

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

**Investigation into a complaint against  
Dudley Metropolitan Borough Council  
(reference number: 17 016 386)**

**28 June 2019**

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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

Mrs B	The complainant
C	Her son

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## Report summary

### Special Educational Needs

Mrs B complains about the Council's handling of her requests for an Education, Health and Care Plan for her son.

### 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 or Cabinet and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

In addition to the requirement set out above, the Council has agreed to:

- pay Mrs B £1,800, to be used for educational purposes, for the loss of specialist educational support to C;
- pay Mrs B £500 for the time and trouble she was put to both in the EHC plan process and in the complaint handling; and
- provide us with details of the training it has arranged for staff.

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## The complaint

1. Mrs B complains about the Council's handling of her requests for an Education, Health and Care (EHC) plan for her son. She says the Council's refusal to assess and then to issue a plan meant the process was much delayed. She further complains about comments made by the case officer and the way her complaint was handled. She says that as a result her son spent longer without the specialist support he needs.

## Legal and administrative background

### The Ombudsman's role and powers

2. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Chamber of the First Tier Tribunal ('SEND')*)
3. We cannot investigate a complaint if someone has appealed to a tribunal. However, we might investigate whether there may have been a delay in the process which led to the tribunal. (*Local Government Act 1974, section 26(6)(a), as amended*)
4. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

### Summary of relevant guidance

5. A child with special educational needs may have an EHC plan. This sets out the child's needs and what arrangements should be made to meet them. The EHC plan is set out in sections. We cannot direct changes to the sections about education, or name a different school. Only the SEND Tribunal can do this.
6. If a parent asks for an EHC assessment for their child, the local authority must decide whether an assessment is necessary. It must tell the parent its decision within six weeks of receiving the request.
7. There is a right of appeal to the SEND Tribunal against a decision not to assess or not to issue a plan.
8. Statutory guidance 'Special educational needs and disability code of practice: 0 to 25 years' says:
  - The process of assessing needs and developing EHC plans "must be carried out in a timely manner". Steps must be completed as soon as practicable.
  - The Council should tell the parents of its decision to assess or not to assess within six weeks of the request.
  - The whole process from the point when an assessment is requested until the final EHC plan is issued must take no more than 20 weeks (unless certain specific circumstances apply).

## How we considered this complaint

9. We spoke to Mrs B and considered the information she provided in her complaint. We asked the Council to comment on the complaint and produced this report after

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considering all the information provided and the law and guidance referred to above.

10. We gave Mrs B and the Council a confidential draft of this report and invited their comments. We took the comments received into account before the report was finalised.
11. 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 our final report with OFSTED.

## **What we found**

### **What happened**

12. In October 2015 Mrs B asked the Council to assess her son, C, for an EHC plan. C was nearly six. The Council refused to do so. Mrs B appealed to the SEND tribunal who directed the Council to assess C. The Council assessed C but refused to issue an EHC plan. Mrs B again appealed. Shortly before the date of the tribunal hearing the Council conceded and agreed to issue an EHC plan. The Council issued a final EHC plan. Mrs B again appealed about the content of the plan to the tribunal. The tribunal instructed changes to the plan. C started at the named school in September 2018.

### **Analysis**

#### **Jurisdiction**

13. There are limits on our powers which mean we cannot consider all of this complaint. Where there is a right of appeal to SEND about a placement decision, the Court has decided the decision, and the consequences of it, are matters which are '*inextricably linked*'. (*R (on the application of ER) v the Commissioner for Local Administration, 2014*). We cannot, therefore, investigate either the decision subject to the appeal or the consequences arising from the decision. This means we cannot consider those periods where Mrs B has exercised her right of appeal.
14. Mrs B considers the Council's decisions have been wrong throughout and her position has been vindicated by the decisions of the tribunal. In its consideration of her complaint and in response to the draft of this decision the Council has accepted it has been at fault. It has accepted there was delay and a failure to consider professional advice. But we cannot consider any of the core issues about the decisions the Council made about C's needs because they have been subject to appeal to the tribunal.

#### **Delay**

15. We can consider any delay which happened outside of any periods which were subject to an appeal.
16. It took the Council 11 weeks to respond to Mrs B's request for an assessment. It should have taken six. That is fault and delay of five weeks.
17. After the decision by the tribunal it was seven weeks for the Council to decide not to issue an EHC plan. The guidance says that the total time from the request to assess to the decision not to issue a plan should be no more than 16 weeks. Taking the two periods together there is a delay of a week.
18. From the date on which the Council agreed to issue a plan, to the issue of a draft plan took almost nine weeks. It should only have been five. It then took a further

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eight weeks to issue the final plan. The total time taken here should have been 11 weeks so overall there was delay of six weeks in this period.

