Local Government & Social Care OMBUDSMAN

# Report by the Local Government and Social Care Ombudsman

## Investigation into a complaint against London Borough of Hackney (reference number: 17 001 811)

## 18 April 2019

# 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

| | |
|---|---|
| Mr X | The complainant |
| Child B | His younger son |
| Officer C | Head of Education, Health and Care Planning |

## Report summary

### Special Educational Needs and Education, Health and Care Plans

Mr X complains that the Council has delayed in issuing an Education, Health and Care Plan (EHC Plan) for his son. As a result, the complainant has had to pay for the educational support his son required.

### Finding

Fault causing injustice and recommendations made

### Recommendations

To remedy the injustice caused, the Council should, within three months of the date of this report:

- apologise to Mr X and his family for the faults we have identified;
- reimburse him £19,343.00, to recognize the money the Council would have paid had it not delayed in completing the EHC Plan. This payment is contingent on itemized receipts and proof of expenditure from Mr X. Interest should be paid to this at the retail price index rate for the period from June 2016, when Mr X first raised a complaint about the backpayment, to February 2019 (this is the date the most recent retail price index figure is available). This amounts to an uplift of 8.3% and a total payment of £20,948.47;
- pay £1,000 for Mr X and his family's distress caused by its avoidable delays and its failures in the review and complaints process;
- pay £500 for Mr X's time and trouble in pursuing his complaint with the Council. This is more than we would normally recommend in recognition of the efforts, which Mr X has had to go to, in challenging the Council's complaint responses and highlighting its legal obligations;
- review its procedures when it receives a notification under Section 24 of the *Children and Families Act 2014* that a child in its area may have special educational needs, to ensure that it consults parents and other professionals so to reach a decision within 6 weeks;
- explain, on its website and in written guidance to parents/carers, how requests for a statutory assessment, be they made by telephone or in writing, will be dealt with in accordance with the legislation and *Special Educational Needs Code of Practice.* If the Council wants a request for an EHC needs assessment in writing, this must be explained to the applicant, with reference to its written policy. Where an applicant has difficulty in submitting a written request, the Council should have procedures to help the applicant complete the required form;
- make available on its website its standard form for making requests for a statutory assessment; The test for whether the Council should consider whether to carry out a statutory assessment of SEN is that a child *may* have special educational needs which require provision. It does not need to establish that the child does have such needs. The threshold is low, and the Council should reflect this in its local offer, and on its website.
- ensure that its Panels, which make key decisions about whether to proceed with an EHC needs assessment or not, or whether to issue an EHC Plan, keep

proper records of their meetings, provide clear reasons for their decisions and they record the information and reports they have considered;

- offer training to its complaint team in respect of the statutory timescales for EHC assessments and how it should remedy avoidable delays in its EHC Plan process, taking into account the findings made in this report;
- if other parents, because of this report, complain to the Council about delays in their child's EHC Plan process, the Council should be willing to consider these in light of the findings in this case.

## The complaint

1. The complainant, Mr X, complained to the Council in 2016 and 2017 about its assessment of his son's (Child B's) special educational needs and about the way in which the Council had investigated his concerns.

2. Child B was formally diagnosed with an autistic spectrum disorder (ASD) on 14 May 2015. Mr X requested an assessment from the Council of Child B's special educational needs by telephone on 15 May 2015. Before that, the Council had received notification from a Consultant Community Paediatrician dated 7 April 2015 that Child B may have special educational needs.

3. Hackney's Learning Trust is a department of the Council and is responsible for assessing and providing for Child B's special educational needs.

4. A summary of Mr X's complaints is as follows.

   **Complaint (a)** - The Council took 69 weeks to complete an Education, Health and Care Plan (EHC Plan).

   **Complaint (b)** - The Council failed to issue an amended final ECH Plan by 15 February in the year of Child B's transfer to primary school.

   **Complaint (c)** - There were faults by the Council in the annual review process.

   **Complaint (d)** - There were faults in the way the Council considered Mr X's complaints.

## The Ombudsman's role and powers

5. 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)***

6. SEND is a tribunal that considers special educational needs. ***(The Special Educational Needs and Disability Chamber of the First Tier Tribunal ('SEND'))***

7. 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)***

8. We cannot investigate a complaint if someone has appealed to a tribunal or a government minister or started court action about the matter. ***(Local Government Act 1974, section 26(6), as amended)***

## Legal and administrative background

### Assessments

9. The *Children and Families Act 2014 (*the Act*),* the *Special Educational Needs Code of Practice 2015* (the *Code)* and the *Special Educational Needs and Disabilities Regulations 2014 (*the Regulations*)* contain detailed guidance to councils about how they should manage the EHC Plan process.

10. Section 24 of the Act provides that a local authority (council) is responsible for a child or young person if he or she is in the authority's area and has been-

*(a) identified by the authority as someone who has or may have special educational needs, or*

*(b) brought to the authority's attention by any person as someone who has or may have special educational needs.*

11. Section 36(8) provides that an Education Health and Care (EHC) needs assessment must be carried out if the council considers that a child has or may have special educational needs and it may be necessary for provision to be made available to the child or young person.

12. Section 34(4) provides that a council should consult the parents as soon as practicable after receiving a request or after the child has been brought to its attention.

13. A child has special educational needs (SEN) if they have a learning difficulty or disability which calls for special educational provision to be made. Special educational provision means educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream schools or maintained nursery school. Only when an assessment has been carried out, does a council have to decide whether it is necessary to provide special educational provision under an EHC Plan.

14. Paragraph 9.3 of the *Code* states "*the factors a local authority should take into account in deciding whether it needs to undertake an EHC needs assessment are set out in paragraphs 9.14 to 9.15 and the factors a local authority should take into account in deciding whether an EHC Plan is necessary are set out in paragraphs 9.53 to 9.56."*

15. Paragraphs 9.14 and 9.15 of the *Code* says the council should pay particular attention to:

- evidence of a child's academic attainment and rate of progress;
- information about the nature, extent and context of the child's SEN;
- evidence of the action already being taken by a school to meet a child's SEN;
- evidence that, where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided;
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet those needs by other agencies.

16. In *Cambridgeshire County Council v FL-J [2016] UKUT 0225* the Judge said:

*"The authority or tribunal does not have to decide at this initial stage whether special educational provision 'is necessary'… that question only arises when an assessment has been made… the issue at the initial state is a provisional and predictive one; it is only when an assessment has been made that a definitive decision has to be made."*

17. The *Code* (paragraph 9.16) says that councils may develop criteria as a guide to help it decide when it is necessary to carry out an EHC needs assessment but councils must be willing to depart from those criteria where there is compelling reason to do so. The *Code* (paragraph 4.30) says a council must publish its 'Local Offer' which, among other things, should include details of how parents and

young people can request an assessment and arrangements for identifying and assessing young people's SEN and this should include the arrangements for EHC needs assessments. Councils should keep the Local Offer under review.

