

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

**Investigation into a complaint against  
Kirklees Metropolitan Borough Council  
(reference number: 17 019 805)**

**13 September 2018**

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## The Ombudsman's role

For 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 X	The complainant
Z	The complainant's son

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## **Report summary**

### **Provision within the Statement of Special Educational Need**

Mrs X complains the Council failed to provide all the support specified in her son's Statement of Educational Need.

### **Finding**

Fault found causing injustice and recommendations made.

### **Recommendations**

To remedy the injustice caused, within three months of our final decision the Council should pay Mrs X:

- £200 for the unnecessary distress and time and trouble caused in having to bring a third complaint to us;
- £400 for the term and a half of applied behavioural analysis Z missed from September 2017 to February 2018; and
- £400 to acknowledge the cumulative effect on Z of the extended period the Council failed to provide the complete package of support specified in his Statement.

Within three months of our final decision, the Council should also review the procedures it uses to monitor and ensure delivery of special educational provision. It should report to the Ombudsman on its findings and action taken.

The Council has accepted these recommendations.

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## The complaint

1. Mrs X complained the Council failed to provide elements of the support outlined in her son, Z's, Statement of Special Educational Need (Statement). She says this has caused him a significant disadvantage. It has also caused her additional frustration because she has complained to us twice before about the educational support provided by the Council and we upheld most of these complaints.

## Legal and administrative background

### The Ombudsman's role

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. We investigate complaints about councils and certain other bodies. We cannot investigate the actions of schools. (*Local Government Act 1974, sections 25 and 34A, as amended*).

### The Law

4. A child with special educational needs may have a Statement. Since September 2014 some children have an Education, Health and Care Plan instead of a Statement. In this case, Z has a Statement. The Statement sets out the child's needs and what arrangements should be made to meet them. We cannot change a Statement if a parent disagrees with a council's decision; only the Special Educational Needs and Disability First Tier Tribunal (the Tribunal) can do that.
5. The law states that where a council maintains a Statement, unless the child's parent has made suitable arrangements, that council must ensure the special educational provision specified in the Statement is provided to the child. (*Education Act 1996, section 324(5)(a)(i)*)
6. The Special Educational Needs Code of Practice 2001 provides practical advice to councils, schools and others in carrying out their statutory duties under the Education Act 1996 to identify, assess and make provision for children's special educational needs. The 2001 Code remains in force for those children who still have a Statement and have not yet been transferred to an Education, Health and Care Plan.
7. Part 3 of the Statement describes the special educational provision a child will receive. The council has a duty to ensure the child is provided with the educational provision specified in Part 3. (*Special Educational Needs Code of Practice 2001*)
8. The Courts have held that councils have a binding legal duty to ensure special educational provision in a Statement is provided. In *R v London Borough of Harrow ex parte M* [1997] ELR 62 the judge ruled it is the council's duty to arrange provision in the child's Statement.
9. Where a council has been ordered by the Tribunal to amend the special educational provision, it must issue the amended Statement within five weeks of the order being made.

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10. We can consider complaints about where support set out in a Statement has not been provided or where there have been delays in the process.

## **Terminology**

### **Applied behavioural analysis (ABA)**

11. ABA refers to interventions that are based on the causes and the consequences of behaviour.
12. ABA can be effective for children with autism because it helps to build skills based on the child's strengths with an emphasis on communication, social interaction and play skills.

### **Augmentative and alternative communication systems (AAC)**

13. AAC is the term used to describe various methods of communication that can 'add-on' to speech and are used to get around problems with ordinary speech.
14. AAC includes simple systems such as pictures, gestures and pointing, as well as more complex techniques involving powerful computer technology.

## **How we considered this complaint**

15. We spoke to Mrs X and considered the information she provided in her complaint.
16. We considered the relevant legislation and guidance which included the Special Educational Needs Code of Practice 2001 and the Education Act 1996.
17. We produced this report after examining relevant documents and interviewing the complainant.
18. We gave the complainant 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.

## **What we found**

### **Background**

19. Mrs X's son, Z, has autism with moderate to severe learning difficulties. He has had a Statement since he started school in September 2011 at the age of four.

### **Previous complaints to us**

#### **Complaint to us - 2016**

20. At the beginning of 2016, Mrs X complained to us. Z's Statement said he needed ABA, speech and language therapy and occupational therapy. However, the Council did not place details about the specific provision of these therapies in Z's Statement, as required by the 2001 Code. Instead, it placed the details in a different document called a 'delegated funding agreement'.
21. In Z's delegated funding agreement, the Council said it would provide:
  - full-time ABA on a one to one basis;
  - contact for Z from a speech and language therapist on a half-termly basis; and
  - advice from occupational therapy as appropriate.

