

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

**Investigation into a complaint about  
Kent County Council  
(reference number: 22 003 403)**

**26 June 2023**

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## The Ombudsman's role

For almost 50 years we have independently and impartially investigated complaints about councils and other organisations in our jurisdiction. If we decide to investigate, we look at whether organisations have made decisions the right way. Where we find fault has caused injustice, we can recommend actions to put things right, which are proportionate, appropriate and reasonable based on all the facts of the complaint. We can also identify service improvements so similar problems don't happen again. Our service is free.

We cannot force organisations to follow our recommendations, but they almost always do. Some of the things we might ask an organisation to do are:

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

We publish public interest reports to raise awareness of significant issues, encourage scrutiny of local services and hold organisations to account.

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

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## Report summary

### Education – special educational needs

Mrs X complained the Council failed to ensure her son, Y, received the Speech and Language Therapy (SALT) set out in his Education, Health and Care plan (EHCP). She also complained the Council has delayed the EHCP process and that communications were poor.

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

The Council must 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*)

In addition to the requirement set out above, to remedy the injustice caused the Council should:

- apologise to Mrs X and Y for failing to issue a decision following the annual review in June 2021, not issuing the EHCP in the statutory timescales, not ensuring the SALT provision specified in the plan was provided, not responding to the complaint and its poor communication;
- pay Mrs X £300 to acknowledge the time and trouble she has spent pursuing this complaint and for the Council's failure to formally respond to it;
- pay £200 to acknowledge the frustration and distress caused due to the Council's faults;
- pay £1,300 for not providing SALT sessions over 13 months which would have been in place had the EHCP been issued within an appropriate timescale. This money should be used for Y's benefit;
- pay £100 a month, for every month the SALT was not set up from January 2023 until the SALT provision is in place. This money should be used for Y's benefit; and
- evidence SALT provision has started and is being delivered in line with the requirements of the EHCP.

In addition, the Council should write to each of the 170 people it has identified to apologise for its delay responding to their stage one and two complaints. The apology should:

- explain they have been identified following an investigation by us;
- set out the steps the Council has already taken to reduce its stage one and two complaint backlog. It should also explain that, in line with our recommendation, the Council will consider what further steps it should take to prevent a future backlog; and
- include that, once they receive the stage two response, they have the right to complain to us if they remain dissatisfied with the Council's response to the substantive matter they complained about. It should say that if we choose to investigate the main issue they complain about, we can also consider the Council's complaint handling.

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To improve services, the Council should within three months of the date of this report:

- review its EHCP annual review procedure to ensure it follows statutory timescales set out in the Special Educational Needs and Disabilities (SEND) regulations. Ensure decisions about maintaining, amending or discontinuing plans are communicated clearly and promptly to the young person and their family to enable appeal rights to be engaged;
- develop an action plan to show how it intends to address ongoing delays with EHCP annual reviews and complaints about them. This report should be taken to the relevant committee for democratic scrutiny; and
- update us on the backlog for stage one and two responses and its timeliness.

The Council has accepted these recommendations.

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## The complaint

1. Mrs X complained the Council failed to ensure her son, Y, received the Speech and Language Therapy (SALT) set out in his Education Health and Care plan (EHCP). She also complained the Council has delayed the EHCP process and its communication has been poor. Mrs X says Y has missed SALT he needs and they have been frustrated by the process.

## 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. 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.
4. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
5. 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.

### Law and policy

6. A child with special educational needs may have an Education, Health and Care plan (EHCP). This sets out the child's needs and what arrangements should be made to meet them. The EHCP is set out in sections. We cannot direct changes to the sections about special educational needs and provision, or name a different school. Only the Tribunal can do this.
7. The Council is responsible for making sure that arrangements specified in the EHCP are put in place. We can look at complaints about this, such as where support set out in the EHCP has not been provided, or where there have been delays in the process.
8. The Council has a duty to secure the specified special educational provision in an EHCP 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. The procedure for reviewing and amending an EHCP is set out in legislation and government guidance. (*Section 44 Children and Families Act 2014*). EHCPs should be reviewed at least every 12 months.
10. Within four weeks of a review meeting, a council must notify the child's parent of its decision to maintain, amend or discontinue the EHCP. (*Section 20(10) Special Educational Needs and Disability Regulations 2014 and SEN Code paragraph 9.176*)

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11. Where a council proposes to amend an EHCP, 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. (*Section 22(2) Special Educational Needs and Disability Regulations 2014 and SEN Code paragraph 9.194*)
  12. The Special Educational Needs and Disability Code states if a council decides to amend the plan, it should start the process of amendment "without delay". (*SEN Code paragraph 9.176*)
  13. 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 EHCP as soon as practicable and within eight weeks of the date it sent the EHCP and proposed amendments to the parents. (*Section 22(3) SEND Regulations 2014 and SEN Code paragraph 9.196*)
  14. Parents have a right of appeal to the SEND Tribunal if they disagree with the special educational provision or the school named in their child's EHCP. The right of appeal is only engaged when the final amended plan is issued.
  15. The Council's complaint policy confirmed it will acknowledge the complaint within three working days and provide a full reply within 20 working days. It also stated if a complaint raised complex issues that could not be answered within 20 working days, the Council would keep the complainant informed of progress until it could fully respond.

