

FOR PUBLICATION

DERBYSHIRE COUNTY COUNCIL

CABINET

17 June 2021

Report of the Monitoring Officer

**Report of the Local Government & Social Care Ombudsman -
Investigation into Complaint No 18/000/932 against Derbyshire County
Council
(Children's Services)**

1. Divisions Affected

1.1 County wide.

2. Key Decision

2.1 This is not a key decision.

3. Purpose

3.1 To inform Cabinet of a recent case investigated by the Local Government and Social Care Ombudsman (LGSCO) who has made a finding of fault by the Council causing injustice to the complainant.

4. Information and Analysis

4.1 Members are aware that if an individual is dissatisfied with the service provided by the Council he/she may complain under the Council's Corporate Complaints Procedure. If a complainant remains dissatisfied they are able to refer the complaint to the Local Government and Social Care Ombudsman. If the LGSCO decides to investigate a complaint he will determine whether, in his opinion, the Council has been guilty of

“maladministration” and if so whether the complainant has sustained “injustice” in consequence.

- 4.2 Section 5A of the Local Government and Housing Act 1989 imposes a duty upon the Monitoring Officer to prepare a report to the Executive if at any time it appears to her that there has been maladministration in the exercise of its functions. The duty does not arise in respect of a finding of maladministration by the LGSCO unless the LGSCO has conducted an investigation (S. 5A(4)). The Monitoring Officer is obliged to and has consulted the Head of Paid Service and Chief Financial Officer in the preparation of this section 5A report and provided a copy to each Member of the Council.
- 4.3 As soon as practicable after the Executive has considered the Monitoring Officer’s report it must prepare a report which specifies:-
- (a) What action (if any) the Executive has taken in response to the Monitoring Officer’s report,
 - (b) What action (if any) the Executive proposes to take in response to the report, and
 - (c) The reasons for taking the action or for taking no action.

Background

- 4.4 This report relates to a complaint in relation to Z, a child with several physical and mental health conditions. He was previously supported by a Statement of Special Educational Needs which Derbyshire County Council transferred to an Education Health and Care Plan (EHCP) in January 2018. The EHCP is a legal document which outlines a young person’s needs, support and educational placement.
- 4.5 On 27 June 2018, towards the end of Z’s time in Year 5, his school held an annual review meeting, the minutes of which were sent on to the special educational needs and disabilities (SEND) assessment team on 23 July 2018. An annual review is a process which needs to take place each year in order to determine whether any changes are needed to a young person’s package of support. The annual review for Z stated the Council needed to amend Z’s EHCP to reflect that his increased anxiety required a higher ratio of adult support with therapeutic provision included and an enhanced transition package at the end of key stage 2 , In September 2018, Z moved into Year 6, his last year at primary school.
- 4.6 On 23 October 2018, the Council issued Z’s parents with a notice stating it planned to amend Z’s EHCP and on 7 November, Ms X sent the Council a request to consult with her preferred placement which was

a mainstream secondary school called School 1. Ms X's second preference, School 2, was an independent special school.

- 4.7 The Council consulted with School 1 and another school and Derbyshire County Council agreed to name School 1 as the school of choice, but unfortunately this was not actioned. Over June and July the Council consulted with School 2 (Ms X's second preferred choice) and another school. However, on 15 July 2019, the Council issued Z's final EHCP allocated Z *"a further year at [his current primary school] or until a suitable secondary school can be found"*.
- 4.8 Ms X did not appeal the EHCP because she said officers agreed to consult with six secondary schools over the summer holidays. Ms X could then visit the schools once they reopened in September. However, the officer leading on the case did not action this and did not explain to Ms X that there had been a change in the intention to consult.
- 4.9 In September 2019, Z was due to start Year 7 at secondary school. As the Council had not named a secondary school place for him, Z remained at his primary school. Whilst he was at primary school, Z received 1:1 teaching each morning based on the Year 7 curriculum. In the afternoons, he joined his class for Year 6 lessons. Ms X felt this worked well for Z because the teachers at his primary school understood him and could avoid the triggers which he found distressing.
- 4.10 In November 2019, Ms X told the Council she had been to School 3 and it seemed suitable for Z. School 3 was an independent special school. Unfortunately, the council officer leading the case was too slow in agreeing to consult with this school and eventually failed to do so.
- 4.11 In January 2020, officers consulted with two further schools. It named one of those schools, school 4, on Z's Plan which it finalised in February 2020. Ms X took up her rights to appeal to a tribunal and the case was heard the case in June 2020. The tribunal directed the Council to name School 3 on Z's EHCP.