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22. Our investigation found Z had not received any speech and language therapy since December 2015, and had also not received advice from an occupational therapist. However, we could not say the Council failed to provide what was required by Z's Statement, because the details were included in the delegated funding agreement and not in Z's Statement. We were critical of the Council for not acting in line with the Code when it used a delegated funding agreement and failing to include specific details of therapy provision in Z's Statement.
  23. In addition, we also found that the Council had failed to ensure Z had the support he needed to meet two of his eligible needs relating to his social development for the winter and spring terms of the 2015/16 school year.
  24. As a result of our investigation, we made a number of recommendations. However, we were not able to make a recommendation about the speech and language therapy and occupational therapy Z missed out on because these were not included in Part 3 of his Statement.

### **Appeal to the Tribunal - 2016**

25. Around the same time that she brought her complaint to us, Mrs X lodged an appeal with the Tribunal about the needs and educational provision set out in Z's Statement. One of her appeal arguments was the provision in Part 3 of Z's Statement did not meet his special educational needs. This is because the Council had included the details of provision in the delegated funding agreement.
26. The Tribunal heard Mrs X's appeal on 11 November 2016. It was critical of the Council's actions in using a delegated funding agreement and directed the Council to reissue Z's Statement so it specified details of the therapies Z required.
27. Following the Tribunal hearing, the Council amended Z's Statement to say Z required:
  - a programme of full-time one to one ABA with a view to reducing this provision once Z was able to maintain the advances he had already made;
  - half-termly speech and language therapy totalling a minimum of 12 hours each school year. The Tribunal said "*We agree the [speech and language therapist] will need to be familiar with ... augmentative communication systems and this is included in the Statement*"; and
  - 12 weeks of 30 minute weekly sessions of occupational therapy to provide specialist sensory integration therapy.
28. The Council had until 16 December 2016 to carry out the Tribunal's order and amend the Statement to ensure it was providing the revised therapies in Part 3.

### **Complaint to us - 2017**

29. Mrs X complained to us again in 2017. Two of her complaints were that following the Tribunal hearing in November 2016, the Council:
  - failed to provide the occupational therapy set out in Part 3 of Z's amended Statement; and
  - only partly provided the speech and language therapy specified in Part 3 of Z's amended Statement because it did not provide the AAC element.

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30. We found that Z experienced:
- a delay of two terms in receiving speech and language therapy in line with the provision outlined in his Statement because although some therapy began in February 2017 it did not contain the AAC element; and
  - a delay of two terms for his occupational therapy to start.
31. At the time we investigated these complaints, Z continued to wait to receive both the AAC element of his speech and language therapy and his occupational therapy.
32. We considered these were significant injustices to a child with considerable additional and special educational needs. As a result, the Council agreed to pay Mrs X:
- £300 for the time and trouble of bringing the complaint to us again when she could reasonably have expected the matters to have been resolved by her previous complaint to us;
  - £700 for her to use for Z's benefit for the two terms of occupational therapy Z missed from January 2017;
  - £200 for her to use for Z's benefit for every month from September 2017 that the Council failed to provide Z with the occupational therapy detailed in his Statement;
  - £350 for her to use for Z's benefit for the lack of AAC in his speech and language therapy for two terms; and
  - £100 for her to use for Z's benefit for every month from September 2017 that the Council failed to provide Z with the AAC element of his speech and language therapy.

### **Recent events**

33. In January 2018, Mrs X contacted us for the third time. She said the Council:
- continued not to provide the AAC element of Z's speech and language therapy. This meant Z had not received any AAC from January 2017, when ordered by the Tribunal; and
  - had not provided any ABA from September 2017.
34. During our investigation, the Council put both the ABA and the AAC element of Z's speech and language therapy into place. His ABA began following the February half term 2018 and his AAC began in May 2018.
35. This meant in total Z missed out on the AAC element of his speech and language therapy for four and a half terms and his ABA for one and a half terms.
36. The Council informed us during our investigation that in relation to the AAC element of the speech and language therapy, it was unaware Z had not been assessed in line with the Tribunal's findings until Autumn 2017. It said that once it became aware, it took steps to assess Z in October 2017. By this time, Z had reached the top of the service provider's waiting list.
37. The Council and Mrs X decided it was better to wait for this service provider's assessment as there was a wider range of AAC equipment available from the provider. Due to delays by the provider in carrying out the assessment, this did not take place until 21 March 2018.