## **How we considered this complaint**

16. We produced this report after examining relevant documents and speaking to the complainant.
17. We gave Mrs X 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.

## **Findings**

### **What happened**

18. This is a summary of events, outlining key facts and does not cover everything that has occurred in this case.
19. Y has complex special educational needs. The Council first issued his EHCP in 2016.
20. Y's school, school A, held an annual review in June 2021. This annual review identified SALT provision for Y. Mrs X requested a change of placement after she and the Occupational Therapist (OT) expressed concerns school A could not meet Y's needs. School A agreed Y needed a change of placement. The outcome of the annual review was the Council would consult with other schools to see if they could meet Y's needs and it would update the plan.
21. Mrs X complained to the Council at the end of July 2021. She complained the Council had delayed action since the annual review in June 2021 and she had not had any response despite chasing the Council on multiple occasions.
22. In August 2021, the Council sent consultations to three schools for Y to potentially move to. The Council then wrote to Mrs X to inform her it would be amending Y's EHCP. The Council responded to Mrs X's complaint the same day. The response confirmed it would amend Y's plan and apologised for the poor communication.

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23. Mrs X told the Council Y would not return to school A in September 2021. The Council noted school A agreed it would be harmful to Y for him to return. Mrs X chased the Council for alternative education as school A could not meet his needs. The Council then chased up the schools it consulted with in August 2021. School B confirmed it could meet Y's needs and offered him a place. The Council confirmed it would name school B in Y's EHCP and issue the plan as soon as possible.
  24. Y started at school B in October 2021.
  25. The Council issued Y's EHCP in January 2022 and named school B as Y's placement. The plan stated the annual review had to be completed by June 2022 and included the SALT provision Y needed.
  26. Mrs X contacted the Council in February 2022 and asked when the SALT would start. The Council then sent a referral to its SEND therapies team.
  27. The Council chased the SEND therapies team at the start of March 2022, with no response.
  28. Mrs X complained again in March 2022. She complained the Council was not ensuring Y received the SALT specified in his EHCP.
  29. The Council chased its SEND therapies team at the end of May 2022 and again in July 2022, with no response.
  30. The SEND therapies team contacted Mrs X in September 2022 and explained it had staff shortages and was having difficulty with demand on the service.
  31. The Council and Mrs X chased the Council's SEND therapies team in September 2022, with no response. Mrs X contacted the SEND therapies team again in November 2022, with no response.
  32. The Council's SEND therapies team reviewed Y's case in December 2022 and identified him as a priority.

## **Analysis**

### **Complaint handling**

33. The Council has not responded to Mrs X's complaint from March 2022. It failed to respond to Mrs X when she chased on multiple occasions. This is fault and has caused Mrs X distress, frustration and avoidable time and trouble.
34. The Council has explained the delays in this case are due to low staffing levels and high workloads. This does not remove the Council's duty to respond to Mrs X and is not an acceptable excuse. The failure to offer any explanation for the delay until we became involved added to Mrs X's frustration.
35. Others are likely to be affected by the Council's fault evident in this complaint. The Council has confirmed it had 141 overdue SEN stage one complaints at the time of enquiries being made on this case. It also confirmed a further 29 overdue SEN stage two complaints. The Council reported the average response time for stage one complaints was 43 working days and 51 working days for stage two. Both exceed the 20-day timescale. While complaints remain unresolved, there is a potential for ongoing significant injustice, as was the case in this complaint.

### **EHCP delays**

36. The Council did not issue the notice to amend the EHCP or the updated plan following the annual review in June 2021 in the statutory timescales. This is fault

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and Mrs X and Y suffered frustration, distress and Y has missed out on SALT provision.

37. The Council has not held an annual review since June 2021. This is fault. There was a lost opportunity to address the lack of SALT provision and Y's plan is not up to date with his current needs.
38. The Council did not issue an updated EHCP for seven months. This frustrated Mrs X's appeal rights to the Tribunal. Mrs X had no means to challenge the contents, or the placement named in the plan if she was dissatisfied with either.
39. Councils must abide by the statutory and legislative requirements under the SEN legislation and guidance. The Council's failure to meet the required timeframes here is fault.

#### **Lack of SALT provision**

40. The Council has not arranged the SALT provision, recommended and agreed in the June 2021 annual review. As the provision is now in the plan, on the balance of probabilities, if the Council had updated the plan within the statutory timescales, the SALT would have been available sooner. This is fault and Y has missed out on provision for 13 months. The Council has explained the lack of support in this case is due to a lack of therapists and high workloads. This does not remove the Council's duty owed to Y and is not an acceptable excuse for not fulfilling its statutory duties.