The initial complaint to the Council

- 4.12 On 29 November 2019, while the above events were taking place, Ms X complained to Derbyshire County Council and on 28 April 2020 a stage 1 response was sent which upheld the majority of complaints and offered an unreserved apology. Ms X was unhappy with the Council's initial response and she escalated her complaint to Stage 2/final response of the Council complaint procedure on 22 May 2020. The complaints and Council responses are below:

- a) Delays in the annual review process and the issuing of the final amended EHCP - The Council partially upheld the complaint as the plan was late in being issued.
- b) Failure to consult with schools - The Council did not uphold this part of the complaint as Ms X's preferred school was consulted with in a timely manner.
- c) Delay in Z transferring to secondary school - The Council upheld this part of the complaint as officers did not act on the agreed transfer to secondary school.
- d) Poor communication with the Council- The Council upheld this part of the complaint at Stage 1 but Ms X felt the response had taken too long. Ms X said this had left Z academically behind his peers and feeling isolated and lacking in self-worth because he thought he had been forgotten. The Council responded within timescale on 30 June 2020 through a stage 2 investigation and agreed it had taken too long to address the initial complaint for which it apologised.
- e) Failed to find Z a suitable secondary school - The Council only partially upheld this part of the complaint. The Council said it acted in line with legislation when it named School 4 on Z's EHCP and would shortly amend his plan in accordance with the tribunal's order to name School 3. The Council acknowledged it had been a difficult time for Ms X and Z, made worse by COVID-19. However, it only partially accepted it was responsible for the delays in Z starting secondary school. The Council said in future it would ensure that SEND officers communicated effectively with Ms X and it would issue Z's amended EHCP within the required timescales.

The complaint to the LGSCO

- 4.13 Ms X remained unhappy with the Council's response to her complaint and complained to the LGSCO who agreed to investigate. As a result of its investigation, the LGSCO found the Council was at fault when it delayed in carrying out Z's annual review, issuing his final amended Education, Health and Care Plan and consulting with secondary schools. As a result, Z missed out on special educational provision and had to remain in primary school for an additional year. A copy of the LGSCO report setting out the decision is attached at Appendix 2 for information. In summary the actions the Council has agreed with the LGSCO are:

- a) The Executive to consider the report and confirm within three months the action it has taken or proposes to take.
- b) To remedy the injustice identified in the report, within three months of the date of the report to:
 - apologise to Ms X for the faults we have identified; and
 - pay Ms X on behalf of herself and Z, £1,000 to acknowledge the distress Z experienced when he was unable to transfer to secondary school at the same time as his peers for a whole school year and for the unnecessary frustration, distress and time and trouble Ms X experienced because of the Council's faults.
- c) Within six months of the date of the report review its processes to ensure it is carrying out annual reviews, issuing decision notices and finalising amended Education, Health and Care Plans in line with the statutory guidelines.
- d) To provide the LGSCO with evidence it has carried out these recommendations.