18. A request under Section 36(1) of the Act for an assessment may be made by the child's parent, by a young person over the age of 16 but under 25 and a person acting on behalf of a school, ideally with the agreement of the parent or young person. The term request is not defined in the legislation and the guidance stipulates that only a request has to be made.

19. Once an assessment has been made, a council must determine whether it is necessary for special educational provision to be made to the child. Where the council decides that an EHC Plan is not necessary, it must notify the child's parent and provide reasons for its decision.

20. If an assessment determines that special educational needs provision is required for a child with special educational needs, the council has a duty to ensure it is in place and is maintained. The courts have decided that councils can ask other agencies to make the provision on their behalf but the duty to make sure it is in place remains with the council. The child's needs and provision should be set out in the EHC Plan.

**Timescales**

21. Paragraph 9.39 of the Code provides that "*local authorities should ensure that they have planned sufficient time for each step of the process, so that wherever possible, any issues or disagreements can be resolved within the statutory timescales".*

22. Paragraph 9.40 states that*: "The whole process of EHC Plan needs assessment and EHC Plan development, from the point when an assessment is requested (or a child or young person is brought to the local authority's attention) until the final EHC Plan is issued,* ***must*** *take no more than 20 weeks (subject to exemptions set out below)".*

23. The following specific requirements apply (paragraph 9.41):

    a) *"Local authorities must give their decision in response to any request for an EHC Plan assessment within a maximum of 6 weeks from when the request was received or the point at which a child or young person was brought to the local authority's attention*

    b) *When local authorities request information as part of the EHC needs assessment process, those supplying the information must respond in a timely manner and within a maximum of 6 weeks from the date of the request*

    c) *If a local authority decides, following an EHC needs assessment, not to issue an EHC Plan, it must inform the child's parent or the young person within a maximum of 16 weeks from the request for a EHC needs assessment, and*

    d) *The child's parent or young person must be given 15 calendar days to consider and provide views on a draft EHC Plan and ask for a particular school or other institution to be named in it".*

24. There are rights of appeal to the Special Educational and Disability (SEND) First Tier Tribunals for parents where a local authority refuses, at week six, to carry out

a statutory assessment, or where a council decides, at week sixteen, not to issue an EHC Plan, or when parents disagree with the contents of the final Plan.

**Reviews**

25. Regulation 18 requires that, where a child is within 12 months of a transfer between phases of education, the council must review and amend, where necessary, the child's EHC Plan before 15 February in the calendar year of a child's transfer. This gives time for parents to appeal to the SEND Tribunal before the start of the school year.

26. Regulations 21 and 22 set out the requirements for reviews where the child or young person does not attend a school or other institution. The council must invite key professionals to the review meeting and give them two weeks' notice. It must obtain advice and information about the child and circulate this two weeks in advance.

27. Paragraph 9.177 of the *Code* says the council must send a note of the meeting to those who attended. This should set out recommendations on any amendments and should refer to any difference of opinion between the council's recommendations and of others attending the meeting.

28. A council must decide whether to maintain the EHC Plan, amend it or cease to maintain the Plan and must notify the parents of its decision within four weeks of the review meeting.

29. Where a council proposes to amend the Plan, it should send the parents, without delay, a copy of the EHC Plan, together with a notice specifying the proposed amendments along with copies of any evidence which supports those amendments. Parents have 15 days to make representations. A council should send the final amended Plan as soon as practicable and in any event within eight weeks of the council sending the Plan and notice of amendments.

30. There is statutory provision in paragraphs 9.178 of the *Code* which says councils should consider reviewing an EHC Plan for a child under five at least every three to six months. Such reviews would complement the duty to carry out a review annually. But councils are not required to undertake reviews every three to six months; they are required to consider doing so.

**Provision and appeals**

31. Paragraph 9.61 of the *Code* sets out the principles for preparing an EHC Plan. Decisions about the content should be made openly and collaboratively with the parents, child and young person.

32. Councils are not obliged to provide what each parent requests. However, they should ensure that parents are involved properly in the decision making and be able to explain clearly why they consider a suggested provision meets the assessed needs of any individual child.

33. Where the child or young person has an EHC Plan it is open to the council to offer a personal budget to allow the young person or his parents to arrange the special educational needs provision themselves. The council should include details of the proposed personal budget in the draft EHC Plan.

34. The SEND Tribunal deals with disputes about assessments and provision for special educational needs. This means we cannot normally look at a council's decisions not to carry out an assessment or provide an EHC Plan. Once the SEND Tribunal has made an order to amend an EHC Plan, the council must do so within five weeks.

35. Even if a complainant is appealing against the provision specified or the named placement, the council still has a duty to provide the support specified during that period.

36. The Court of Appeal confirmed in *R v Commission for Local Administration, ex parte Field [1999] EWHC 754 (Admin)* that we cannot consider a complaint when the complainant has pursued an alternative remedy, even if it does not provide a complete remedy to the claimed injustice This means we cannot consider a complaint about the suitability of education arranged by a council when someone has appealed to the SEND Tribunal about the provision named in an EHC Plan. But, where there has been a delay in issuing an EHC Plan, we may consider whether any additional provision ordered by the Tribunal could have been made sooner but for the council's delay.

**The Council's procedures**

37. Information about the Council's assessment process is available on its website. Its guidance of December 2016 explains to parents that they do not have to prove that an EHC Plan is necessary to obtain an assessment; they just have to show it may be necessary. So, if parents consider that their child needs more help than the school can provide, they can ask for an assessment.

38. The Council's guidance refers to a graduated approach to support the special educational needs of children and young people. It states that only a few pupils will require an EHC Plan. The early stages include: assess; plan; do; review; signpost (to a specialist). Following the implementation of this cycle, the Council's guidance says that some children may still be making less than expected progress. The evidence should demonstrate that, although the setting has responded to external advice, it is clear the child requires support beyond that which can be reasonably provided by the setting.

39. The Council's guidance refers to the timeline for an EHC needs assessment process as follows:

- Stage 1 is between 0-6 weeks, or earlier if possible, and refers to a request for an EHC needs assessment;
- Stage 2 is 7-16 weeks when the Council will seek further advice from professionals and the guidance suggests a meeting at week 14; and
- Stage 3 is 16-20 weeks and is the final stage. The Council's guidance says that if there is a dispute about provision and/or placement, the Council should finalise the EHC Plan to enable the parent to consider mediation or appeal.

40. The Council believes that a notification under Section 24 of the Act is not a direction to initiate an assessment.

41. The Council's 2016 guidance states that parents can request a statutory assessment in writing although Mr X says that, in 2015, this information was not on the Council's website.

**Pivotal Response Treatment (PRT)**

42. This is a form of educational provision for children with ASD. Mr X considers this is the best provision for his son and he has provided evidence to the Council supporting his views. The provision is best provided both in an educational setting and at home so that there is consistency between the two settings.

