

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Surrey County Council
(reference number: 18 005 886)**

8 February 2019

The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mr X	The complainant
Y	His son
Officer A	Officer in the Council's Special Educational Needs (SEN) department
Officer B	Officer in the Council's SEN department

Report summary

Special educational needs

Mr X complains the Council took 18 months between July 2015 and January 2017 to issue a final Education Health and Care (EHC) Plan for his disabled son, Y. This delayed his right of appeal against the EHC Plan and prevented Y from receiving the correct provision for 15 months longer than necessary. The Council also knew about missing occupational therapy (OT) provision for Y six months earlier than it claimed, forcing Mr X to chase the matter for longer than necessary. Finally, the Council sought to restrict Mr X's communications when it had no good reason to do so. This caused him avoidable frustration, more so as the Council had previously failed to communicate with him properly in a complaint (reference 15 003 601) where we found it had denied Y free home-to-school transport for six months in 2015.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused by fault, we recommend the Council takes the following action within three months of the date of this report:

- Apologises to Mr X for:
 - a delay of 15 school months in issuing the EHC Plan;
 - wrongly telling him it was unaware of missing OT sessions until March 2016; and
 - seeking to restrict his communication without good reason;
- Pays Mr X £3,000 for Y's lost provision for 15 school months. It should also pay Mr X £250 for his time and trouble in having to pursue the matter of the missed OT sessions over several months and £500 for the frustration caused by restricting his communications without good reason. This amount reflects the fact that Mr X has experienced similar difficulties in gaining responses from the Council as he did in complaint [15 003 601](#). These sums total £3,750.

To prevent a recurrence, we recommend the Council arranges training for special educational needs (SEN) staff within three months of the date of this report to ensure they are aware that:

- attending a specialist school does not automatically meet a child's SEN when the EHC Plan is out-of-date, and amendments must be made in accordance with statutory timescales; and
- they should not restrict a person's communications without evidence of the behaviour that has led to this.

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

The Council has agreed to these recommendations.

The complaint

1. Mr X complains the Council failed to consider the frequency of 19 occupational therapy (OT) sessions it agreed to provide for his son, Y, to make up for missed sessions, but instead offered them as a block.
2. Mr X says the Council knew in September 2015 that Y was not getting the OT sessions he should have had, but that it has since claimed it did not know of this until April 2016.
3. He also says the Council took from July 2015 until January 2017 to issue a final amended EHC Plan for Y.

Legal and administrative background

4. We investigate complaints about ‘maladministration’ and ‘service failure’. In this report, we 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. We 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 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 has done. Although these matters go back more than three years and this is a late complaint, Mr X earlier complained promptly to us in 2016. We discontinued our investigation in 2017 as Mr X appealed to the SEND Tribunal against the EHC Plan issued by the Council, inviting him to return after the hearing if he wished. He has done so without delay, so there is a good reason for us to now investigate these late matters. (*Local Government Act 1974, sections 26B and 34D, as amended*)
6. The Special Educational Needs Code of Practice 2014 (the Code) is a document that lays out councils’ statutory responsibilities to children with SEN. The Code states at paragraph 9.192 that councils have 14 weeks to reassess and issue revised EHC Plans after a decision to amend them.
7. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Tribunal (‘SEND’)*)
8. Almost all councils have a policy for dealing with unreasonably persistent and vexatious complainants. Such policies allow the council to restrict a person’s communications where they are unduly frequent or repetitious, or are abusive or threatening. We recommend they should contain provision for a warning and the review of any restrictions imposed. Surrey County Council has such a policy.

How we considered this complaint

9. We have produced this report after examining the relevant files and documents and interviews with the complainant and officers of the Council. Both parties have had the opportunity to comment on a draft of this report and we have considered their comments.

What we found

Relevant background

10. Mr X's son, Y, has significant SEN. In complaint [15 003 601](#) we found the Council failed for almost two school terms between February and September 2015 to provide free home-to-school transport for Y to the special school he attended. We also found the Council failed to communicate properly with Mr X, or to deal properly with his complaint. The Council did not agree with all our findings, but agreed to accept our recommendations to draw matters to a close. It apologised and paid Mr X £2,250.

