

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

**Investigation into a complaint against  
Derbyshire County Council  
(reference number: 20 000 611)**

**22 February 2021**

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## 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.

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

Ms X	The complainant
Z	Her son

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## **Report summary**

### **Education and Children's Services – Special Educational Needs and Disability Assessments and Reviews**

Ms X complained the Council delayed carrying out her son's annual review, issuing his final amended Education, Health and Care (EHC) Plan and consulting with secondary schools.

#### **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*)

To remedy the injustice identified in this report, within three months of the date of this report the Council has agreed 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.

Within six months of the date of this report the Council should 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.

The Council has accepted our recommendations.

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## The complaint

1. Ms X complained the Council failed to:
  - carry out her son, Z's, annual review in line with the statutory timescales;
  - consult with secondary schools in a timely manner;
  - issue Z's final amended Education, Health and Care (EHC) Plan within the statutory timescales when he transitioned to secondary school;
  - ensure Z received a suitable education from September 2019 to June 2020 when she appealed to the Tribunal;
  - communicate appropriately with her; and
  - deal with her complaints in a timely manner.
2. As a result, Z had to remain at primary school for an additional school year and Ms Z says that during this time only received part of the Year 7 curriculum. Ms X said this led to a deterioration in Z's behaviour and feelings of low self-esteem and isolation.

## Legal and administrative background

### The Ombudsman's role and powers

3. 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*)
4. We cannot investigate complaints about what happens in schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b), as amended*)
5. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Tribunal ('SEND')*)
6. The law says we cannot normally investigate a complaint when someone can appeal to a tribunal. However, we may decide to investigate if we consider it would be unreasonable to expect the person to appeal. (*Local Government Act 1974, section 26(6)(a), as amended*)
7. The law says that a parent or carer can appeal to the tribunal after the Council has issued a final EHC Plan. The Council issued Z's EHC Plan in July 2019 and at this point Ms X could have appealed the placement named in Z's Plan. In this case we have decided to exercise our discretion and also investigate after this date. This is because at this time, the Council told Ms X it would consult with schools to identify a suitable secondary school placement for Z. Ms X was entitled to expect the Council to do this in a timely manner, so she had no reason to appeal at the time.
8. We have no jurisdiction where a parent has appealed to the Tribunal to investigate events from the date the SEN appeal right arises until the appeal is completed. Any loss of education or fault during this period which is a consequence of the decision being appealed is out of jurisdiction, even if this means the injustice will not be remedied.

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9. When the Council issued a further final amended EHC Plan in February 2020, Ms X was unhappy with the school named by the Council and appealed to the Tribunal. Therefore, we cannot look at the events which took place after this date.
  10. 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 decision with Ofsted.

## **Relevant law and guidance**

### **Children with special educational needs**

11. A child with special educational needs may have an EHC Plan. This sets out the child's needs, what arrangements should be made to meet them and where or how the child will be educated. The EHC Plan is set out in sections. We cannot make changes to the sections about special educational provision or name a different school. Only the SEND Tribunal can do this.

### **Annual reviews**

12. Councils should ensure an annual review of the child's EHC Plan is carried out within 12 months of the issue of the original plan or the completion of the last annual review. The purpose of the annual review is to consider whether the special educational support and educational placement is still appropriate. The annual review is not complete until the council has decided to either maintain the Plan, cease the Plan or amend the Plan.
13. 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. *(s20 (10) Special Educational Needs and Disability Regulations 2014)*
14. 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. *(s22 (1) & (2) Special Educational Needs and Disability Regulations 2014)*
15. The Special Educational Needs and Disability Code (the Code) states if a council decides to amend the Plan, it should start the process of amendment "without delay". *(SEN Code para 9.176)*
16. The council must give the parent or young person at least 15 calendar days to comment on the proposed changes. *(s22 (2)(c) SEND Regulations 2014)*
17. 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. *(s22 (3) & (4) SEND Regulations 2014)*
18. If the council decides not to make the amendments, it must notify the child's parent or the young person, explaining why, within the same time limit.
19. Where a child is transferring from one phase of education to another, for example, from primary to secondary school, their EHC Plan must be reviewed and amended by 15 February in the calendar year of the transfer. *(s18 (1)(b) SEND Regulations 2014)*

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## How we considered this complaint

20. We produced this report after examining relevant files and documents and speaking to the complainant.
21. We considered the relevant legislation and statutory guidance.
22. We gave Ms X and the Council a confidential copy of this report and invited their comments. We took the comments they made into account before finalising this report.