43. The Council says that PRT treatment has a limited evidence base within the UK. The Council says that there is no evidence that Mr X discussed this matter with the Council before starting the PRT for Child B.

## How we considered this complaint

44. We are investigating the Council's actions since April 2015.

45. We have produced this report following the examination of the Council's computer records, an interview with Mr X and an interview with the Head of Education, Health and Care Planning, Officer C. We issued a previous draft report and have taken into account the comments received in response. We have also received legal advice.

## What happened

### Complaint (a): Assessment of Child B's special educational needs and issue of an EHC Plan

#### Events from March to May 2015

46. In March 2015, the Speech and Language Therapist (SALT) referred Child B for an assessment to the Neurological Department at the Complex Communications Clinic because of concerns he had features of autism. On 7 April 2015, the Consultant Community Paediatrician notified the Council's Learning Trust on its referral form called 'Notification to the Learning Trust of a Child Under 5 Years who has or may have special educational needs'. The Council received this although it is not clear of the date of receipt.

47. The Consultant provided the name of the parent, his address and the name of the General Practitioner (GP). He referred to Child B's severe speech and language development, social communication and behaviour, emotional and social developmental difficulties. The Consultant ticked the boxes: statement, action, action plus and statutory assessment. He stated that the parent was supportive of the referral to the Council and that Child B was receiving speech and language therapy and early support and he provided the name of the Speech Therapist.

48. The Council says that these notification forms are now rarely used and the Council has a Multi-Agency Referral (MAR) form. Cases will be discussed at a multi-disciplinary meeting with the Council's Early Years Team. The Council did not take any action when it received the Consultant's notification.

49. Mr X says that the Complex Communications Clinic carried out a multi-disciplinary assessment of Child B and completed its report on 14 May 2015, sending a copy to the Learning Trust. The report noted that Child B's behaviours were consistent with a diagnosis of autism.

#### Analysis and findings

50. There is no requirement for a council to agree that a child or young person may have special educational needs. But the notification from the Consultant Community Pediatrician fell within Section 24(1)(b) of the Act. He identified Child B as a child, who may have special educational needs and he provided relevant information to support his concern. The fact that the Consultant Community Pediatrician used a form, which the Council now rarely uses, is immaterial. We are satisfied that this was a notification to the Council that Child B may have special educational needs and was therefore capable of forming the start point for the 20 week time limit.

51. On 15 May 2015, Mr X received the formal diagnosis that Child B had ASD and Mr X told the Council this on the telephone. Mr X says that this diagnosis came within the 6-week initial assessment period, albeit close to the end, and this added detail to Child B's difficulties. Mr X does not consider it was new evidence and, even if it was, the Council could have considered this evidence during week 6 to 16 of the EHC process.

52. The Council, when it received the notification of 7 April 2015, should have consulted Mr and Mrs X, the Nursery and the Speech and Language Therapist in accordance with paragraph 9.14 of the *Code.* It then had 6 weeks (to 19 May 2015) to decide whether to carry out a statutory assessment and to tell the parents its decision. It failed to do this and we are satisfied that this amounts to fault by the Council.

53. Mr X says that, during this six week period to 14 May, the Council would have had the notification from the Pediatrician, information from the Nursery and from SALT and it should have asked for a report from the Special Educational Needs Coordinator (SENCO).

54. We consider, however, that it is likely that the Council would have refused to assess Child B based on the 7 April notification alone. Mr X could have appealed this decision and therefore he lost this opportunity, an injustice in its own right. But we consider that it is unlikely Mr X would have done so given he had just received the formal ASD diagnosis and it is likely he would have asked the Council to have reviewed its decision in the light of this new information.

55. We consider that a subsequent request for a statutory assessment can provide a fresh trigger for the 20-week timeframe. Neither the Council nor Mr X had the formal ASD diagnosis at the time of the Consultant Community Pediatrician's 7 April 2015 notification. It was relevant information and it confirmed Mr X and other professionals' suspicions about Child B's difficulties. But, based on what we know about the Council, it seems more likely it would have refused to conduct an assessment, particularly given the amount of evidence it says it requires to agree to an assessment.

56. We consider the ASD diagnosis in mid-May was a material change of circumstances which warranted a new request for an assessment. We therefore conclude that this formal diagnosis triggered, in the particular circumstances of this case, a new start date for the assessment process.

**Events of May to July 2015**

57. Child B was attending a non-maintained nursery (the Nursery). Child B has severe language and social communication difficulties, he can be highly distractible and easily fixates on specific interests or sensory stimulation, he can have restricted motivation towards engaging with learning materials and he lacks the communication and interaction skills to make adequate progress in the absence of targeted and personalised support. Outside school, Child B is easily emotionally dis-regulated resulting in challenging and maladaptive behaviours.

58. Mr X decided that it was necessary to put the PRT in place early on. Mr X and his wife therefore started this treatment for Child B, which they funded themselves. This entailed one to one support for Child B at Nursery, and at home, while waiting for an assessment and provision from the Council.

59. Mr X says that he and his wife had to borrow money on credit cards and re-mortgage their property to consolidate this debt and make other changes to fund the PRT programme. Mr X says that there have been significant

improvements in Child B's communication skills and behaviours because of this provision. Mr X and his wife believe that, putting in this expert educational package early, which has been proven to be effective, was in Child B's best interests. It is a demanding programme which requires commitment from all those working with Child B including themselves.

60. The Council says that Mr X and his wife started this programme in the absence of an agreed EHC Plan and therefore did so at their own risk and volition.

61. Mr X says he requested an assessment of Child B by telephone on 15 May 2015. Mr X has named the two case officers within the Council's SEN department with whom he spoke and has evidence from his telephone bill of these calls. He says he was told that there must be three support plans from Child B's Nursery before the Council could begin the statutory assessment process. Mr X says that the Council claimed this to be a legislative requirement when it was the Council's preferred internal process. Mr X says that this meant he did not write to the Council at this point because he thought he needed the three support plans from the Nursery. At this stage, Mr X was new to the special educational needs legislation although, over the following months, he became more knowledgeable.

62. Mr X says that the Nursery also believed that three support plans were necessary before the Council would begin an EHC needs assessment. The support plans set out what additional support the educational setting had provided.

63. The Council accepts that there is no legislative requirement for three support plans. However, the Council has regard to the SEN *Code* which sets out the kind of evidence which should be provided to demonstrate that a child would not be able to make expected progress, alongside any evidence provided by an early years provider. The Council says it is entitled to set out the criteria it will use to help it make such decisions and this is explained on its website as part of its Local Offer. The Council tells us that it will depart, however, from its normal approach when this is necessary.

64. The Council says that one of its case officers in the SEN department recalls speaking to Mr X. Although reference was made to three support plans, the Council says this was done in the context of explaining to him the need to provide robust information to support his request. The Council believes that its staff provided Mr X with appropriate and correct information in May 2015. However, the Council accepts the process to request an EHC assessment may not have been made sufficiently clear to Mr X.