What happened

11. The Council carried out an annual review of Y's EHC Plan on 25 June 2015. The notes of this annual review show the Council agreed the EHC Plan was out-of-date. It therefore needed to be amended.
12. On 11 September 2015, Mr X attended a meeting with an SEN Officer (Officer A). Mr X recorded this meeting covertly. He told us he did so because he had lost trust in the Council. He supplied a copy of the recording. We checked the recording of the whole meeting against the copy of the minutes of the meeting the Council supplied. This confirmed the recording was of this meeting.
13. At the end of the meeting, the recording shows Mr X asked to speak to Officer A. It records Mr X told Officer A he was concerned about "historic" lack of provision, "not providing for [Y]", for a period of "about six months". Officer A then asked Mr X what outcome he was looking for because the Council couldn't "turn the clock back". Mr X replied that he wanted changed procedures and some OT provision outside Y's school.
14. Mr X also provided a copy of an email he sent to Officer A on 7 February 2016. In this email, he raised the issue of the historic missing OT provision again. Further emails the Council supplied showed he chased this again on 3 April 2016.
15. On 7 March 2016, an OT emailed the Council. The Council provided a copy of this email. The OT told it the 19 OT sessions would be best provided in a block.
16. In May 2016, the Council told Mr X it would not issue an amended EHC Plan because another annual review would happen in July.
17. In its response to our enquiries, the Council told us Mr X agreed to this. He has denied it. We offered the Council the opportunity to provide evidence to show Mr X agreed. It was unable to do so.
18. In response to the draft report, the Council told us it had issued an EHC Plan on 1 June 2016, against which Mr X could have appealed. However, in a letter of 30 August 2016, to which we will return later, Officer A told Mr X that Y's "2016 annual review [referred to in the next paragraph] was informed by a newly-revised draft EHCP". We have not seen any evidence that the EHC Plan of 1 June 2016 was a final Plan against which Mr X could have appealed.
19. On 6 July 2016, the Council carried out the next annual review of Y's EHC Plan. The Council had still not issued the amended EHC Plan following the previous annual review. The minutes of the July 2016 annual review recorded Mr X was not satisfied with the provision. They also recorded the meeting was based on a draft EHC Plan.
20. By this time, Mr X had complained to the Council about the delayed EHC Plan and the missed OT provision.

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21. On 30 August 2016, Officer A wrote to Mr X with a final response to his complaint. He said the Council had been alerted to missing OT sessions by the email of 7 March 2016. This letter did not clarify a timeframe for how far back the missed sessions went. In this letter, Officer A said the Council had addressed the shortfall as soon as it became aware of it. He also said he was confident Y had not missed any provision because of the delay in issuing the amended EHC Plan because he attended “a highly specialist school which provides individualised programmes of support with integrated therapy provision.”
 22. At the end of the letter of 30 August 2016, Officer A said Mr X needed to abide by “communication ground rules”. These were that he communicated only by email, that he only used one email address and that he emailed no more than once a week.
 23. Copies of Mr X’s emails to the Council and vice-versa from the period 2014 to 2016 that the Council supplied did not show any unusual frequency. Many of them were about delays by the Council. One involved a delay of three weeks by Officer A in responding to an email. Others contained apologies from officers for delayed responses. The Council has not supplied any records of telephone calls from Mr X. We also note the Council apologised to Mr X in the letter of 30 August 2016 that its first response to his complaint had been late.
 24. We interviewed Officer A. He told us he had thought Mr X was unhappy about the amount of OT Y was getting rather than the historic missing OT.
 25. Officer A also confirmed his view that because Y was attending a specialist school there was no disadvantage to him in not having an up-to-date EHC Plan. He said the school was for children with severe learning difficulties and autistic spectrum disorders. He said that its core offer was a high-level offer, at the high end of provision and that there is a high staff ratio set up to meet children’s most complex needs.
 26. We interviewed another SEN officer (Officer B). He told us he had been the case worker since June 2016. He said the school had taken until late September 2016 to issue the paperwork after the annual review. He said he had felt it best to organise a meeting as Mr X was concerned about the school. He said a forum then considered Mr X’s requests, but did not agree them, so there was another meeting. He said Mr X agreed to this delay. As we had not seen any evidence Mr X agreed to the delay, we offered to consider any evidence Officer B had of this. We have received none.
 27. Mr X told us he did not consent to any delay.
 28. The Council issued the amended EHC Plan in January 2017.
 29. Mr X appealed to the SEND Tribunal. The Council later agreed a new EHC Plan. This specified a change of school. It also included greater provision. This included a specialist programme for Y’s autism such as applied behaviour analysis (ABA). It also included extra speech and language therapy (SALT) with guaranteed weekly time, extra OT time each week and joint SALT/OT timed sessions each half term.

Conclusions

Frequency of occupational therapy sessions to make up for those missed

30. There is no dispute that the Council agreed to make up 19 OT sessions Y had missed. Mr X says the Council should have spread out the sessions for Y to gain

the most benefit. The email we have seen shows the OT felt the sessions would be better in a block. Mr X disagrees with the OT's professional opinion. But we are not able to prefer another view where a matter is one of professional opinion and there is no fault in the way the decision was made. We do not find the Council at fault.