## What we found

### What happened

23. Z is classed as a child with several physical and mental health conditions. He used to have a Statement of Special Educational Needs which the Council transferred to an EHC Plan in January 2018.
24. Z's 2018 EHC Plan detailed the style of teaching he needed to achieve the outcomes in his Plan.
25. On 27 June 2018, towards the end of Z's time in Year 5, his school held his annual review. The school sent the Council the outcome of the review on 23 July 2018. This stated the Council needed to amend Z's EHC Plan.
26. In September 2018, Z moved into Year 6, his last year at primary school.
27. On 23 October 2018, the Council issued Ms X with a notice stating it planned to amend Z's EHC Plan. The Council sent Ms X a copy of Z's existing Plan.
28. On 7 November 2018, Ms X sent the Council a request to consult with her preferred placement which was Secondary School 1, a mainstream school. Ms X's second preference, School 2, was an independent special school.
29. On 16 and 30 November 2018, the Council consulted with School 1 and another school.
30. The Council held a Panel meeting in January 2019 to consider Z's school placement. The Panel agreed to name School 1 in Z's EHC Plan. However, the Council did not act upon this.
31. On 20 February 2019, the Council sent Ms X a copy of Z's draft amended EHC Plan.
32. In June and July 2019, the Council consulted with School 2 (Ms X's second preferred choice) and another school.
33. On 15 July 2019, the Council issued Z's final EHC Plan. Section I of the Plan said the Council had allocated Z *"a further year at [his current primary school] or until a suitable secondary school can be found"*.
34. The Plan also said one of Z's main difficulties was social interaction and Sections E and F contained the type of support he needed to develop his social skills so he could interact and co-operate with his peers.
35. Ms X did not appeal the Plan. This is because she said the Council agreed it would consult with six secondary schools over the summer holidays to speed up the process. Ms X could then visit the schools once they reopened in September. In response to our enquiries, the Council said it decided not to do this. It did not explain to Ms X that it had changed its intention to consult.

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36. In September 2019, Z was due to start Year 7 at secondary school. However, because the Council had not found a place for him, Z remained at his primary school. Whilst he was at primary school, Z received one to one teaching each morning based on the Year 7 curriculum. In the afternoons, he joined his class for Year 6 lessons. Ms X told me this worked well for Z because the teachers at his primary school understood him and could avoid the triggers he found distressing.
37. 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. Ms X asked the Council to consult with the School. Ms X said the Council refused to do so until Z had been for a trial placement. She said the Council also told her it would not consult with the school unless she requested an annual review. Ms X said the Council then conceded and said it would consult with School 3. It did not do so.
38. In January 2020, the Council 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 appealed to the Tribunal the same month.
39. The Tribunal heard the case in June 2020. It directed the Council to name School 3 on Z's EHC Plan. Since being at School 3, Z has followed the full Year 8 curriculum.

### **Ms X's complaint to the Council**

40. On 29 November 2019, while the above events were taking place, Ms X complained to the Council. The Council responded on 28 April 2020, around five months after Ms X had complained. The Council made the following findings.

### **Delays in the annual review process**

41. The Council said it took eight weeks too long to inform Ms X that it would amend Z's EHC Plan when the process began in 2018. It said this was due in part to the school which took four weeks to send the Council the request to amend Z's Plan following the annual review meeting. It also said the summer term was the "*main season*" for annual reviews which added to the delay. The Council said "*in terms of the overall transition process to secondary school, [we] do not find this to be a material delay in the process*".
42. The Council partially upheld this complaint.

