

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

Summary: Dr X complains the Council failed to provide all the special educational provision as set out in his son's EHC plan. We find fault with the Council for failing to provide all the SEN provisions. We have made recommendations for the Council to remedy the injustice caused to Dr X and his son.

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## **The complaint**

1. Dr X complains the Council failed to provide all the special educational provision as set out in his son's EHC plan. Dr X says this has negatively impacted on his son's educational progress and caused him distress.

## **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. 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**

4. I spoke with Dr X and considered the information he provided.
5. I made enquiries with the Council and considered the information it provided.
6. I sent a draft decision to Dr X and the Council and considered their comments.

## **What I found**

### **Legislation and guidance**

#### **SEN and Education, Health, and Care plans**

7. A child with special educational needs and disabilities (SEND) may have an Education, Health and Care (EHC) Plan. This sets out the child's needs and what

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arrangements should be made to meet them. The EHC plan is set out in sections. Section F details the special educational provision the child needs.

8. 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*)

### **COVID-19 pandemic**

9. During the COVID-19 pandemic, the Secretary of State issued a notice under the Coronavirus Act 2020 to give councils more flexibility in dealing with EHC Plans and provision. It temporarily changed councils' absolute duty to 'secure' the education provision in an EHC Plan to one of using 'reasonable endeavours' to do so. This change applied from 1 May to 31 July 2020. At the end of this period, councils' usual duties resumed.
10. In March 2020, all schools were ordered to close, retaining some staff to provide education for the children of key workers and some 'vulnerable' children. These included children with an EHC Plan. Schools did not have to allow all children with EHC plans to attend. Instead, the government asked councils to carry out a risk assessment with children who had an EHC plan to determine whether their needs could be met at home and whether they would be safer there than attending an educational setting.

### **What happened**

11. Dr X's son, A, has an Education, Health and Care (EHC) plan. In April 2020, following an appeal, the Council issued A's final amended EHC plan.
12. A's EHC plan noted he required the following special educational provisions:
  - Occupational therapy (OT)
  - Physiotherapy (PT)
  - Hydrotherapy
  - Speech and Language therapy (SALT)
13. In May 2020, the Council said it held a structured conversation with Dr X and discussed its reasonable endeavours during the lockdown period. Dr X confirmed A was shielding at home during this lockdown. The Council could not provide any record of its conversation with Dr X.
14. In June and July 2020, the Council began to search for OT and PT providers to deliver A's special educational provision. In July 2020, Dr X told the Council he felt A needed to settle into school before introducing new people and asked for direct work not to start until late September 2020. Records noted Dr X told the Council some work could take place via telephone and video call.
15. The Council commissioned the OT and PT providers at the end of October 2020.
16. Between November and December 2020, there was a national lockdown. During this lockdown, A did not attend school as he was shielding at home.
17. In November 2020, the Council contacted A's school to check whether his SALT provision was in place. The school confirmed there was no SALT provision.

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18. Between January and March 2021, there was a national lockdown. During this lockdown, A did not attend school as he was shielding at home. A returned to school on a phased return in March 2021.
  19. In April 2021, A's PT provider confirmed it had not provided all the special education provisions the Council had commissioned it to provide. The PT provider agreed to provide all the outstanding therapies.
  20. In May 2021, the Council received confirmation the SALT support was being delivered to A. A's OT provider also updated his therapy programme.
  21. In March 2022, the Council secured a pool for A's hydrotherapy.

## **Analysis**

### **April 2020 – July 2020**

22. The Council's legal duty during this period was to make 'reasonable endeavours' to arrange A's SEN provision.
23. The Council only started looking for providers in June 2020, despite the final EHC plan having been issued in April 2020. This is delay and is fault.
24. I consider the fault identified caused Dr X distress at knowing A did not have all his SEN provisions secured. While the delay meant A did not have all his SEN provision secured, I cannot say this meant he lost out on provision, for the reasons set out below.
25. During this period, A did not attend school as he was shielding at home. It was for the Council to decide what was reasonable to arrange in the circumstances of the COVID-19 pandemic. For example, the Council could have decided it was only reasonable to provide A with reduced provision given he was not attending school. While the records note the Council spoke with Dr X in May 2020, there is no record of what it discussed with him. Therefore, I cannot say what the Council discussed with Dr X, or whether it even discussed A's SEN provision at all.
26. While it is for the Council to decide what it considered reasonable to arrange, it must show proper consideration of the matter. There is no evidence the Council properly considered its reasonable endeavours duty. This is fault.
27. I consider the fault identified have caused some uncertainty. This is because I cannot say whether A would have received all his SEN provisions between April and July 2020 if the Council had properly considered its reasonable endeavours duty.

### **September 2020 onwards**

28. The Council's reasonable endeavours duty ended in July 2020. After this point, the Council had an absolute duty to secure A's SEN provisions.
29. Records show the Council:
  - Did not commission the providers to provide A's OT and PT SEN provisions until late October 2020.
  - Did not check with the commissioned OT and PT providers to ensure the SEN provisions were being delivered.
  - Did not check with A's SALT provision was being delivered until November 2020.
30. The Ombudsman recognises it is not practical for councils to keep a 'watching brief' on whether schools are providing all the special educational provision for

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every pupil with an EHC plan. However, the Ombudsman does consider councils should be able to show due diligence in discharging its legal duty and, as a minimum, have systems in place to:

- check the special educational provision is in place when a new or substantially different EHC plan is issued or there is a change in placement;
  - check the provision at least annually via the review process; and
  - investigate complaints or concerns that provision is not in place at any time.
31. The Council did not check its providers were delivering the SEN provisions after commissioning them. When it did eventually check with the providers, it turned out not all the provisions had been delivered. Further, despite being aware the SALT provisions were not being delivered in November 2020, the Council did not follow up with the SALT provider until April 2021.
32. Therefore, while we recognise the Council did commission providers to deliver A's SEN provision, the Council failed to check, or significantly delayed in checking, that the SEN provisions were being delivered to him in line with his EHC plan.
33. As a result, not all of A's provisions were delivered in line with his EHC plan. Therefore, the fault identified meant A did not receive all the SEN provision set out in his EHC plan between September 2020 and May 2021. This is fault.
34. I consider this loss of provision would have had some impact on A's educational progress and wellbeing.
35. Further, the Council failed to secure a pool for A's hydrotherapy until March 2022. While we recognise the Council had difficulty in finding a suitable pool, the Council's duty to secure the SEN provision is absolute, and there is no defence for 'best endeavours'. Therefore, this is fault.
36. The fault identified meant A did not receive any hydrotherapy between September 2020 and March 2022, a delay of 18 months. It is likely this loss of provision would have had some impact on A's progress and wellbeing.

### **Agreed action**

37. To remedy the injustice caused by the faults identified, the Council has agreed to complete the following:
- Apologise to Mr X for the injustice caused by the faults identified.
  - Pay Mr X £300 to recognise the distress and uncertainty caused by the faults identified.
  - Pay Mr X £400 a month to recognise A's loss of SEN provision, including hydrotherapy, between September 2020 to May 2021 (eight months). In reaching this figure, I have considered the fact A did receive some of his SEN provision. The total amount to pay is £3200.
  - Pay Mr X £100 a month to recognise A continued to receive no hydrotherapy between May 2021 and March 2022 (10 months). The total amount to pay is £1000.
38. The Council should complete the above within four weeks of the final decision.

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## **Final decision**

39. I find fault with the Council for failing to provide all the SEN provisions set out in A's EHC plan. The Council has accepted my recommendations. Therefore, I have completed my investigation.

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