65. Over the 2015 summer term, the Council's special educational needs co-ordinator (SENCO) for the Nursery worked with Mrs X and the Nursery to support Child B. The Council says that the likelihood of an EHC needs assessment being agreed is much less without sufficient supporting evidence.

66. The Council maintains that there was no valid statutory assessment request from Mr X in May 2015; to initiate an assessment, based on a telephone call, would be inappropriate. The Council says it also has a responsibility to ensure that any request it receives is made by an appropriate and legally responsible adult. That is why the Council says it asks for requests for a statutory assessment to be made formally in writing. It has a standard form for this: 'Request for Statutory Education Health and Care Needs Assessment'.

67. Mr X says that they were reliant on the Council to provide them with this form and it was not available for them to download from the Council's website.

68. The Council's standard form requests:

- information from health services and social care services;
- details of the educational provision;
- copies of relevant reports or referrals;
- the interventions in place to support the child at the educational setting and their impact;
- the weekly timetable of support and early years stage; and
- the form also asks whether the Head of the educational establishment attended supports the request.

69. The Council says that a diagnosis of autism would not necessarily warrant automatic agreement for an EHC needs assessment given the breadth of the autistic disorder and, in any event, interventions were taking place at the Nursery to meet Child B's needs. The Council also does not consider the duty to assess is triggered at the point that it becomes aware that a child may have special educational needs.

70. Mr X says the Council was entitled to tell him its preferences for evidence but it should have correctly advised him that there was no legal obstacle to him submitting a written application for an EHC needs assessment that day. In addition to the formal diagnosis of ASD, there was the notification from the Consultant of April 2015, sent to the Council, that Child B may have special educational needs.

**Analysis and findings**

71. It is accepted that Mr X telephoned the Council on 15 May 2015 on receiving Child B's diagnosis. On the balance of probabilities, it is likely that Mr X was asking about how he could obtain support from the Council for his son's special educational needs. Further, the mention by the SEN case officer of needing three support plans from the Nursery would not have arisen unless Mr X had been asking about receiving support from the Council. His only purpose in telephoning the Council on 15 May was to clarify the EHC Plan process and he relied upon the Council to provide him with accurate information.

72. The Council says that the requirements of the *Code* allows it to set criteria for the kind of information it should seek when making decisions about requests for a statutory assessment. The *Code* provides guidance on the factors a council can consider in deciding whether to undertake an EHC needs assessment but, in circumstances where the council is seeking additional information, the relevant timescales, which councils are required to meet, do not change.

73. The intention behind the EHC Plan process was not to impose disproportionate administrative burdens on parents and children. As such, we consider the Council's request for three support plans, in this case, was disproportionate and not supported by legislation. The Council has not accepted this point so far during the course of the investigation.

74. There is subsequent evidence, after 15 May 2015, that Mr X was formalising his request for an assessment. In mid-July 2015, he again sought clarity about the process and timeframe. We cannot see that the Council provided him with a clear answer at this time, or earlier on 15 May when he telephoned, and this was recognised in the Council's consideration of his complaint in July 2016.

75. We consider that the Council should have sent Mr X its standard form requesting an EHC statutory assessment promptly, after he telephoned on 15 May 2015. Or

it could have advised him to write formally requesting an assessment. Its failure to do so is fault.

76. Had the Council provided the form to Mr X, following the telephone conversation on 15 May 2015, we consider – on the balance of probabilities – that he would have completed the Council's request for a statutory assessment form promptly or made a written request for an EHC needs assessment. It would have been possible for Mr X to have done this without the SENCO's input (although that might have affected the Panel's decision) given he had Child B's medical diagnosis and a SALT report as well as the Nursery's support for such a request.

77. We consider it is reasonable to conclude that Mr X would have, had he known to do so, written to the Council within two weeks of 15 May formally requesting a statutory assessment and providing relevant information as required. In view of the Council's failure to provide Mr X with accurate information about the Council's EHC process, we consider Mr X's request for a statutory assessment would have been made sooner than the Council now claims (14 October 2015). So, we will take 01 June 2015 as the date when the Council should have started the Council's statutory assessment of Child B's special educational needs

**Events of July to November 2015**

78. On 8 July 2015, the SENCO emailed Mr X to say that she would not be able to see Child B before the end of the term. She explained that they could meet the following term to discuss requesting an EHC Plan assessment. Mr X replied, stating he thought the assessment had started and that they were keen to get the EHC assessment process underway as "*we are privately funding a programme of PRT and Speech and Language Therapy (SALT) but I am not really up on what steps and timeframe are, what we need to be doing now to assemble our case and if the onus is on us to drive it".*

79. The Council says that the SENCO was clear that there was an understanding that the EHC needs assessment process had not started until she received Mr X's email of 8 July 2015 stating that he understood it had.

80. Mr X says that he was then told in September 2015 that the assessment had not started and that he had to submit a written application to trigger the process. On 9 October Mrs X completed the Council's form, this having been provided to her by the SENCO.

81. On 14 October 2015, the Council received the Area SENCO's written request for an EHC needs assessment which Mrs X had signed. Accompanying the request was the Hospital Paediatrician's report dated 15 May 2015; a Speech and Language report dated 12 March 2015; the PRT Supervisor's report dated April 2015 and the Early Support Officer/Area SENCO's report dated September 2015. The Head of the Nursery supported the request, stating that Child B would not be able to access any activities without support.

82. The application referred to three support plans to date and that the PRT provision had started in April 2015 with daily sessions and one to one support to Child B at home and one to one support at the Nursery each Friday as from June 2015. The Council says that three support plans were required.

83. On 6 November 2015, the Council's EHC Panel (the Panel) met to discuss Mr X's request for an EHC needs assessment. The Panel was made up of a range of personnel including the interim Head of SEN/Learning Consultant and the Inclusion and Specialist Support Team Leader. The minutes do not refer to what documents the Panel considered and do not record any discussion which the

Panel might have had. The minutes simply recorded its decision as follows: "*Panel did not agree assessment as the child does not currently meet the criteria to assess due to lack of evidence if the setting has been able to provide extra support"*. It was recommended that the SEN case officer looked to funding from the Early Years Fund to provide support.

84. On 6 November 2015, the Council wrote to Mr and Mrs X explaining the Panel's decision, stating that there was not sufficient evidence of the interventions used over time to support Child B at the Nursery. The Council advised that the Nursery could seek additional resources from its Early Years Fund and that, after Child B had been in his educational setting for longer, his difficulties would be more apparent in an educational setting. The Council also informed Mr X of his right of appeal, provided information about mediation and it referred to paragraph 9.14 of the *Code* as the relevant evidence required to make its decision.

85. On 11 November 2015, the Area SENCO advised Mr and Mrs X to speak to the SEN Manager about the Panel's decision. On 23 November, Mr X met her. He says, she told him the decision not to assess had been made in error and she apologised.