Response to the LGSCO's report

- 4.14 The Council has accepted the LGSCO's findings and agreed to the recommendations, which has been welcomed by the LGSCO. Following receipt of the report, the Council has already apologised fully to Ms X for the faults identified and paid Ms X on behalf of herself and Z, £1,000.
- 4.15 In accordance with the LGSCO requirement, the Council will place two public notices announcements in two local newspapers/websites within two weeks of the LGSCO publishing the report. It will also made copies of the report available free of charge at one or more of the Council Offices.
- 4.16 This report fulfils the requirement to arrange for the LGSCO's report to considered by the "executive" and following this meeting the LGSCO will be informed that this has been done.
- 4.17 The LGSCO requires that within six months of the date of the final report the Council should review its processes to ensure it is carrying out annual reviews, issuing decision notices and finalising amended EHCPs in line with the statutory guidelines. The Council has begun a review into it processes for the completion of annual reviews to ensure practice is as efficient as possible. Annual reviews are conducted by the provisions delivering an EHCP and the council's role is to ensure any amendments required are made in a timely manner.
- 4.18 Work already begun has identified elements of the annual review process that will enable shorter timeframes which includes termly

prompts to nurseries, schools and colleges about which annual reviews are due, date checking procedures and chasing up of returns. As part of this, the SEND assessment team has attended recent regional training to maintain knowledge of up to date practice which can be shared through county training. The training for Derbyshire's provider leaders in inclusion is currently being reviewed and will include training on best practice for annual reviews. The SEND assessment team also have a programme of legal training in place to ensure their work is fully compliant with the law. The Council will provide evidence to the LGSCO by the required date to confirm the actions have been taken in accordance with the agreed remedy.

- 4.19 Importantly, the SEND assessment service has also considered the final aspect of the LGSCO's recommendations regarding the response to Ms X's complaint. During the last year, the number of complaints has fallen and all complaints are taken seriously. However, in this instance, it is clear that Ms X's complaint should have been fully upheld rather than two aspects being partially upheld.

Further actions already taken to address the matters arising within this historical complaint.

- 4.20 The Director of Legal and Democratic Services had noticed in 2019 that there was a theme in complaints to the LGSCO relating to Children's Services matters and SEN. This was also the situation nationally. The Council received a LGSCO report relating to another SEN matter in 2019 and this was reported to the Governance, Ethics and Standards Committee on 3 October 2019.
- 4.21 Following the Governance Ethics and Standards Committee, the Director of Legal and Democratic Services contacted Children's Services Quality & Assurance Team to discuss the number of Children's Services SEN LGSCO complaints and asked whether Legal Services could support Children's Services to address the underlying issues and to reduce the likelihood of a further LGSCO report on a Children's Services SEN matter. There were a number of meetings with Legal and Children's Services and at that time a new Assistant Director of Children's Services with responsibility for SEN had also been appointed. Children's Services were confident that since the last LGSCO report in relation to SEN they were making good progress on complaints generally and SEN matters.
- 4.22 The SEN assessment team is responsible for delivery of the Council's statutory duties with regard to the assessment of need, writing and reviewing of EHCPs. Significant change has taken place within this

team to address the matters that have arisen in the history of this complaint. These are detailed below.

(a) Performance in the team

- 4.23 During the last year, there has been a significant change of leadership and officers across the department of Schools and Learning and the SEND assessment team. A new induction process for recently appointed senior officers within the SEND assessment team is now in place which ensures they are aware of expectations and team performance. This is supported by regular supervision of senior officers by the Head of Service aligned to the performance data.
- 4.24 A performance culture has been introduced into the SEND assessment team which ensures that officers track their performance to meet statutory deadlines. This has resulted in significantly improved timeliness of new EHCP assessments being completed within their statutory timescales of twenty weeks. This has increased from 38% in 2018 and 44% in 2019 to 71% in 2020 (above national average). There has also been a rise in timeliness of annual review completion rates from 11.6% in August 2020 to 49.8% in December 2020.
- 4.25 Since November 2019, officers have looked at the emerging themes from complaints and actioned a change of practice. There are now regular weekly meetings between the SEND head of service and complaints' manager to ensure communication and timely response to complainants and this has resulted in a significant reduction in lower level complaints and timely response now in place.

During 2019-2020, 103 complaints were received with only 26 responded to in time.