19. We recognise Mrs B looks at the whole time taken. It took 104 weeks to get to the final statement; a process the guidance says should be completed in 20 weeks. But because there were periods where the matter was before the tribunal, we cannot consider it as a whole and can only look at the isolated periods we have identified above. We therefore consider there was delay of 12 weeks.
20. A result of the delay by the Council is that C was attending a mainstream school which could not meet his needs. The school he moved to in September 2018 provides specialist support with eight children to one teacher and three teaching assistants. There is further input from various specialists. Where fault has resulted in the loss of educational provision, we will usually recommend a payment of between £200 and £600 a month to acknowledge the impact of that loss. The school C was attending has said there had been a dramatic change in C over the early part of 2017 and they considered they could no longer meet his needs. Had there been no fault by the Council C would have been receiving the specialist support. We therefore consider the remedy for the delay should be at the upper end of £600 a month giving a total of £1,800.

### **Complaint handling**

21. Mrs B complained to the Council in January 2018. The Council issued a stage one response in July. The Council's complaint procedure says this stage should take 20 working days although a complex complaint can take longer. The stage one response upheld part of Mrs B's complaint but not all. There was no apology for the faults the Council had accepted.
22. Mrs B was not satisfied with the response and complained further. It took the Council a further two months to respond. The Council's complaint procedure says that at this stage a more senior officer will investigate and provide a new response within 20 working days.
23. There was unacceptable delay in the Council's handling of Mrs B's complaint. In commenting on this the Council has said there were a number of changes of staff dealing with the complaint. That is not a satisfactory explanation or reason and the delay is fault.
24. The responses themselves are inadequate. They do not give reasons for the decisions made or any analysis or weighing up of the issues or explanation of how the decision was reached based on the facts and information considered.

### **Comments made by an officer**

25. Mrs B obtained copies of internal Council documents. Among these were comments made by a senior officer who was dealing with her case. In an email written in April 2016, immediately after the first tribunal decision which directed the Council to assess C, the officer said: "The decision has been received and as we expected the LA does have to conduct a statutory assessment. We have attached the decision for you to read as it does go on a bit! But in a nutshell what it seems to imply is that if you pay enough people you'll get an assessment!!... Thank you again for all your hard work on this to date, no doubt we will be doing it all over again when we don't issue a plan!"

The email was to colleagues involved in the assessment.

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26. In responding to this point the Council said the matter was considered under the Council's employment policies and procedures but the outcome could not be shared with Mrs B.
27. The comments made by the officer were unprofessional and inappropriate. Also they indicate a lack of proper, measured consideration by the relevant officers. It suggests the officer was approaching the assessment with a pre-determined view on the outcome: that the Council would not issue a plan. This is wrong and supports Mrs B's impression the Council was fighting her at every stage.

### **Action taken by the Council in response to the issues raised by the complaint**

28. In response to the draft of this report the Council said that it has:
- increased staffing for the SEND 0-25 Team by 55% until March 2020. It has appointed an experienced senior manager to ensure it meets statutory obligations. A key part of the role is to ensure complaints are answered fully and in accordance with the published timescales. And to oversee appeals, support delivery of a financial recovery plan, and ensure that adequate staff supervision is in place, supported by revised case tracking methods and case audits;
  - started training to ensure staff are fully aware of their statutory obligation to meet deadlines and to follow good practice and the relevant law when collating evidence and working with children and their families throughout the EHC plan process. Part of this training centres on appeals and tribunals;
  - since April 2019 arranged a single nominated officer to exercise the Council's statutory duties, as enshrined in the Children and Families Act 2014 and SEND Code of Practice;
  - reminded senior managers of their responsibilities for ensuring that responses to complaints are provided within the published timescales and that those responses are clear and directly address the issues raised. And it has started a review of the complaints process. This is looking at those occasions where the Council may need to extend deadlines if the matters are complex and ensuring that clients are kept better informed if a complaint response is delayed for any reason.

### **Recommendations**

29. 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 or Cabinet and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
30. In addition to the requirement set out above, the Council has agreed to:
- pay Mrs B £1,800, to be used for educational purposes, for the loss of specialist educational support to C;
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  - provide us with details of the training it has arranged for staff.

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## **Decision**

31. We have completed our investigation into this complaint. We have found evidence of fault causing injustice. We have recommended action to remedy the injustice caused.