

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

Summary: Ms X complained the Council delayed issuing Child A's Education Health and Care (EHC) plan and ignored medical professionals. Because of the delay, Ms X said Child A missed specialist pre-school provision between April and early September 2022 and did not have an appropriate setting in place for the new school year. The Council was at fault for the delay in issuing Child A's EHC plan and not providing Child A with all the provision set out in it. The Council will pay Ms X £300 for frustration caused by the delay and £2400 to acknowledge the missed provision. The Council will provide evidence of the action it is taking to increase educational psychology capacity and specialist school places.

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## **The complaint**

1. Ms X complained the Council delayed issuing Child A's EHC plan and ignored advice from medical professionals. As a result of the delay Ms X said Child A has missed out on specialist pre-school provision between April and early September 2022 to which they were entitled and Child A did not have an appropriate setting for the new school year. Ms X said this has caused distress and anxiety. She would like compensation and for Child A to have adequate provision to meet their educational and wellbeing needs.

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

2. 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*)
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. 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.

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5. 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*)
  6. 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.

## **How I considered this complaint**

7. I considered:
  - the information Ms X provided and spoke to her about the complaint;
  - the information the Council provided in response to my enquiries;
  - relevant law and guidance, as set out below; and
  - our guidance on remedies, published on our website.
8. Ms X and the Council had the opportunity to comment on the draft decision. We considered their comments before making a final decision.

## **What I found**

### **Relevant law and guidance**

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 EHC plan is set out in sections which include:
  - Section B: The child or young person's special educational needs.
  - Section F: The special educational provision needed by the child or the young person.
  - Section I: The name and/or type of school.
11. The Council is responsible for making sure that arrangements specified in the EHC plan are put in place. We can look at complaints about this, such as where support set out in the EHC plan has not been provided, or where there have been delays in the process.
12. There is a right of appeal to the SEND Tribunal against a decision not to assess, issue or amend an EHC Plan or about the content of the final EHC Plan. Parents must consider mediation before deciding to appeal. An appeal right is only engaged once a decision not to assess, issue or amend a plan has been made and sent to the parent or a final EHC Plan has been issued.
13. The courts have established that if someone has lodged an appeal to a SEND Tribunal, the Ombudsman cannot investigate any matter which is 'inextricably linked' to the matters under appeal. This means that if a person disagrees with the placement named in an EHC Plan we cannot seek a remedy for lack of education after the date the appeal was engaged if it is linked to the disagreement about the school place named. (*R (on the application of ER) v Commissioner for Local Administration (Local Government Ombudsman) [2014] EWCA Civ 1407*).

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14. Where a council receives a request for an EHC needs assessment it must give its decision within six weeks whether to agree to the assessment. The whole process from the point when an assessment is requested until the final EHC Plan is issued must take no more than 20 weeks (unless certain specific circumstances apply).
  15. As part of the EHC assessment councils must gather advice from relevant professionals (*SEND 2014 Regulations, Regulation 6(1)*). This includes:
    - the child’s education placement;
    - medical advice and information from health care professionals involved with the child; and
    - psychological advice and information from an Educational Psychologist (EP).Those consulted have six weeks to provide the advice.

### **Compulsory school age**

16. A child is of “compulsory school age” on 1 January, 1 April or 1 September following their fifth birthday. This means for a child born in September, although they will typically start school in the September in which they reach age five, they are not of compulsory school age until 1 January the following calendar year.

### **What happened**

17. Child A is not of compulsory school age and attended a mainstream pre-school setting. In March 2021 a doctor diagnosed Child A with autism and speech and language difficulties.
18. In late April 2021, Child A’s pre-school requested the Council carried out an Education Health and Care (EHC) plan needs assessment on Ms X’s behalf.
19. In early June 2021 the Council decided not to progress with a statutory assessment for Child A. The Council records show it recognised Child A had special educational needs (SEN) but there was minimal information in the application about the support Child A required at the pre-school setting.
20. Ms X agreed to mediation and in early July 2021 the Council revised its original decision and agreed to complete an EHC needs assessment.
21. In early August 2021 the Council advised Ms X there was delay in obtaining advice from the Educational Psychology service.
22. Between August and mid-November 2021, the Council received advice from education, an early years specialist, social care, NHS Speech and Language Therapy (SALT) and a doctor. In August 2021 Ms X also sent the Council an independent SALT report and an Applied Behavioural Analysis (ABA) report she had commissioned privately.
23. In mid-November 2021 the Council received Child A’s educational psychologist report. The same day the Council emailed Ms X with the update.
24. The next day the Council’s needs assessment panel decided Child A’s needs should be met through an EHC plan and it sent Ms X a letter of its decision.
25. In early December 2021 the Council told Ms X it was progressing Child A’s draft EHC plan.
26. In late December 2021 the Council issued Child A’s draft EHC plan and sent it to Ms X. Two days later Ms X emailed the Council and asked why the ABA report and independent SALT report she commissioned had not been included in Child A’s draft EHC Plan.

