue a decision with written reasons about the reassessment request, but in this case, as Mr X has appealed, he can raise any lack of evidence or concerns about the wording in the plan with the Tribunal.
55. I have not considered if the delay in appeal rights has led to loss of provision for Mr X's child. It is premature to do so when the appeal has not yet been decided.

### **Agreed action**

#### **Within four weeks of my final decision**

56. The Council will provide a further apology to Mr X for the failure to issue a decision following his request for reassessment and for the unnecessary time and trouble he has been put to getting updated final EHC plans issued.
57. The Council will pay Mr X a symbolic payment £500 for the frustration and additional time and trouble caused by its fault in 2021 and 2022 and for delaying his appeal rights by eight months. This does not include any amount for lost educational provision. The Council should consider in line with the Ombudsman's Guidance on Remedies if a remedy for lost provision due to the eight months delay is merited. If Mr X and the Council cannot agree a suitable remedy, Mr X may bring this matter back to the Ombudsman after the outcome of the appeal for us to determine.
58. The Council will remind officers about the importance of completing annual reviews on time and of providing written decision letters with appeal rights where required by the Act. The Council should review whether it has adequate diary and reminder processes in place for officers to keep track of missed deadlines or missing documents.
59. The Council will provide us with evidence it has complied with the above actions.

### **Final decision**

60. I have completed my investigation. There was delay in finalising an EHC plan in 2021 and 2022 and a failure to respond to a request for statutory reassessment. This caused distress, frustration, time and trouble and delayed a right of appeal

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by eight months. I am satisfied that completion of the agreed actions above are a satisfactory resolution to the complaint. The complaint is upheld.

**Investigator's decision on behalf of the Ombudsman**