### **Issuing of Z's final amended EHC Plan**

43. The Council informed Ms X that it "*is not subject to a statutory timescale from the date of a decision to amend an EHC Plan following a SAR [statutory annual review] until a draft amended version of the EHC Plan has been sent to the parent. The LA then has 8 weeks in which to finalise that draft EHC Plan...*".
44. The Council stated it had issued Z's EHC Plan seven weeks late and also after the 15 February deadline required when pupils were transferring between key phases in their education. The Council upheld Ms X's complaint.

### **Consultations with schools**

45. The Council did not uphold this complaint. It said it consulted with Ms X's preferred school promptly. It said it had no obligation to consult with Ms X's second preferred school (School 2) because it was not a school which had been approved by the Secretary of State.
46. The Council said "*the sending of consultations could have been 'more timelier'*" but did not uphold Ms X's complaint.

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### **Delay in Z transferring to secondary school**

47. The Council said the Panel had approved a place for Z at School 1 in January 2019 but officers had failed to act on this. The Council upheld Ms X's complaint.

### **Poor communication with the Council**

48. The Council said Ms X had requested case officers contact her on 23 occasions between September 2018 and November 2019. The records show Ms X did not receive any substantive contacts from officers at all during this period. The Council upheld Ms X's complaint.
49. The investigating officer apologised to Ms X where they had found fault.
50. Ms X was unhappy with the Council's response and on 22 May 2020 she escalated her complaint to stage 2 of the complaint procedure. Ms X complained the Council had:
- taken too long to respond to her initial complaint; and
  - failed to find Z a suitable secondary school.
51. 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.
52. The Council responded on 30 June 2020, around six weeks later. It agreed it had taken too long to deal with Ms X's initial complaint and apologised for this.
53. The Council only partially upheld Ms X's complaint that it had failed to find Z a suitable secondary school. It said it acted in line with legislation when it named School 4 on Z's EHC Plan and it would shortly amend his Plan following the Tribunal's order to name School 3.
54. 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.
55. The Council said in future it would ensure the SEND Team communicated effectively with Ms X and it would issue Z's amended EHC Plan within the required timescales.
56. Ms X remained unhappy and complained to us.

## **Conclusion**

### **Delays in the annual review process and the issuing of a final amended EHC Plan**

57. Following an annual review meeting, a council must issue a decision letter within four weeks of holding the meeting. If amendments are required, the Code says councils must send the parent a copy of the proposed amendments "*without delay*". Councils then have a maximum of eight further weeks after sending the copy of the amendments to issue the final amended EHC Plan.
58. The school held Z's annual review meeting on 27 June 2018. The school informed the Council Z's Plan needed amending on 23 July 2018. The Council issued Ms X with the decision it would amend the Plan on 23 October 2018. This was nearly 17 weeks after the annual review was held. This substantial delay was 13 weeks longer than the law allows and was fault.

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59. A council must start the process of amending the EHC Plan without delay and then issue the final amended Plan within eight weeks of issuing the proposed amendments. The Council eventually issued Z's final amended EHC Plan on 15 July 2019, 56 weeks after the annual review process began in 2018. This was a significant delay and was fault.
  60. The faults above are further compounded by the fact that the delays took place in a transition period for Z from primary to secondary school. The law says councils must review and issue the final amended EHC Plan by 15 February of the calendar year the child moves school. The Council issued Z's final amended Plan on 15 June 2019, 21 weeks after the deadline. This was also significant delay and was fault.
  61. Ms X stated from the beginning that her preferred school was School 1. The Council consulted with the school and the Panel decided in January 2019 this should be the school named in Z's Plan. The Council failed to action this and this was fault.
  62. In November 2019 Ms X asked the Council to consult with School 3. The Council did not have a duty to consult with this school, but it should have explained its reasons why it did not. It failed to do so and this was fault.