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27. The Council contacted the NHS SALT three times between early January and mid-February 2022 to ask for Child A's SALT report and to discuss the independent SALT report commissioned by Ms X.
  28. In mid-January 2022 Ms X made formal comments to the Council on the draft EHC plan and named two preferred specialist schools for Child A. She contacted the Council several times to discuss it.
  29. In mid-February 2022 the Council contacted Ms X and explained:
    - if section I of Child A's EHC Plan named specialist provision it would send out consultation requests;
    - why it had decided not to include the ABA report in Child A's EHC plan; and
    - it was still waiting for NHS SALT advice on the independent SALT report.
  30. In late February 2022 the Council received a response from the NHS SALT.
  31. In late March 2022 Child A's EHC co-ordinator was absent from work for two months.
  32. In late March 2022 Ms X and her legal representative contacted the Council three times for an update on the final EHC plan. Ms X then made a formal complaint to the Council about the delay in finalising Child A's EHC plan. She asked for it to be issued as soon as possible and asked the Council to apologise. The Council responded to Ms X in late March 2022.
  33. In early April 2022 the Council issued Child A's final EHC plan. Child A's provision included specified one to one support, 12 Occupational Therapy (OT) sessions per term plus additional OT support and three one to one SALT sessions for the year. Section I of Child A's EHC plan stated the placement as: '*Special school - to be confirmed*'.
  34. In late April 2022 the Council sent Ms X its stage 1 response. It apologised for the delay in Child A's EHC needs assessment process. It said Child A's educational psychology report should have been produced in mid-August 2021 but because of a shortage in educational psychology capacity and increased demand it was not submitted until mid-November 2021. It advised it had secured extra educational psychology capacity to reduce waiting times. It also acknowledged there were delays in issuing the draft EHC plan which was not shared until late December 2021 because of a Council officer absence. There were then additional delays whilst the Council sought clarification from professionals relating to their reports.
  35. In early May 2022 Ms X asked the Council for mediation about the school placement.
  36. Three days later Ms X asked the Council to commence the OT provision set out in the EHC plan and the next day the Council contacted the OT and enquired about the cost.
  37. In mid-May 2022 a medical professional wrote to the Council and said Child A's mainstream pre-school placement was not meeting Child A's health needs and they required a specialist setting.
  38. In late May 2022 mediation took place which discussed SALT provision and the Council contacting specialist schools. It was agreed once the Council received the school consultation responses they would be heard by the panel by early July 2022. Between late May and mid-June 2022 the Council sent consultations to the special schools including Ms X's two preferred schools. The Council did not receive all the responses until mid-September 2022.

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39. In early June 2022 the NHS SALT emailed the Council about Child A and said she could provide Child A with three to four SALT sessions to ensure strategies were in place for staff and Ms X.
40. In late June 2022 Ms X provided comments on the Council's complaint response and asked to go to the next stage. She also appealed the placement and content of Child A's EHC Plan to the SEND Tribunal.
41. In late July 2022 the Council sent its stage 2 response to Ms X. It reiterated there was a delay in issuing Child A's EHC plan, because of the delayed educational psychology report and the absence of the case coordinator between February and March 2022 and apologised.
42. The same day the Council approved OT support for Child A and was told by the OT there was a waiting list of up to three months. The Council emailed Ms X to tell her.
43. In late July 2022 Ms X made a further formal complaint to the Council. She said the Council failed to provide Child A's EHC Plan provision and failed to follow the mediation agreement. The Council responded to Ms X in late August 2022. It advised it had consulted her preferred schools and others maintained by the Council. It had yet to receive a response from two schools. Those who had responded were unable to offer Child A a place. It said it was not clear what provision Ms X considered the Council was failing to provide.
44. In early September 2022 Ms X escalated her complaint. She said:
- the Council had not met Child A's needs or provision set out in the EHC Plan because Child A was still not in specialist provision;
  - despite her appeal to the tribunal the Council still needed to deliver all provisions in section F of Child A's EHC Plan;
  - the only provision Child A had been provided was OT and that was delayed by six months. The one to one provision and SALT provision had not been provided;
  - Child A had been denied access to the full curriculum; and
  - the delay in providing Child A's EHC plan provision had a harmful effect on Child A's health, wellbeing, social and educational development.
45. Ms X wanted Child A to receive 30 hours funding until a specialist school placement was found.
46. Four days later the Council responded to Ms X's stage 2 complaint, it said:
- the Council had started the process of securing a suitable placement for Child A and had consulted several settings including Ms X's preferred schools but a placement with a specialist setting had not yet been found;
  - there was a high demand for specialist school places and demand often exceeded capacity. The Council was investing in increased capacity for specialist provision;
  - the Council was satisfied the provision in Child A's EHC plan was being provided and arrangements were in place for OT provision to be delivered and Child A was on the waiting list;
  - Child A should receive 3 NHS SALT sessions per year. The NHS SALT saw Child A once in May 2022 and further sessions had been arranged but

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cancelled due to illness and an inconvenient meeting date for Child A. The NHS SALT offered a further session in September 2022.