Month	Number received	Response within timeframe	
April 2019	9	2	22%
May 2019	15	4	27%
June 2019	13	3	23%
July 2019	16	3	19%
August 2019	8	3	37%
Sept 2019	2	2	100%
October 2019	4	2	50%
November 2019	13	2	15%
December 2019	4	0	0%
January 2020	7	2	28%
February 2020	5	1	20%
March 2020	7	2	28%

Total	103	26	25%
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However, there was a significant improvement in performance in 2020-21 with 55 out of 72 complaints responded to in time. The number of complaints received and responses by month April 2020 – March 2021 are set out below:

Month	Number received	Response within timeframe	
April 2020	1	1	100%
May 2020	7	6	86%
June 2020	6	4	67%
July 2020	12	5	42%
August 2020	6	4	67%
Sept 2020	5	4	80%
October 2020	7	6	86%
November 2020	3	3	100%
December 2020	6	5	83%
January 2021	5	5	100%
February 2021	6	5	83%
March 2021	8	7	87.5%
Total	72	55	76%

- 4.26 There are now also fortnightly meetings between the SEND head of service and SEND quality assurance manager to address any matters arising from EHCP quality.
- 4.27 It is important that when considering this LGSCO report, Members are mindful that this and many of the recent complaints to the LGSCO are legacy complaints that originated in practice from previous years, prior to the above changes. A strategic working group from SEND and the complaints team is now in place to monitor and address LGSCO reports specifically, ensure actions are delivered and to also monitor refusals to investigate.
- 4.28 It must also be noted that sometimes agreement of EHCPs may be late for a variety of reasons including parents' illness and therefore the team may be unable to agree a plan. However, performance has improved in this area and plans where there are significant delays have reduced from approximately 38 in May 2020 to 20 in July 2020, 7 in October 2020 and 2 in January 2021.

(b) Communication

- 4.29 In addition to the focus on a performance culture, there have been a number of developments internally with Learning Access and Inclusion Services and across departments that have significantly improved

internal communications to ensure that delays are picked up for vulnerable cohorts. Those involving the SEND assessment team are listed below:

- SEND attendance secured at team monitoring meetings (eg Education Planning Group which addresses children not in school)
- SEND and Elective Home Education meetings in place
- SEND and Social Care meetings in place
- SEND and Virtual School meetings in place.

4.30 There have also been increased and improved communications with parents over the year which have been recognised as making significant difference by the parents themselves and the regional adviser. These include:

- Regular virtual afternoon and evening meetings with Derbyshire Parents Carer Voice, Derbyshire Information and Advice Support Service, Schools and Learning Director, Assistant Director for Learning, Access and Inclusion, SEND head of service and co-production theme leads from Educational Psychology
- Weekly/fortnightly meetings with Derbyshire Parent Carer Voice, SEND head of service and senior officers
- Work has begun on a parents drop in with Derbyshire Parent Carer Voice to provide way to raise immediate concerns

Further recommendations of the Monitoring Officer

4.31 The Council has already apologised fully to Ms X for the faults identified and paid Ms X on behalf of herself and Z, £1,000. In respect of the action to review processes to ensure the Council is carrying out annual reviews, issuing decision notices and finalising amended EHCPs in line with the statutory guidelines, it is recommended that Cabinet consider requiring a progress report to the relevant Cabinet member in August and November.

4.32 In view of the fact that specific changes had already been made in areas identified prior to receipt of the LGSCO's report and the Council has accepted the LGSCO's recommendations, no further activity is recommended.

5. Alternative Options Considered

- 5.1 In view of the fact that the LGSCO has categorised the complaint as “Upheld: maladministration and injustice”, the statutory process for reporting the decision must be followed.
- 5.2 The Executive could decide to take no action other than to implement the recommendations made by the LGSCO. This could however result in the Council receiving further complaints and there being further instances of maladministration in the exercise of this function. The Executive could also decide to take a different course of action to that recommended in the report, however it is considered that the actions proposed are appropriate based on the information considered.

6. Implications

- 6.1 Appendix 1 sets out the relevant implications considered in the preparation of the report.