### **Injustice caused to Z**

63. We can look at fault and the injustice caused by that fault up to the date Ms X's appeal rights were triggered which was in February 2020 because Ms X went on to lodge an appeal with the Tribunal.
64. Because of the delays in the EHC Plan process and the Council's failure to follow the Panel's instructions to name School 1 on Z's Plan, Z had to remain at primary school for Year 7. During this time, the Council ensured he received one to one Year 7 tutoring each morning. This meant that when he was able to transfer to secondary school in September 2020, Z was able to go into Year 8 with his peers. The Council therefore took appropriate steps to ensure he received a suitable education whilst remaining at primary school.
65. However, Z's EHC Plan included an outcome to develop Z's social skills so he could interact and co-operate with his peers more successfully. Because Z was kept behind for a year, he had to socialise with children who were not his peers, but who were younger than him. As a result, he missed out on the opportunity to mix with children his own age.
66. Ms X has said the delays in going to secondary school have been traumatic for Z. He felt like he had been forgotten and this led to distress and upset. He also had to join his school year late, when the other children had already made friendship groups. This will have been additional and unnecessary stress on an already vulnerable child. And it will also have caused Ms X distress as Z's mother.
67. Furthermore, because of the delays we have identified, Ms X's right of appeal to the Tribunal was also delayed which caused her additional frustration. The fact she then used that right when she could, shows she experienced injustice because of the Council's delays.

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## Council complaint responses

68. In its complaint responses to Ms X, although the Council admitted to some errors, it failed to identify the full extent of its fault. It only partially upheld Ms X's complaint that it delayed in the annual review process, when the delays were significant. It should have upheld her complaint in full. Its failure to do so was fault.
69. The Council also informed Ms X it delayed by "7 weeks" in issuing Z's EHC Plan. This was incorrect. The whole process from holding the annual review to issuing Z's Plan took over a year. The Council should have acknowledged the full extent of the delays. Instead, in its stage 1 response to Ms X, the Council said it "*is not subject to a statutory timescale from the date of a decision to amend an EHC Plan following a SAR [statutory annual review] until a draft amended version of the EHC Plan has been sent to the parent. The LA then has 8 weeks in which to finalise that draft EHC Plan...*".
70. This is not in line with the legislation. The regulations state councils must issue a decision letter to amend within four weeks of the annual review. It should then issue the amendment notice and draft Plan "*without delay*" and the final Plan within eight weeks of the amendment notice. The Council took 17 weeks to issue the notice to amend Z's Plan and did not finalise Z's Plan until 56 weeks after the annual review. At no stage did it act "*without delay*" and where there were specific statutory guidelines it failed to meet them. The Council should have acknowledged this to Ms X and apologised. The Council should amend its procedures to ensure they are in line with legislation.
71. The Council also stated its faults only partially led to the delays in Z transferring to secondary school. Again, we disagree. The Council's failure to name School 1 in January 2019 on Z's EHC Plan in line with the Panel's instructions was a significant fault and caused Z to remain at primary school.
72. The Council took around five months to respond to Ms X's stage 1 complaint. This was significantly longer than we would expect and was fault. The Council's response at stage 2 was within six weeks and we do not find fault with that timescale.
73. Because the Council's complaint response was delayed at stage 1 and failed to acknowledge in full where the Council had acted with fault, Ms X was left feeling unnecessarily frustrated. She was also caused additional time and trouble because she had to complain to us.

## Agreed actions

74. 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*)
75. To remedy the injustice identified in this report, within three months of the date of this report the Council has agreed 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,

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distress and time and trouble Ms X experienced because of the Council's faults.

76. Within six months of the date of this report the Council has agreed to 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.
77. The Council has agreed to provide us with evidence it has carried out these recommendations.

## **Decision**

78. 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. The Council has agreed to take the action identified in paragraphs 74 to 76 to remedy that injustice and prevent a similar recurrence in the future.