

Report by the Local Government and Social Care Ombudsman

Investigation into a complaint about Surrey County Council (reference number: 22 000 826)

12 January 2023

The Ombudsman's role

For more than 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.

I 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

Mrs X	The complainant
Y	Her son

Report summary

Children's services – Education, Health and Care plans

Mrs X complained the Council failed to deliver provisions set out in her son, Y's, Education, Health and Care plans between September 2020 and March 2022. She also complained about how it handled her complaint.

Finding

Fault found causing injustice and recommendations made.

Recommendations

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*)

Within three months of the date of this report, the Council will also:

- write to Mrs X to apologise for the faults identified and the injustice this has caused to her and Y;
- pay Mrs X £5,400 to be used for Y's educational benefit. This is to remedy the injustice caused to Y by lost hours of education and therapy provision between September 2020 and March 2022;
- pay Mrs X £1,000 to recognise the frustration and distress caused over a prolonged period (September 2020 to May 2022) as a result of the faults. This also recognises Mrs X's frustration is compounded by poor complaint handling and because this is the second time she has had to complain to us about very similar matters;
- pay Y £1,000 to recognise the distress caused by the lost provisions and the enduring nature of the Council's failure to provide suitable education and special educational provisions for him between September 2020 and March 2022. This figure recognises the enduring injustice resulting from the Council's failures since 2018, as set out in this report and the previous decision we issued;
- review its procedures for how it arranges and monitors delivery of provisions in the Education, Health and Care plans of its children and young people that it is under a non-delegable duty to make sure are provided. This should ensure that provision within a plan is put in place in a timely way after a plan is finalised and a clear process for the Council to monitor this thereafter; and
- review its children's and education services complaint handling processes to ensure complaints are investigated in line with its policy. It should ensure all complaint response letters make it clear whether they are a stage 1 or stage 2 response and tell the complainant what to do if they remain dissatisfied following the response. It should also provide evidence it has reminded its staff of this need to be clear and follow the correct complaints process.

The Council has agreed to our recommendations.

The complaint

1. Mrs X complained the Council failed to deliver provisions set out in her son, Y's, Education, Health and Care plans between September 2020 and March 2022. It also handled her complaint poorly. She says Y missed out on special educational provisions as a result which have impacted on his education and caused her and her son distress. She wants the Council to acknowledge its failings and provide a financial remedy for the lost special educational provision, the distress caused to her and Y and poor complaint handling. She also wants the Council to improve its services.

Legal and administrative background

The Ombudsman's role and powers

2. 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*)
3. The First-tier Tribunal (Special Educational Needs and Disability) considers appeals against council decisions about special educational needs. We refer to it as the SEND Tribunal in this report.
4. When considering complaints, if there is a conflict of evidence, we make findings based on the balance of probabilities. This means that we will weigh up the available relevant evidence and base our findings on what we think was more likely to have happened.
5. Our view, based on caselaw, is that 'service failure' is an objective, factual question about what happened. A finding of service failure does not imply blame, intent or bad faith on the part of the council involved. There may be circumstances where we conclude service failure has occurred and caused an injustice to the complainant despite the best efforts of the council. This still amounts to fault and we may recommend a remedy for the injustice caused. (*R (on the application of ER) v CLA (LGO) [2014] EWCA civ 1407*)
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 report with Ofsted.

Education, Health and Care plans

7. Some children and young people with special educational needs and disabilities will have an Education, Health and Care plan (EHC plan). The EHC plan identifies a child's education, health and social care needs and sets out the extra support needed to meet those 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*)
9. If a person is unhappy with the content of an EHC plan, they have a right of appeal to the SEND Tribunal. Where the Tribunal orders a council to amend an EHC plan, the council shall amend the EHC plan within five weeks of the order being made. (*Special Educational Needs and Disability Regulations 2014*) We cannot direct changes to the sections about education. Only the tribunal can do this.

The Council's complaints procedure

10. Councils must have complaints procedures to support the effective handling of complaints. Surrey Council's complaints procedure has two stages:
 - Stage 1 – local resolution. The service complained about will provide an initial complaint response within 10 working days. If the person is dissatisfied with the stage 1 response, they can request a stage 2 investigation.
 - Stage 2 – investigation. An officer independent of the service complained about will review the complaint. They will either:
 - carry out a further investigation; or
 - refer the request back to the service complained about with a request to reconsider all, or specific parts of the complaint. They will provide a response within 20 working days.