86. On 18 November 2015, the Speech and Language Therapist (SALT) wrote to the SEN Manager raising concern about the Panel's decision, explaining that she was concerned that the decision had been made without considering all the evidence of interventions in place for Child B. She explained that Mr and Mrs X were paying for the professional support, both at home and Nursery, and that Child B had made marked progress because of the provision. She stated that she supported the family raising a query about the Panel's decision.

87. In the spirit of working with parents, the Council says it was open to reviewing its decisions, and it did so, in light of the new evidence provided by the Nursery and by SALT. The Council says this evidence was not available previously. Mr X says that the Council was in possession of the evidence of the Nursery's interventions because the plans had been co-produced with the Council's SENCO. And that, if the Council had not made this evidence available to the Panel, that was fault by it.

88. On 30 November 2015, the Panel reviewed the request and it decided to proceed with an EHC needs assessment.

89. The Council says that its legal advice is that the 20 week timescale clock stopped at the point the Panel refused to assess on 6 November 2015. The process restarted when either the Panel reviewed and reversed its decision or when a SEND Tribunal reversed the decision.

90. Officer C says that, in these circumstances, the EHC process restarts at week one and that an officer from the Department of Education had advised the Council, at a training event, that this was the correct approach. Officer C was not sure if the process returned to week one if the Council refused to issue an EHC Plan, at week sixteen, but later reviewed its decision. The Council says that, while there may not be any specific reference in the statutory guidance that the timeframe can stop and start, it considers it is clear, from the points at which the right of appeal to the SEND Tribunal is triggered, that this can be considered as a stop point. If new information is provided following a refusal to assess, as in Child B's case, the Council says that it is reasonable to consider that this is a new request to assess.

91. The Council says it always strives to issue EHC Plans in 20 weeks but for a variety of reasons it may not manage this. It considers that this is a national

problem. The Council has worked to improve its timescales and, in the last two SEN returns, the Council met the 20 week timeframe better than other inner London councils.

### Events of November 2015 to March 2016

92. Between November 2015 and March 2016, there was various correspondence between Mr X and the Council. On 15 March 2016 Mr X provided a breakdown of the costs of the provision for Child B.

93. On 16 March 2016, the Council's Panel considered the available evidence. It declined to issue an EHC Plan for Child B. Mr X was informed of his right of appeal to the SEND Tribunal.

94. Mr X raised concerns about this decision and the PRT Consultant wrote to the Council as well as raising her concerns. Mr X says that it transpired that the Council had lost a key medical report from Child B's Hospital Paediatrician. When this error came to light, the Panel reversed its decision on 14 April 2016.

95. The Council says that there was some confusion about the medical report. The Council subsequently apologised for this and it determined that the clock had not stopped.

96. On 14 April 2016, the Council issued a draft EHC Plan and it had four weeks to finalise it. Mr X says he was told by the SEN Learning Consultant that, should the Council exceed the timeframe to issue a final EHC Plan, it would backdate the provision. The Council cannot find any evidence to support Mr X's claim. But there are emails from Mr X to the SEN Learning Consultant referring to this undertaking

## Analysis and findings

### Mr X's rights of appeal and our jurisdiction

97. Mr X had two points in these events when he had a right of appeal to the SEND Tribunal. In early November 2015, when the Council refused to conduct an EHC needs assessment and, in March 2016, when the Council refused to issue an EHC Plan.

98. We must consider whether it was reasonable for the complainant to have resorted to the SEND Tribunal at these points. Where an appeal right exists, we generally expect parents to use that remedy unless it is or was unreasonable for them to do so.

99. When making this decision, we consider the individual circumstances that led to the refusal to assess or proceed to an EHC Plan and the complainant's reasons for not proceeding to appeal. Our remit is focused on the fault of the processes, particularly around the administrative requirements surrounding the development and delivery of any EHC Plan.

100. If the complaint is about a judgement that has been properly made, then the matter is for the SEND Tribunal. But, if the complainant alleges fault in the way a council reaches a judgment, it may not be reasonable to expect or to have expected the complainant to have gone to appeal.

101. There are a range of factors which may weigh on our assessment; for example: whether any anticipated costs of litigation would have been disproportionate; whether the parents felt that there was administrative fault by a council in making its decision and therefore they had a good prospect of changing the council's decision through negotiation and whether a council's review of its original decision

was reversed within a short time period and as a result of fault in the original decision making.

102. On both appeal opportunities, we consider that it was reasonable for Mr X not to exercise his appeal rights in circumstances where steps were taken to successfully resolve the matter, without the need to appeal, and the Council reversed both decisions within a short period of time and before the deadline for appealing had even expired and, crucially, on the basis of evidence which had already previously been brought to its attention. Essentially there was no reason for Mr X to need to exercise his right of appeal.

103. We are therefore satisfied that it is right to exercise our discretion to investigate as there is evidence of administrative fault by the Council in the decision-making process in November 2015 and in March 2016.

**Statutory timescale of 20 weeks**

104. The Council considers the statutory timeframe of 20 weeks to complete an EHC Plan stops and starts when the parent has a right of appeal to the SEND Tribunal. If the decision is overturned at the point that the Council refuses to undertake an EHC needs assessment (at week six), the Council's advice is that the statutory process starts again at week one.

105. The Council is correct to say decisions not to assess or not to issue an EHC Plan can stop the clock on the assessment framework because they start the clock on the time limits for appeal. So, a council's decision, at these points, stands until set aside by a Tribunal, by judicial review or by the council reversing its decision, as in this case.

106. It may be reasonable for a council to agree to review, in the light of fresh evidence, and change its view thereby saving the parents and council the costs of an appeal. Or for a council to take a defensible decision but subsequently decide to limit its risks in Tribunal proceedings by conceding its position. But we do not conclude that these considerations apply in this case.

107. If a council reverses its decision, the question is whether this can be regarded as part of the original decision-making process (and subject to the 20 week timeframe) or a response to a new request for assessment, which is what the Council contends. This is principally a question of fact. But, where a council reverses its original decision because it failed to take into account relevant information, or there is some other fault, the 'revised' decision should, in our view, still be regarded as a response to the original request and fall within the original, timeframe without pauses or interruptions.

108. We have explained why we conclude that the Council made errors at the Panels of 6 November 2015 and March 2016 and subsequently, as a result, reversed its original decisions both in November 2015 and March 2016. Therefore, we do not agree with the Council that its decisions, at these points, which could have been appealed by Mr X, has the effect of stopping the 20 weeks from running for the following main reasons.

- There is no provision for this in the legislation or guidance.
- This would potentially allow councils to benefit from their own errors in circumstances where a defective decision is made and subsequently overturned, at the Council's own motion, such as in this case.

- There is no reason why the statutory process should start at week one if a decision has already been made to assess and a council would have a further 14 weeks to prepare and finalise the EHC Plan.
- The Council has not published its policy in this regard, contrary to good practice.