7. Background Papers

- 7.1 None Identified

8. Appendices

- 8.1 Appendix 1- Implications.
- 8.2 Appendix 2 – Report of the Local Government & Social Care Ombudsman.

9. Recommendations

That Cabinet:

- a) notes the findings of the Local Government and Social Care Ombudsman set out in the report at Appendix 2 and the actions which have been taken by the Council in response to that report and more generally to prevent further escalations of complaints;
- b) confirms whether it is satisfied with the steps taken to address the findings and whether the additional action set out in paragraph 4.31 should be taken; and
- c) notes that a copy of this report has been circulated to all members of the Council.

10. Reasons for Recommendations

- 10.1 To comply with the provisions of the Local Government and Housing Act 1989.
- 10.2 To ensure that there is a robust plan in place to put right the issues identified by the LGSCO and avoid any complaints or instances of maladministration in the exercise of this function in the future.

11. Is it necessary to waive the call in period?

11.1 No

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This report has been approved by the following officers:

<p>On behalf of:</p> <p>Director of Legal Services and Monitoring Officer Director of Finance and ICT Managing Executive Director</p>	<p>Drafted by the Monitoring Officer) Consulted in the preparation of the) report as Head of Paid Service and Chief Financial Officer</p>
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Implications

Financial

- 1.1 Payments have already been made to the complainant in accordance with the recommendation of the LGSCO.

Legal

- 2.1 The Local Government and Social Care Ombudsman's powers are defined by the Local Government Act 1974 as amended by the Local Government and Public Involvement in Health Act 2007. The LGSCO may investigate complaints of maladministration causing injustice.
- 2.2 The LGSCO cannot question whether a Council's decisions are right or wrong simply because the complainant disagrees with them. He must consider whether there was fault in the way the decision was reached. (Local Government Act 1974, section 34(3)).
- 2.3 Section 31 of the Local Government Act 1974 requires a report to be submitted to "the authority" when a report on maladministration is received from the Local Government and Social Care Ombudsman. The specific requirement is that the report to "the authority" is made to the "executive" i.e. Cabinet (s.25(4ZA) Local Government Act 1974).
- 2.4 The Director of Legal and Democratic Services' report is made to the "executive" under the Director's role of Monitoring Officer (s.5A Local Government and Housing Act 1989). In the role of Monitoring Officer the Director of Legal and Democratic Services is also obliged to consult with the Head of Paid Service and S151 Officer when preparing the report. The report must be sent to each member of the Council and Cabinet must meet to consider the report within 21 days of the report being sent to the Executive.
- 2.5 The Council is required to give public notice by advertisements in two local newspapers stating that copies of the LGSCO's report will be available to inspect by the public at the Council's offices for a period of three weeks (s.30 Local Government Act 1974). In view of Covid restrictions the Council intends to go further than this and the public notices will state that the Council will send a copy of the report by post or email and it will also be available on the Council's website and the LGSCO's website.

- 2.6 The LGSCO's recommendations are not legally enforceable although it is extremely unusual for a Council not to accept them. The Council must inform the LGSCO of the actions it proposes to take within 3 months of the date on which the Council received the report. If the Council fail to do this or the LGSCO is not satisfied with the action proposed by the Council then the LGSCO can issue a further report.
- 2.7 The Council's Constitution provides that one of the roles and function of the Governance , Ethics and Standards Committee is '*11. To receive regular reports on the of the Corporate Complaints process, Local Government Ombudsman referrals and to recommend revisions to related policies and procedures as appropriate*'. A report will therefore also be prepared for the Committee.

Human Resources

- 3.1 None directly arising from this report.

Information Technology

- 4.1 None directly arising from this report.

Equalities Impact

- 5.1 As this is a statutory report in response to the findings of the Local Government and Social Care Ombudsman no equality impact assessment has been prepared.

Corporate objectives and priorities for change

- 6.1 None directly arising from this report.

Other (for example, Health and Safety, Environmental Sustainability, Property and Asset Management, Risk Management and Safeguarding)

- 7.1 None directly arising from this report.