#### **Our previous service improvement recommendations**

41. We have identified recurrent fault by this Council in a number of our previous decisions over the last two years about SEN provision and EHCP delays.
42. The Council has agreed to make service improvements, which have included:
  - reminding relevant staff of the duty to deliver special educational provisions which are included in Section F of children's and young people's EHCPs. This was in response to a complaint about missed EHCP provision from March 2021 to January 2022. The final decision was in February 2022, to be implemented by March 2022;
  - reminding officers of the timescales and duties to notify parents of decisions to reassess and decisions following reviews whether that is to maintain, amend or cease. Remind relevant staff of the importance of attempting to resolve complaints at the earliest opportunity. This was based on a complaint of missed provision from February 2019 to December 2021. The final decision was in April 2022, to be implemented by July 2022; and
  - arranging training for relevant officers to ensure reviews of EHCPs take place promptly after 12 months and of the timescales required for issuing final plans. This was based on a complaint about a delayed annual review and a delay issuing the final plan from January 2021. The final decision was in April 2021, to be implemented by May 2021.
43. Whilst some of these recommendations were made around or after the period outlined in this specific complaint, it is our view the Council should have been aware of these continued issues internally through its own measures of performance and complaints handling. We would have expected the Council to have made improvements itself, not acting only after continuous recommendations from us.

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44. The fault in this case indicates lessons are not being learnt, issues are not being addressed appropriately and service improvements are not being fully or adequately embedded.
  45. We acknowledge the Council says it is implementing service improvements which require ongoing work and training. We are issuing this report to draw attention to these past failings and to highlight moving forward, that EHCP timescales, provision, communication and complaint handling needs to be improved as a priority with meaningful improvements having a long-term effect.

## Conclusions

46. The Council did not ensure Y was provided with suitable SALT provision it had agreed should be part of his EHCP from June 2021. It has not carried out its statutory duty and this is fault.
47. The impact of the faults we have identified has caused injustice. This has affected Y's ability to make progress as he was without appropriate SALT provision for a long period.
48. There has been distress and uncertainty to Mrs X, placing strain on her. Also, she had to go to avoidable time and trouble to get the matter resolved. Mrs X's appeal rights to the SEND Tribunal were frustrated. Mrs X has not received any response to her complaint or any explanation for this delay. This caused her frustration and distress.
49. Through this investigation we have become aware of others affected by delayed complaints investigations. They will also be caused frustration, distress and potentially loss of provision.

## Recommendations

50. 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*)
51. In addition to the requirement set out above, to remedy the injustice caused the Council agreed to carry out the following actions within three months of the date of this report.
  - Apologise to Mrs X and Y for failing to issue a decision following the annual review in June 2021, not issuing the EHCP in the statutory timescales, not ensuring the SALT provision specified in the plan was provided, not responding to the complaint and for its poor communication.
  - Pay Mrs X £300 to acknowledge the time and trouble she has spent pursuing this complaint and for the Council's failure to formally respond to it.
  - Pay £200 to acknowledge the frustration and distress caused due to the Council's faults.
  - Pay £1,300 for not ensuring Y was provided with SALT sessions over 13 months which would have been in place had the EHCP been issued within an appropriate timescale. This money should be used for Y's benefit.
  - Pay £100 a month, for every month the SALT was not set up from January 2023 until the SALT provision is in place. This money should be used for Y's benefit.

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- Evidence SALT provision has started and is being delivered in accordance with the requirements of the EHCP.
52. In addition, the Council has agreed to write to each of the 170 people it has identified to apologise for its delay responding to their stage one and two complaints. The apology should:
- explain they have been identified following an investigation by us;
  - set out the steps the Council has already taken to reduce its stage one and two complaint backlog. It should also explain that, in line with our recommendation, the Council will consider what further steps it should take to prevent a future backlog; and
  - include that, once they receive the stage two response, they have the right to complain to us if they remain dissatisfied with the Council's response to the substantive matter they complained about. It should say that if we choose to investigate the main issue they complain about, we can also consider the Council's complaint handling.
53. To improve services, within three months of the date of this report the Council has agreed to:
- review its EHCP annual review procedure to ensure it follows statutory timescales set out in the SEND regulations. Ensure decisions about maintaining, amending or discontinuing plans are communicated clearly and promptly to the young person and their family to enable appeal rights to the SEND Tribunal to be engaged;
  - develop an action plan to show how it intends to address ongoing delays with EHCP annual reviews and complaints about them. This report should be taken to the relevant committee for democratic scrutiny; and
  - update us on the backlog in its complaint process for stage one and two responses and its timeliness.
54. The Council needs to now take action to improve the quality of its services as a matter of priority and demonstrate it has learned from previous findings in recent years, as well as our findings in this report.
55. The Council should provide evidence of the actions taken to satisfy the recommendations.

## **Final report**

56. We have completed our investigation. We have found fault by the Council, which caused injustice to Mrs X and Y.