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38. The Council says as a result of Mrs X's experiences, it will make service changes to tighten liaison and monitor schools to ensure that agreed services are provided as quickly as possible.
39. The Council also explained that Z missed out on his ABA because his support worker left at the end of July 2017 and a new worker had to be employed and trained.

## **Conclusions**

40. In total, Z missed out on the AAC element of his speech and language therapy for four and a half terms.
41. In our investigation in July 2017, we recommended the Council made a payment for the AAC that Z had already missed and to pay Mrs X £100 a month from September 2017 for any continued failure to provide AAC. The Council has done this.
42. However, the Council failed to effectively monitor whether Z received the AAC element in line with the Tribunal's order and our recommendation. This caused an unnecessary delay.
43. As a result, the Council failed in its duty to meet the Tribunal's order or meet our recommendation in a timely manner. This led Z to be without AAC for four and a half terms. Although we recommended a payment for future unmet provision of the AAC element and the Council met this requirement, it was reasonable to expect the Council to put the AAC element into place earlier than it did. As a result, we consider an additional payment is appropriate to remedy the cumulative effects of such a long and unreasonable delay on Z's development. The Council should also provide evidence that it has carried out service changes to tighten liaison and monitor schools to ensure that agreed services are provided as quickly as possible.
44. Mrs X also complained in January 2018 that the Council had not provided Z with any ABA from September 2017 to February 2018, a period of a term and a half.
45. Both AAC and ABA are required by Z's Statement. The Council was therefore at fault for failing to provide them.
46. In addition, this is the third time Mrs X has had to complain to us about the repeated failure of the Council to ensure Z received the special educational provision in his Statement.
47. These faults have led to further significant injustice to a child with considerable additional needs and special educational needs.

## **Cumulative effect of missed support**

48. The Council had identified the support in Z's Statement as an educational need; therefore, we are satisfied that without this support his educational and behavioural needs were not fully met.
49. Where a council repeats the same fault, we may issue a public report. In this case it is the third time the Council has failed to provide the support required by Z's Statement.
50. In total, since September 2015, the Council failed to ensure Z received:
- the support he needed to meet two of his eligible needs relating to his social development for the winter and spring terms of the 2015/16 school year;



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- speech and language therapy for the winter and spring terms of the 2015/16 school year;
  - the AAC element of speech and language therapy for four and a half terms from the spring term of the 2016/17 school year to the second half of the summer term of the 2017/18 school year; and
  - ABA for the winter term of the 2017/18 school year.
51. Therefore, at no time since 2015 has the Council provided Z with all the support required in Part 3 of his Statement. We have already found fault with the Council's actions and made recommendations in 2016 and 2017 which the Council has accepted and actioned. However, this additional delay in delivering the provision Z needs from September 2017 has led us to decide to issue this report as the Council does not appear to be learning from previous failures.
52. Although we cannot say for certain what the cumulative effect of this lack of support will have had on Z, it is likely to be significant. In addition, Mrs X has the uncertainty of not knowing the extent to which her son's development has suffered or the distress and anxiety caused to him due to the lack of this support.
53. The nature of Z's condition means that he will need the support of the Council throughout his school life. The past failings by the Council have left Mrs X with a fear that the promised support will not be forthcoming.
54. When Mrs X complained to us for the second time in 2017, the Council agreed to make an ongoing payment for each month Z missed support and a payment to acknowledge the distress and time and trouble its actions caused Mrs X. It has done so. However, similar faults have reoccurred three times in the last three years. As a result, we have taken this into account when determining our recommendations in this case.
55. This continual failure to ensure delivery of special educational provision and lack of corrective action following our past two decisions is additional cause for concern.

## 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. In addition to the requirements set out above, the Council has agreed to make the following payments to Mrs X within three months of our final decision:
- £200 for the unnecessary distress and time and trouble caused in having to bring a third complaint to us;
  - £400 for the term and a half of ABA Z missed from September 2017 to February 2018; and
  - £400 to acknowledge the cumulative effect on Z of the extended period the Council failed to provide the complete package of support specified in his Statement.
58. The Council has also agreed that within three months of our final decision it will review the procedures it uses to monitor and ensure delivery of special educational provision. It should report its findings to us and the action taken.

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## **Decision**

59. 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.