109. While the requirement to consult parents with the aim to co-produce EHC needs assessments and/or Plans is appropriate, the Council must make sure that it manages these negotiations within the statutory timescales set down in the legislation. Overall the Council has tended to look at what was reasonable for the Council to do rather than consider its actions in the light of the legal requirements on it.

110. The Council at times also sought to attribute blame to Mr X for the Council's delays when it has responsibility for the management of the EHC assessment process and it should ensure timeframes are met. There are opportunities within the process to negotiate with parents/carers about provision but that should not mean that the statutory timeframe is not met. What is required is for meetings with parents, and responses to queries, to be arranged or provided in a timely manner. When the process overruns, as in this case, it leads to delay in implementing provision for the child, and prevents parents from pursuing timely appeals to the SEND Tribunal.

111. We consider the Council should have completed the EHC Plan process within 20 weeks from 1 June 2015 which means a final EHC Plan should have been completed by 19 October 2015. But the Council did not issue the final EHC Plan until 2 August 2016. That amounts to 41 weeks of avoidable delay over and above the statutory 20 weeks limit. The Council is therefore at fault and it has failed to abide by the legal requirements in the assessment of Child B's special educational needs and provision.

112. The Council has allowed some backdating of provision in consequence of its delay. But it has only allowed for seven weeks of delay. This is not a suitable remedy for the loss of provision and avoidable time, trouble and distress to Mr X and his family by the Council's prolonged delay. In addition, it means that there are 34 weeks of avoidable delay, during which Mr X financed the PRT programme, and which Child B's final EHC Plan eventually endorsed as appropriate but for which the Council has provided no financial support.

**Events of April to September 2016**

113. The Council asked Mr X to attend a meeting but the earliest the SEN Learning Consultant could offer was five weeks after the Panel had decided to issue an EHC Plan.

114. On 16 May 2016 Mr X met the Council's SEN Consultant. The Council generally allocates high needs top up funding to EHC Plans for children and young people, attending mainstream school, according to five funding levels. In Mr X's case, the Council agreed that level four funding (£12,034 a year) was appropriate to meet Child B's needs. Mr X explained that the cost of the PRT package was considerably more a year. The SEN Consultant agreed to reconsider the Council's financial offer.

115. On 22 June 2016, the SEN Consultant wrote to Mr X to say that it would fund Child B's package for 25 hours a week for 39 weeks a year and it would fund the full cost of the PRT Therapist, Consultant and supervision. This amounted to £20,432. The SEN Consultant stated that the start date of the assessment was

30 November 2015 when the Panel agreed to assess and the timeline of 20 weeks begun at this point. Mr X replied stating that the clock starts from "*when an assessment is requested not when the Council deigns to begin it".*

116. The Council subsequently offered a budget of £25,000 a year and later increased this to £29,593.91. The Council issued a final EHC Plan on 2 August 2016. After protracted complaint consideration the Council offered seven weeks of backdated provision at a cost of £4,062, effectively providing funding from 14 June 2016.

117. On 27 July 2016, the Council wrote to Mr X, stating that the timeframe started on 14 October 2015 when it received Mrs X's written request for an EHC needs assessment. It accepted that the Council had failed to ensure appropriate checks and follow ups were in place when gathering information from the professional network for the March 2016 Panel meeting and it said the clock did not stop between 16 March and 14 April 2016 as originally stated.

118. On 12 August 2016, the Council wrote to Mr X to say that there was evidence that he had made a more formal request for an EHC needs assessment in July 2015.

119. The Council's Business Analysis and Complaints Team reviewed the complaint, concluding there was uncertainty regarding the implications when councils do not meet the 20 week timeframe. But its legal advice was that the law was silent on what happened if there was a failure to adhere to the 20 week timeframe. The Council referred to the fact that the dialogue between Mr X and the Council allowed it to work with Mr X "*at every point in the process and for [him] to successfully argue the case outside of SEND Tribunal formalities and resulted in a significant shift in allocated funding but, to some degree, at the cost of expediency".* Mr X refutes that this was the case; instead the Council sought to stall the EHC process.

120. The Council decided, in these circumstances, that the offer of seven weeks additional financial support covering the period mid-June to 2 August 2016 was reasonable.

121. On 13 September 2016, the Acting Group Director of Children, Adults and Community Health sent to Mr X a copy of Business Analysis and Complaints Team's review report. She confirmed that this was the Council's final offer. The Council stated that Mr X had chosen to prolong the EHC Plan process and that Mr X had committed to specific provision ahead of the Council's decisions as part of the EHC needs assessment process. Mr X says he had assumed that the Council would agree to assess Child B and devise an EHC Plan within 20 weeks as the law requires it to do.

122. The Council considers flexibility is required to ensure the principles of co-production of Plans are maintained and which, in turn, provide the preferred provision that appropriately meets the child's needs. The Council says it does not want to apportion blame in this case because the process is two-way and some delay is symptomatic of the process.

123. The alternative, the Council says, is for it to issue EHC Plans that are not co-produced, are of poor quality, and destabilise working relationships between parents/carers and the Council and which will inevitably be challenged through appeal. In any event, the Council did agree eventually to fund a PRT programme while Child B was at Nursery.

124. Mr X says that by taking 16 weeks to finalise the EHC Plan, it cost him a further £5,876 in provision which otherwise the Council would have had to pay to support Child B. Mr X says that the Nursery was not willing to have Child B attend without

full time one to one support. He thought the Council had agreed to this at the draft EHC Plan stage.

125. Mr X could have appealed to the SEND Tribunal in respect of content and provision in the final EHC Plan of 2 August 2016. But he decided that the appeal costs were prohibitive. The Council says the appeal process is not as onerous as he has implied and that costs should not be an issue in determining whether to lodge an appeal or not. The Council considers that many parents lodge an appeal without any cost to the parent being incurred and that the choice to bring in experts was Mr X's choice rather than this being required.

**Analysis and findings**

126. Mr X had a right of appeal in respect of the final EHC Plan of 2 August 2016. Mr X was concerned about the financial shortfall (estimated by Mr X at about £1,000 a month) of what the PRT cost with what the Council was offering. This is a matter about which he could have appealed. Mr X had to consider the benefit of spending additional money on pursuing an appeal when he had at least achieved some provision.

127. Mr X says the cost of mounting an appeal would have required expert assessments and legal costs, amounting to around £15,000, and paid upfront. The cost to him of making up the shortfall was less and was required on a monthly basis and therefore was easier to finance. So, he decided to accept the final EHC Plan of 2 August 2016.

128. Mr X considers that our discretion to consider this aspect of his complaint is a vital protection that was put in place for parents in his situation. Parents, who in the best interests of their child, are ensuring that the early intervention required for Child B's condition is provided to maximise his long-term interests. Further, the Council's delay in completing the EHC Plan process has caused financial difficulties for Mr X which justify us exercising discretion in his favor. Mr X says the case concerned a final Plan with several complex areas of need, provision and case law and he could not have conducted an appeal without expert reports and legal advice.