- Child A's EHC plan included one to one for some of the provision but Section F did not include a need for full time one to one support. Child A's mainstream setting confirmed Child A had one to one support for most of the 20 hours per week attended;
  - Child A's mainstream setting advised the Council it needed extra funding for one to one support for Child A, and Child A's attendance should be reduced to 12 hours per week after October 2022. The Council said it was progressing the extra funding for Child A;
  - Child A's EHC plan did not specify full-time pre-school education. It said the Council's duty to provide full time education would not apply until Child A was of compulsory school age. It said it had given advice about claiming for additional funding. However, it had concerns regarding Child A's ability to tolerate an increase above the current hours; and
  - it had offered home support through the Schools and Family Support Service.
47. The Council apologised Child A was adversely affected by the delay in securing a suitable school place. The Council agreed to consider additional funding to support Child A at pre-school, tender for a suitable independent school place, renew consultations with maintained special schools and contact Ms X's preferred school.
48. In January 2023 Child A started attending a specialist school.

## **My findings**

### **Delay in issuing EHC Plan**

49. The Council reached its initial decision not to carry out an EHC assessment within six weeks, which was within the statutory timescales and so was not fault. However, the final EHC Plan was not sent to Ms X until April 2022. Even allowing for the time taken for the Council to revise its decision to carry out an assessment the whole process took six months longer than it should have. This was fault.
50. The Council has accepted delays due to delays in receiving the educational psychology report and staff absence. When it became clear the Council would not receive the psychology report within the 20-week timescale for completing the EHC plan, the Council should have considered whether to commission a private assessment or seek external advice. The delay of 6 months in issuing the EHC Plan was fault and caused Ms X frustration. On balance, it is likely Ms X would have appealed earlier had the timescales been met. I cannot comment on the content or placement named in the plan because Ms X has appealed to the SEND tribunal. However, had the Council issued the EHC plan in line with statutory timescales then, on balance, Child A would have started receiving the support set out in section F of the plan, six months sooner.

### **EHC Plan Provision**

51. Child A did not start attending a special school until January 2023. Child A was attending a pre-school setting, was not of compulsory school age and was receiving some education and support. However, the plan issued in April 2022 stated 'a special school' so they were not attending a suitable school, in line with the plan. This was fault.

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52. The Council delayed securing OT provision for Child A as set out in the plan of April 2022. Child A received no OT support between April and September 2022 and not the full OT support set out in the plan between September and December 2022. This was fault and meant Child A did not receive the support they were entitled to receive.
53. The Council records show it did try to arrange Child A's NHS SALT sessions, but Child A could not attend these because of illness and one session was not convenient. However, Child A only received 1 of the 3 NHS SALT sessions for the year which was fault. Ms X commissioned a private SALT and an ABA report. However, there was no requirement for this in the EHC Plan. Disagreement with the content of the plan is for the Tribunal to consider and we would not look at these aspects as it was open to Ms X to appeal the content of the plan.
54. Whilst Child A's plan stated they should attend a special school not a pre-school setting, for which I have already found fault, it was for the Council to determine how many hours of provision were appropriate for Child A. The amount of hours required were not set out in the plan and there is no evidence of fault in the way it reached its decision not to increase Child A's pre-school provision to 30 hours.

### **Agreed action**

55. Within one month of the final decision the Council will:
- pay Ms X £300 for the frustration and time and trouble caused by the delay in issuing Child A's final EHC Plan; and
  - pay Ms X a symbolic payment of £2400 to acknowledge the loss of provision caused by the delay in issuing the plan between October 2021 and April 2022 and Child A's loss of education and provision between April 2022 and December 2022 once the plan was issued.
56. Within 3 months of the final decision the Council will:
- provide evidence of actions it is taking to increase educational psychology capacity and reduce waiting times; and
  - provide evidence of actions it is taking to increase capacity for specialist school places.

### **Final decision**

57. I have completed my investigation finding fault with the Council causing injustice. The Council have agreed to take action to remedy the injustice and prevent recurrence of the fault.

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