

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

Summary: Mrs X complains about the way the Council handled her daughter's Education, Health and Care Plan. We find fault with the Council for delay, failing to communicate with Mrs X and failing to secure the provision specified. This caused frustration and distress to Mrs X and meant her daughter did not get the educational provision she should have. We have agreed service improvements and financial remedies for the injustice caused.

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## **The complaint**

1. Mrs X complains the Council failed to secure the special educational provision specified in her daughter (J's) EHCP from May 2021, failed to communicate satisfactorily, delayed the final EHCP after the Annual Review, and have not responded properly to her complaints.
2. Mrs X would like the Council to provide the specialist provision to J urgently, with extra provision so J can catch up with her developmental progress.

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

3. 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*)
4. 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/care provider has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)
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*)

## **How I considered this complaint**

6. I have considered:
  - The information provided by Mrs X and in discussion with her;

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- The Council's comments on the complaint and the supporting information it provided; and
  - Relevant law and guidance.
7. Mrs X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

## **What I found**

### **Legislation and Guidance**

#### **Education, health and care plan**

8. A child with special educational needs may have an Education, Health and Care Plan (EHCP). This sets out the child's needs and what arrangements should be made to meet them.
9. The Council is responsible for making sure that arrangements specified in the EHCP are put in place. We can look at complaints about this, such as where support set out in the EHCP has not been provided, or where there have been delays in the process.

#### **Arrangements for reviewing an EHC Plan**

10. The procedure for reviewing and amending EHC plans is set out in legislation and government guidance.
11. Within four weeks of a review meeting, a council must notify the child's parent of its decision to maintain, amend or discontinue the EHC plan. (*Section 20(10) Special Educational Needs and Disability Regulations 2014 and SEN Code paragraph 9.176*)
12. Where a council proposes to amend an EHC plan, the law says 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, including copies of any evidence to support the proposed changes. (*Section 22(2) Special Educational Needs and Disability Regulations 2014 and SEN Code paragraph 9.194*)
13. The Special Educational Needs and Disability Code states if a council decides to amend the plan, it should start the process of amendment "without delay". (*SEN Code paragraph 9.176*)
14. 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. (*Section 22(3) SEND Regulations 2014 and SEN Code paragraph 9.196*)
15. 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.

#### **Failure to secure provision**

16. The council has a duty to secure the specified special educational provision in an EHC plan for the child or young person (Section 42 Children and Families Act). The Courts have said this duty to arrange provision is owed personally to the child and is non-delegable. This means if a council asks another organisation to make the provision and that organisation fails to do so, the council remains responsible. (*R v London Borough of Harrow ex parte M [1997] ELR 62*, *R v North Tyneside Borough Council [2010] EWCA Civ 135*)

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### Key transfers

17. An EHCP must be reviewed and amended in sufficient time prior to a child or young person moving between key phases of education, to allow for planning for and, where necessary, commissioning of support and provision at the new institution.
18. The move between schools, especially at the key phase transfers from nursery to infant, primary to secondary and then to post-16 education, is an important moment for any child and especially those with SEN. The Code says that advance planning for these moves is essential. The year 5 review should provide a clear recommendation for the type of provision the child will need at secondary school.
19. The new Code identifies all the key phase transfers and states that an EHCP  
*“must be reviewed and amended in sufficient time prior to a child or young person moving between key phases of education, to allow for planning and, where necessary, commissioning of support and provision at the new institution” (9.179 of the January 2015 Code)*

### Discretion to investigate

20. Events in this complaint begin in May 2021 on completion of J’s EHCP. Throughout that academic year and according to J’s EHCP, it was intended that she receive occupational therapy and her teachers have specialist training. As in paragraph 4, we cannot investigate late complaints unless we decide there are good reasons. Although part of Mrs X’s complaint is late, she says the lack of provision continues, I have used my discretion to investigate the events from May 2021.

### What happened

21. I have included a summary of some key events below. This is not intended to be a comprehensive account of everything that took place.
22. J is Autistic, has Attention Deficit Disorder and other special needs. She had her first EHCP in May 2021. This specified that she needed to have Occupational Therapy (OT) and an OT assessment for her Annual Review (AR).
23. It also said her school teachers should have training with a Speech and Language Therapist (SALT), to help with J’s education.
24. Mrs X says J had not received any of the specialist provision provided for in her EHCP. As the AR was approaching Mrs X made a complaint to the Council in April 2022 chasing the OT assessment.
25. The Council responded to Mrs X saying having reviewed two OT reports, the language in the EHCP was wrong, and only continuing interventions from the school should have been included.
26. Mrs X responded pointing out the Council had failed to look at a further OT report written specifically for the EHCP assessment. She said most need and provision identified was for J’s sensory and physical health, and J had not had any of this provided to her in the last year. The Council did not respond.
27. Mrs X chased the Council after the AR in May as it had not responded within the statutory time frames to say whether it will maintain or amend the EHCP.
28. The Council issued the amended draft EHCP a month late. It responded to Mrs X apologising for the delay and saying it had recently appointed an AR Service Organiser to address these issues.