129. We understand the financial pressures but our understanding is that the SEND Tribunal strives to be as accessible as possible for parents. There does not seem to be any exceptional reasons, in this case, beyond Mr X's choice of approach, that would make the SEND Tribunal process more costly or inaccessible for him than for others. Mr X has exercised that right subsequently in relation to the later version (June 2017) EHC Plan. So, he has demonstrated that he is willing and capable of using the appeal process. Moreover, it is possible for applicants, in certain circumstances, to seek their costs of appeal where it can be shown that a council has acted unreasonably. We understand that Mr X is seeking to do so.

130. We have decided that, on balance, it was reasonable for Mr X to have appealed to the SEND Tribunal if he considered the Council's offer in the 2 August 2016 EHC Plan remained inadequate to meet all of Child B's needs. He had a choice between paying for an appeal, at this stage, or making up a financial shortfall in the subsequent months. Mr X decided on the latter.

131. The period between 2 August 2016 and 15 February 2017 was capable of appeal and therefore falls outside our jurisdiction. In the circumstances, we are satisfied it was reasonable for Mr X to have resorted to the SEND Tribunal.

## Complaint (b): Child B's transfer to primary school

### Events from February to April 2017

132. An EHC Plan must be completed by 15 February in the calendar year of a significant transfer. Child B was due to start school in September 2017. A final EHC Plan should have been completed by 15 February 2017.

133. The Council says it issued an EHC Plan on 15 February 2017, naming the Nursery to the end of August and School Y as from September 2017. School Y was Mr X's first preference school as his older son attends this school. The Council says Child B's EHC Plan was one of 49 sent out on 15 February 2017. No other parent/carer has complained that they did not receive their Plan on time.

134. Child B's EHC Plan stated that funding was for 51 weeks and the Council would provide a personal budget of £29,593.91 for the period of 14 June 2016 to 2 August 2017.

135. Mr X says he never received the EHC Plan in February 2017. The Council has no proof of postage or receipt. But the Council says that there is a creation date on its computer system of 15 February 2017 and Officer C recalled asking the case officer to ensure that the EHC Plan was issued and she showed our investigator email proof of her request. The Council says that the Plan was sent to an address provided by School Y.

136. However, by this stage, the Council had three addresses on its system for Mr and Mrs X and the Plan was sent to an address where Mr and Mrs X were not living and which was different to the address recorded on the EHC Plan.

137. The Council's covering letter, accompanying the Plan, also stated that a school place had been allocated for Child B at School Y and Child B's Plan had been amended. The named enclosure referred to in the letter was: 'What to do if you are unhappy with Hackney Learning Trust decision'. The letter did not refer to enclosing the EHC Plan.

138. The Council says that this is its standard primary transfer letter and Mrs X confirmed that they had received the Plan at the review meeting on 24 March 2017 although this is denied by the parents. However, the Council is now reviewing its administrative processes in the light of the issues this case has raised.

139. Mr X says that the Council had used the correct address for the previous nine months and furthermore the Council had usually emailed correspondence (although the Council has explained that it uses a different process at transfer stage to day to day casework).

140. Mr X says the Council had a duty to consult him under the *Code* (Paragraph 9.179) and a duty to review the EHC Plan before it issued the amended final EHC Plan of 15 February 2017. It was not just about naming the school placement for September 2017. The Council had to explain what support would be available for Child B at School Y.

141. The February 2017 EHC Plan referred to support at the Nursery. The reports informing the Plan were dated early 2016 except the report from the Nursery which was dated 6 and 14 October 2016. The funding was recorded as being from June 2016 to August 2017. There was no reference in the February 2017 Plan to what support the Council would provide to Child B when he started at School Y in September 2017.

142. In addition, Mr X claims that the Council backdated the EHC Plan 'working document' of April 2017 with a date of February 2017 when it provided evidence to us. This – he says – is shown by the fact there is information in the document which was only available after the March 2017 review. Mr X alleges the Council did this to mislead us into concluding it had met its obligation to issue the EHC Plan by the 15 February deadline. He has also provided evidence from his previous landlord confirming that, after they left the property, no post arrived for them and the School also did not receive the EHC Plan.

143. The Council says the EHC Plan sent on 15 February 2017 was amended to name the parents' preferred primary school in Section I. The Council says the original copy is no longer available and that it can only conclude that it overwrote the February 2017 Plan when it was drafting the April 2017 working document. The Council has provided witness statements from an officer and senior manager stating they dispatched an amended EHC plan in February 2017.

144. Had Mr X received the EHC Plan in February 2017, he says that he would have appealed at this point. Officer C disputed this on the basis that he had not appealed earlier on receipt of the 2 August 2016 Plan and he knew then that the Council's PRT funding only went up to 2 August 2017. Officer C says that the main difference between the 2 August 2016 and 15 February 2017 Plans was that a primary school had been named in the latter.

145. Subsequently, the Council issued a final amended EHC Plan on 29 June 2017, after the review of March 2017, setting out the provision to meet Child B's needs at School Y. The Plan reflected the information provided at the review of March 2017 and the Council says it amended the earlier EHC Plan of 15 February 2017.

146. Mr X appealed to the SEND First Tier Tribunal in respect of the content and provision set out in the 29 June 2017 EHC Plan.

**Analysis and findings**

147. Para 9.179 of the *Code* provides that "*an EHC plan must be reviewed and amended in sufficient time prior to a child or young person moving between key phases of education, to allow for planning for and, where necessary, commissioning of support and provision at the new institution*."

148. The legislation states that a final EHC Plan should be issued by 15 February in the year of a transfer. Child B was due to transfer to school in September 2017. The Council should have issued a final EHC Plan by 15 February 2017, having reviewed the August 2016 Plan and setting out the support available in the next educational setting, regardless of any other consideration. We cannot see that the Council explained this requirement to Mr X even though it would have been fully aware of this deadline in the year of a transfer.

149. The Council says it did issue a final EHC Plan by 15 February 2017 which named Child B's school placement for September 2017. Mr X says he did not receive it. The Council had three different addresses on its system and it will be looking at improving its procedures here.

150. We consider it is more likely than not that the Council did not send Mr X the 15 February 2017 EHC Plan. This was fault. We have reached this view on the basis of the evidence that School Y did not receive it, and Mr X's evidence that no post arrived for them after they left their previous address. We consider it is highly unlikely that two recipients would not receive an item of post.

151. On the balance of probabilities, we do not consider the Council tried to mislead us by backdating the EHC Plan, as Mr X has claimed. It has provided witness statements and contemporaneous emails which indicate an amended EHC Plan existed in February 2017, albeit Mr X did not receive a copy at the time. We also consider it plausible that the original document was overwritten when updates were made to it following the review in March 2017. However, the Council was at fault for not keeping a copy of the final February 2017 plan on its records. This represents poor record keeping.