How we considered this complaint

11. We produced this report after examining relevant documents and interviewing the complainant.
12. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.
13. We considered our decision statement from a previous complaint Mrs X brought to us which we closed in September 2021 (Case reference: [19 020 776](#)). In this case we found the Council at fault as it failed to provide Y with education between March 2018 and April 2020.

What we found

What happened

14. Mrs X's son, Y, has special educational needs and an Education, Health and Care plan (EHC plan). In September 2020, his plan included the following special educational provisions:
 - 15 hours tutoring a week;
 - 1 hour speech and language therapy a week with a termly review;
 - occupational therapy – weekly sessions, a sensory diet programme and daily implementation of an occupational therapy programme;

- a personal learning plan including education and therapeutic input, with a termly multi-disciplinary review.
15. Mrs X was unhappy with the content of the plan and appealed to the SEND Tribunal.
 16. Mrs X says between September 2020 and January 2021, Y received 4 hours tuition a week. Between February and July 2021, he received 6 hours a week. The Council has not provided any evidence to show it offered more tuition or that Y received more tuition than this during this time.
 17. The SEND Tribunal heard the case in April 2021 and ordered the Council to include the following provisions in Y's plan:
 - 25 hours tutoring a week;
 - provision of an occupational therapy (OT) programme;
 - 18 hours a year of speech and language therapy;
 - weekly non-directive therapeutic provision e.g. animal therapy.
 18. The Council amended the EHC plan in line with the Tribunal order and issued the final plan in mid-May 2021.
 19. Mrs X complained to the Council in June 2021. She said the Council had failed to provide education and deliver provisions in Y's plan since September 2020 and despite the Tribunal's order, provision listed in the May 2021 final plan was still not in place. She said:
 - despite his September 2020 EHC plan specifying 15 hours a week tuition, he only received 4 hours a week between September 2020 and February 2021 and 6 hours a week from February onwards;
 - he never had a personalised learning plan;
 - he did not receive his full occupational therapy provision – a sensory diet was not provided until January 2021, the programme devised in November 2020 was never reviewed or adjusted and staff working with Y daily were not trained to deliver it; and
 - termly multi-disciplinary meetings did not take place.
 20. The Council told Mrs X it would not consider her complaint at that time as she had another complaint currently being considered by us. It told her it was putting the complaint "on hold".
 21. In July and August 2021, the Council worked to get provision in place. By the beginning of September, Y was receiving the 25 hours tutoring, OT provision and some speech and language therapy. Mrs X complained that Y was still not receiving all the provisions in his plan. She said the animal therapy and some speech and language therapy was still not in place.
 22. At the end of September, the Council wrote to Mrs X. It said it had now agreed to fund 18 hours of speech and language therapy and that the animal therapy could start. In its response to our enquiries, the Council said this email was its stage 1 complaint response. However, the email did not indicate that it was a formal complaint response, nor did it tell Mrs X of her right to request a stage 2 investigation, if she remained dissatisfied.
 23. The Council said it closed her complaint in October as it did not hear from Mrs X after this email.

24. In November 2021, Mrs X contacted the Council to say Y had been unable to engage with his occupational therapist and she felt he needed a different therapist. She also said the animal therapy sessions still had not begun.
25. The OT provider contacted the Council to say Mrs X had asked it to be involved in termly multi-disciplinary meetings as this provision was in Y's EHC plan. It said the Council had not asked for this and so it was not covered in the original quote. It set out its quote for it to attend 3 multi-disciplinary meetings a year and asked the Council to approve the additional funding. The Council did not respond to this request.
26. In December 2021, the OT provider told the Council it could no longer deliver Y's provision. It said Y had struggled to engage with his therapist. Mrs X had asked if he could be allocated a different therapist, but they did not have an alternative therapist available.
27. As part of its feedback to the Council, the OT provider said the Council had not funded any hours for multi-disciplinary meetings. Because of this, it had been unable to liaise with other professionals working with Y to learn and share what worked for him. If they had been able to do this, it might have helped them understand better how they could engage him.
28. Between December 2021 and February 2022, the Council says it contacted 10 other OT service providers, but none had capacity.
29. In February 2022, Mrs X asked the Council for an update on the OT provision and the animal therapy. She said the animal therapy provider had told her it could begin several weeks ago, and she did not know why this had not started. The Council said it had sent the provider some finance forms in September 2021, but the provider had not returned them. It said it would work to resolve the issue.
30. Y began attending animal therapy sessions in March 2022.
31. In March 2022, Mrs X re-submitted her June 2021 complaint to the Council. In addition to the issues raised in June 2021 she said:
 - delays in agreeing the funding for therapies during Summer 2021 had led to difficulties co-ordinating the provision, even though the Council was duty-bound to deliver all the provisions set out in the EHC plan as ordered by the SEND Tribunal;
 - she was unsure why the Council did not investigate her complaint in June 2021, as the ongoing Ombudsman investigation related to an earlier time period. The Council had then closed her complaint during Autumn 2021 without telling her, which had delayed any meaningful resolution to the issues raised; and
 - Y did not receive any animal therapy between May 2021 and March 2022.
32. In April 2022, the Council told her it had considered her complaint at stage 2 of its complaints procedure. It said it had decided to ask the local service to provide a more detailed response, as it had not yet fully considered the issues raised at stage 1.