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29. Mrs X paid privately for an OT report in October as the Council had failed to arrange one for the previous AR.
  30. Mrs X made a formal complaint in October as the failure to provide the relevant provision has had an impact on J's education and well being. She was supposed to be in receipt of the final EHCP by the end of August but the Council still had not issued it. She was also concerned that all the provision had been removed from the plan.
  31. J is in a transition year from primary to secondary school, and Mrs X wanted to make sure the Council would carry out the AR in time to ensure the statutory time limits are met.
  32. In the Council's response it apologised that Mrs X had to make a complaint and that it had not resolved her previous complaint properly. It explained the OT report she referred to had been misfiled which was why her previous complaint response came to the wrong conclusion. The Council has since located the report and it has remained in J's EHCP.
  33. The Council admitted fault for not securing the provision in the EHCP and said records show Mrs X had made repeated requests for it. The Council said it would refund Mrs X for the cost of the independent OT assessment she got for the AR.
  34. The Council apologised for the delay in breach of the statutory timescales for issuing the final EHCP in November. A system error had removed the provision from the EHCP and the Council sent an email to Mrs X to let her know in October.
  35. It apologised for "falling below the levels of service and communication the Council strives to provide", as records show that Mrs X sent many requests for information and updates.
  36. It went on to say the Council has consulted with the preferred school for the transfer process. The Council made a new role in the team to report to senior management on issues arising from complaints and any lessons learned. The Senior Practitioner for Performance and Complaints will give feedback directly to colleagues involved in J's case, and the wider team.
  37. The complaint response says the next steps will be to ensure the Senior Practitioner keeps oversight of J's case to ensure prompt responses and to address any issues. The school and Council will contact therapy services, and the AR in November will consider the recent OT assessment, to agree any amendments needed to the EHCP.
  38. Mrs X made a stage two complaint to the Council in December as she said she wanted the OT provisions secured immediately, not after the AR. It was supposed to be in place since May 2021 but the Council first tried to secure it in October 2022.
  39. She said while it may have been an administrative oversight the OT report was misfiled, it was listed as "additional contributions" in the EHCP and should not have been overlooked. When Mrs X brought this to the Council's attention, she got no response. She also wanted the SALT provision to start immediately.
  40. Mrs X says the Council should have told her sooner the provision had been removed from the EHCP in error. This had caused her much distress over the summer months.
  41. The Council responded in December 2022 with a further apology. It said the case worker will continue to follow up the outstanding school consultation process so

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the Council can name her preferred school for September 2023. The case worker is also in touch with the OT and SALT providers, to look at therapists which have availability to start immediately. The Council signposted Mrs X to the Ombudsman.

42. Mrs X brought her complaint to the Ombudsman as she was concerned about all the missed provision having a damaging effect on J, and wants to ensure a smooth transition to secondary school with all provisions in place. She is angry that J still has not had any provision recommended in the May 2021 EHCP.

### **Analysis**

43. The Council is at fault for not providing the provision contained in J's May 2021 EHCP. This has caused distress and frustration to Mrs X, and means that J has not progressed as she should in her final years of primary school.
44. The Council's response to Mrs X's April 2022 complaint was wrong, and when she provided correct information she did not get any response. This is fault, failing to adhere to the complaint procedure.
45. The Council issued the amended draft EHCP a month late which is fault. It did not adhere to statutory time limits.
46. The final EHCP was three months late. This is fault by the Council, again not adhering to statutory time limits.
47. When communicating with Mrs X the Council failed to follow the rules of good administrative practice by being service user focused, which is fault.
48. The complaint response from the newly appointed Senior Practitioner for Performance and Complaints to Mrs X's October complaint was very thorough. The Council were right to apologise and to refund Mrs X for the OT assessment she had obtained privately. However Mrs X felt that the Council needed to do more to ensure J gets the provision needed to progress.
49. In the complaint response the Council does seem to be addressing concerns raised, by hiring further staff.

### **Agreed action**

50. Within one month the Council should:
- write to Mrs X and apologise for the distress and anxiety caused to her by the faults identified above;
  - pay Mrs X £200 for the frustration and distress caused by the faults above; and
  - pay Mrs X £300 per month to recognise the injustice caused to J by the Council failing to provide the specified provision between May 2021 and March 2023. Excluding holidays J lost 15 months of provision so the Council should pay a total of £4500 for lost provision.
51. Within two months of the final decision the Council should ensure J starts receiving OT and SALT special educational provisions included in her amended EHCP.
52. After our investigation of other complaints we have made recommendations to the Council about improving its services and we ask that compliance with our decisions be monitored.
53. Within three months of the final decision the Council should ensure the SEN staff:

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- send post-review letters within four weeks from the review meeting, notifying of the Council's position;
  - issue final EHCP's within eight weeks from the date of the Council sending proposed EHCP amendments to the parents/young people, and
  - check the provision in new and amended EHCP's is being delivered.

54. The Council should provide us with evidence it has complied with the above actions.

### **Final decision**

I find fault with the Council for delay, lack of provision and failure in communication causing injustice to J and Mrs X. I have suggested remedies to ensure this does not continue.

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