When the Council knew about the missing occupational therapy sessions

31. The recording Mr X provided from the meeting on 11 September 2015 was clear. It shows Officer A should have been aware of the missing OT from that date. Mr X mentioned "historic" missing OT for "about six months" and Officer A asked him what outcome he wanted because the Council couldn't turn the clock back. If there was any uncertainty about the nature of what was missed, the Council should have checked this. Mr X's email of 7 February 2016 was also clear. The Council was therefore at fault in claiming it did not know about the missing OT until March 2016.

Issuing the amended EHC Plan

32. The Council agreed after Y's annual review in July 2015 to issue an amended EHC Plan. It should have done so within 14 weeks. It took 18 months to do this, which was delay of about 15 months. In response to the draft report, the Council has claimed the EHC Plan of 1 June 2016 was a final Plan against which Mr X could have appealed to the SEND Tribunal. It has not provided any evidence to support this, such as a letter to Mr X telling him of his rights. The available evidence, in the form of Officer A's letter to Mr X of 30 August 2016, states the Plan of 1 June 2016 was a draft. Mr X could not have appealed against a draft EHC Plan. The Council has also blamed the school for late completion of the minutes of the July 2016 annual review. Even if the Council's assertion about the school is correct, this would have been only a small part of a much larger delay. Despite our offer to consider this, the Council has not produced any evidence to support its assertion that Mr X agreed to any delay. And his complaint to the Council in 2016 suggests otherwise. This delay was fault.

The Council's restriction of Mr X's communications

33. Despite our offer to consider this, the Council has not been able to provide any evidence to support its restriction of Mr X's communication. Given the delay and other fault identified in this investigation and the previous fault in complaint [15 003 601](#), Mr X was justified in chasing the Council. And the emails we have seen from Mr X to the Council were polite and directed at his son's unmet needs. The Council has not produced any evidence of any inappropriate communications from Mr X in any other format. It therefore sought to restrict his communications without good reason and without warning. This was fault.

Injustice

34. Failing to acknowledge the missing OT sessions in September 2015 caused Mr X injustice in the form of time and trouble in having to continue to pursue the matter unnecessarily for several months until the Council proposed a remedy.
35. Seeking to restrict Mr X's communications without good reason when he had good reason to chase the Council caused him avoidable frustration. This is the more so given we previously found the Council's communication with Mr X had been poor in complaint [15 003 601](#). Its unsupported assertion when responding to our enquiries that Mr X agreed to some of the delay in issuing the amended EHC Plan can only have added to that frustration.

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36. However, the principal injustice was caused by the delay of 15 months in issuing the amended EHC Plan in January 2017. Officer A told us at interviews that Y suffered no disadvantage from his out-of-date EHC Plan because he was attending a specialist school. We do not agree. This is because the Council's delay meant Mr X had no right of appeal to the SEND Tribunal against the out-of-date EHC Plan for about 15 months longer than necessary. The Council and Mr X later agreed a different school and different provision. The provision Y was receiving during the 15-month period did not meet his needs. But for the Council's delay, it is reasonable to assume that the subsequent events, including the outcome of the negotiations that led to the agreed provision, would each have happened in their turn 15 months earlier. Y therefore received the amended provision he needed about 15 months later than he otherwise would have done. This loss of provision was injustice to Y. It was also injustice to Mr X in compounding his frustration with the Council's failures going back to February 2015.

Recommendations

37. To remedy the injustice caused by fault, we recommend the Council takes the following actions within three months of the date of this report:
38. Apologises to Mr X for:
- a delay of 15 school months in issuing the EHC Plan;
 - wrongly telling him it was unaware of missing OT sessions until March 2016; and
 - seeking to restrict his communication without good reason;
39. Pays Mr X £3,000 for Y's lost provision for 15 school months. It should also pay Mr X £250 for his time and trouble in having to pursue the matter of the missed OT sessions over several months and £500 for the frustration caused by restricting his communications without good reason. This amount reflects the fact that Mr X has experienced similar difficulties in gaining responses from the Council as he did in complaint 15 003 601. These sums total £3,750.
40. To prevent a recurrence, we recommend the Council arranges training for SEN staff within three months of the date of this report to ensure they are aware that:
- attending a specialist school does not automatically meet a child's SEN when the EHC Plan is out-of-date, and amendments must be made in accordance with statutory timescales; and
 - they should not restrict a person's communications without evidence of the behaviour that has led to this.
41. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
42. The Council has agreed to these recommendations.