33. The Council provided an additional complaint response in May 2022. It accepted there had been a delay setting up the animal therapy and offered her £300 to recognise this. It said it had tried to get another OT provider in place, after Y's provider withdrew in December 2021. However, it had not been able to find a replacement. It accepted it had not delivered all Y's educational and therapeutic provision. It said it had offered her a financial remedy for lost provision after its stage 2 response.
34. Mrs X responded and said the remedy offer it referred to was made after a previous complaint she made about lost special educational provision before April 2020.
35. The Council told her it had completed its consideration of her complaint and she could bring her complaint to us if she remained dissatisfied. Mrs X brought the complaint to us in May 2022.

Conclusions

36. The Council was under a non-delegable duty to ensure the provision in Y's EHC plan was delivered. After councils issue an EHC plan, we expect them to ensure all the provision in the plan is in place. If a council later becomes aware provision is missing, it should act to secure it without delay.

Provision between September 2020 and mid-May 2021 set out in Y's September 2020 EHC plan

37. Mrs X says the Council did not deliver the full 15 hours a week tuition provision set out in Y's plan. The Council has not provided any evidence to suggest otherwise, either in its complaint responses to Mrs X or information provided to us. On the balance of probabilities, we find Y only received 4 hours tuition a week between September 2020 and January 2021 (11 hours a week of lost provision) and 6 hours a week between February and mid-May 2021 (9 hours a week of lost provision). This is fault and meant Y missed out on a significant amount of educational provision during this period.
38. There is no evidence Y had a personalised learning plan, or of any termly multi-disciplinary meetings as set out in this plan. This is fault.
39. There is no evidence Y had a sensory diet programme before January 2021 or that the OT programme was delivered daily or reviewed. This is fault.

Provision between mid-May 2021 and March 2022

40. Between mid-May and July 2021, Y received 6 hours tuition a week. This was 19 hours less each week than the 25 hours that was in his amended plan issued in mid-May 2021. Y did not receive all the tuition hours set out in his EHC plan and this is fault.
41. From September 2021 onwards, Y received 25 hours tuition a week, in line with his plan.
42. There is no evidence Y received OT provision between mid-May and July 2021. This is fault.
43. Y received OT provision between September and December 2021. Although the evidence shows the Council tried to find a suitable alternative provider between December 2021 and March 2022, it did not manage to do so and so Y did not receive any provision during this time. This was service failure and is fault.

44. The plan finalised in May 2021 included 18 hours a year speech and language therapy provision. Between April and July 2021, Y received 1 session every half term. The Council confirmed with Mrs X it had arranged for Y to receive the full 18 hours of speech and language therapy provision at the end of September 2021. Y received this provision from October 2021 onwards. On the balance of probabilities, Y missed out on some speech and language therapy provision between May and September 2021. This is fault.
45. The animal therapy included in Y's plan in May 2021 did not start until March 2022. The Council said this was because the provider had not sent it the finance forms in September 2021, and it did not realise this until February 2022. The Council should have checked this earlier to satisfy itself the provision set out in Y's EHC plan had started as it had a non-delegable duty to ensure Y received this provision. Mrs X told it Y was not receiving the animal therapy in November 2021, but the Council did not act and allowed the situation to drift. This is fault and meant Y missed out on animal therapy provision between May 2021 and March 2022.
46. The Council has accepted Y missed out on the animal therapy provision and offered Mrs X £300 as a remedy. We discuss our consideration of this further below.
47. There is no evidence Y had a personalised learning plan with integrated education and therapy, or of any termly multi-disciplinary meetings as set out in his plans between September 2020 and March 2022. This is fault.

Complaint handling

48. There is no good reason why the Council could not have investigated Mrs X's complaint in June 2021. The fact she had another complaint being considered by us was not good reason for putting her complaint on hold, as the two complaints were entirely separable. The failure to investigate her complaint in Summer 2021 in line with the timescales set out in its policy is fault.
49. The email sent to Mrs X in September 2021 did not say it was a complaint response, did not respond to all the points she had raised and did not tell her how to escalate her complaint if she was unhappy with the response. The email did not indicate it was a complaint response at all. The Council then closed the complaint without informing Mrs X. This is fault.
50. After Mrs X re-submitted her complaint in March 2022, the Council caused further uncertainty by considering the complaint at stage 2 and referring the complaint back to the service for an additional response at stage 1, when Mrs X did not know she had received a stage 1 response in the first place. The additional response then referred to a remedy offered to Mrs X in relation to a different complaint. This led to further confusion.
51. Overall, the Council handled her complaint poorly and this was fault. It should have taken a maximum of 30 working days in line with its complaints policy. Instead, it took 11 months. The poor complaint handling caused Mrs X uncertainty and frustration and led to delay in the Council responding to her concerns.

Considering the remedy

52. The Council has offered Mrs X £300 as a financial remedy for the lost animal therapy provision. However, as set out above, the evidence shows it was not just the animal therapy that Y missed out on. The offer of £300 is insufficient to remedy the injustice caused to Y for all the lost educational and therapy provisions between September 2020 and March 2022.
53. The Council also handled Mrs X's complaint poorly. This caused her frustration and uncertainty and meant she did not receive a response to the significant concerns she raised for 11 months, instead of 30 working days.
54. Our previous investigation found that the Council had failed to provide Y with a substantial amount of education between March 2018 and April 2020, causing him a significant injustice. The Council agreed to pay Y £1,000 to recognise the distress caused and Mrs X £600 for distress and time and trouble in bringing her complaint. The faults identified in this investigation follow on consecutively from our previous investigation and have caused Y a significant additional, and compounded injustice for support he was entitled to receive by law. Mrs X has also been caused a significant additional injustice bringing this further complaint on his behalf.
55. We have recommended a suitable remedy below, based on our guidance on remedies and considering the remedies agreed following our previous investigation. In reaching the recommended figures, we have considered what education and therapy Y missed out on during each school term we have investigated and the cumulative injustice of the enduring faults from March 2018 on Mrs X and Y.

Recommendations

56. 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*)
57. Within three months of the date of this report, the Council will also:
 - write to Mrs X to apologise for the faults identified and the injustice this has caused to her and Y;
 - pay Mrs X £5,400 to be used for Y's educational benefit. This is to remedy the injustice caused to Y by lost hours of education and therapy provision between September 2020 and March 2022;
 - pay Mrs X £1,000 to recognise the frustration and distress caused over a prolonged period (September 2020 to May 2022) as a result of the faults. This also recognises Mrs X's frustration is compounded by poor complaints handling and because this is the second time she has had to complain to us about very similar matters;
 - pay Y £1,000 to recognise the distress caused by the lost provisions and the enduring nature of the Council's failure to provide suitable education and special educational provisions for him between September 2020 and March 2022. This figure recognises the enduring injustice resulting from the Council's failures since 2018, as set out in this report and the previous decision we issued;

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- review its procedures for how it arranges and monitors delivery of provisions in the EHC plans of its children and young people that it is under a non-delegable duty to make sure are provided. This should ensure that provision within a plan is put in place in a timely way after a plan is finalised and a clear process for the Council to monitor this thereafter; and
 - review its children's and education services complaints handling processes to ensure complaints are investigated in line with its policy. It should ensure all complaint response letters make it clear whether they are a stage 1 or stage 2 response and tell the complainant what to do if they remain dissatisfied following the response. It should also provide evidence it has reminded its staff of this need to be clear and follow the correct complaints process.
58. The Council has accepted these recommendations.

Decision

59. We have completed our investigation into this complaint. We have found fault and the Council has agreed action to remedy the injustice caused and improve Council services.

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