152. If Mr X received the final EHC Plan on 15 February 2017 we consider it likely he would have appealed against its contents, as he would have considered it deficient. We say this because the Council should have reviewed the EHC Plan before it was issued on 15 February. Given that the purpose of undertaking a review at the point the child transfers between phases of education is to facilitate planning and the commissioning of support and provision at the new institution, simply changing the name of the school in the February 2017 EHC Plan was not sufficient. The Council should have referred to the support that would be available to Child B when he started primary school.

153. On this basis, we are satisfied that Mr X would have appealed to the SEND Tribunal had he received the Plan in February 2017 (as he did regarding the final Plan of 29 June 2017) because it made no reference to the provision and support for Child B once he started at School Y.

154. The SEND Tribunal is now hearing appeals within 12 weeks from the date the appeal is registered. So, it is likely that the SEND Tribunal would have considered the merits of content and provision by about June 2017 and before Child B started school in September 2017. However, Mr X successfully appealed to the Upper Tribunal, following the First Tier Tribunal decision, and the matter was remitted back to the First Tier Tribunal.

**Complaint (c): The annual review process**

155. The Council says that, for children transferring to school in September 2017, it normally carries out review meetings in December 2016. However, in Child B's case, his EHC Plan of 2 August 2016 had only been in place for a short period and therefore it thought it too early to review the Plan. Mr X points out that the *Code* recommends reviews every three to six months for pre-school children.

156. The Council had responsibility for organising the review process. It had two weeks to send the annual review papers to those attending the review meeting. But these were not received until 24 March 2017, the day of the annual review meeting.

157. The minutes of this meeting noted improvements in Child B's social, language and emotional regulation skills. It was agreed that amendments were required to the phrasing of outcomes with school transition in mind. Mr and Mrs X asked for prompt decisions to be made as the funding agreed by the Council only ran to 2 August 2017.

158. Mr X says the Council failed to issue a report within two weeks after the review meeting, setting out the views of all relevant parties at the meeting. The Council should then have informed him within four weeks of the review meeting whether it would amend, cease or not change the Plan. If amendments were required, the Council should have sent him a notice specifying the proposed changes, the evidence for them and a draft EHC Plan. He then had 15 days to make representations.

159. On the other hand, the Council says its responsibility is to inform parents of its intention to maintain the EHC Plan, amend or cease it. On 13 July 2017, the Council wrote to Mr X, upholding the complaint that the Council had not sent him a copy of the existing EHC Plan or an accompanying notice setting out all the proposed changes as required. In addition, the Council stated that the responses from the EHC Planning Team could have been clearer. In the Council's response to our enquiries, the Council says that there is no requirement to send a notice specifying the proposed changes. It also thought that the minutes of the review meeting were sufficient to inform those attending the review of the various views.

160. The Council says that Mr X advised the Council not to issue a final EHC Plan until certain queries about funding were answered. The Council responded to these on 16 and 19 June 2017. Mr X says the Council's responses were factually incorrect and therefore he asked the Council to issue the final Plan so that he could bring an appeal.

161. The Council says that the whole process from review to the final EHC Plan should take 12 weeks. Mr X says that this is not correct. The four weeks deadline (after the annual review meeting) is for the Council to announce its intentions. The eight weeks deadline is to finalise the EHC Plan. Mr X says they are distinct milestones in the review process and cannot be rolled together.

162. On 26 June 2017, Mr X complained about the delay in issuing the amended EHC Plan. On 29 June, the Council issued a final EHC Plan and on 16 July 2017 the Council responded to Mr X's complaint about this, accepting there had been some delay.

### Analysis and findings

163. There were faults in the annual review process by the Council in that it did not circulate reports two weeks in advance of the annual review of March 2017, it did not issue a report two weeks after the review and it did not issue a notice of its intentions to amend or provide the supporting evidence.

164. We are satisfied that there are failures in the review process which the Council has partly recognised and apologised for. These have contributed to Mr X's avoidable distress and time and trouble and which we will recognise when making recommendations about appropriate remedy.

### Complaint (d): The Council's complaints process

165. Mr X considers the Council's investigation of his complaints at the final stage of its process has been a "whitewash". Further, even when complaints were upheld, there was no recognition of the resulting injustice or a suitable remedy suggested, albeit general improvements were sometimes recommended for the benefit of all children.

166. Mr X says he has spent many hours challenging the Council's findings on his complaint. The Council also says it has invested considerable time and effort into providing full responses to Mr X's representations. The Council says that, when complainants are dissatisfied with a council's findings, they can complain to us as a remedy. Mr X has now done this.

### Analysis and findings

167. We do not consider it would be proportionate to respond to each of Mr X's concerns about the way his complaints were handled, only to say we consider it was a shortcoming that the complaints process did not recognise or adequately remedy the injustice caused by the faults in the ECH process which this

investigation has identified. The consequential injustice has now largely been addressed by this independent investigation, but we recognise this fault also caused avoidable time and trouble to Mr X.

## Conclusions

168. The Council was at fault because it:

- failed to respond to the Consultant Community Pediatrician's notification of 7 April 2015 that Child B may have special educational needs and failed to view this as a start point for an EHC needs assessment and tell the parents its decision within 6 weeks;
- failed to respond properly to Mr X's enquiries about the EHC Plan process in May 2015, specifically failing to tell him that it required a written request for a statutory assessment, completed on its form, before the process could begin;
- delayed unreasonably in completing the EHC assessment and issuing a final EHC Plan for Child B by 41 weeks over the statutory timescale of 20 weeks from the date (1 June 2015) we have concluded the process should have started;
- misunderstood the statutory timeframe for assessments, allowing a stop/start approach when there is nothing in the legislation or guidance which permitted this in the particular circumstances of this case;
- failed to ensure that its Panel meetings properly recorded the rationale for their decisions or to identify which documents they relied upon to inform their decisions;
- failed to review Child B's Plan before issuing the 15 February 2017 Plan, failed to send a copy to Mr X, and failed to keep an original copy on its records;
- failed also to ensure that the EHC Plan of 15 February 2017 set out the support which the Council would provide to Child B when he transferred to primary school in September 2017. This is not a comment about the merits of the provision which are a matter for the Tribunal. Only that it is good administrative practice for the Council to specify the support, which would be made available at the new educational setting, so that parents can make informed decisions about appeals;
- failed to ensure the EHC review process was carried out in accordance with *Regulations* 21 and 22; and
- failed to recognise the above errors as part of the complaints process.

## Claimed injustice

169. Mr X has made a detailed financial claim for the monies he has spent on ensuring Child B received the full educational provision required, for his time and trouble and avoidable distress, for interest on required loans, for penalties on the early redemption of his mortgage and for loss of earnings.

170. Mr X says that there is a loss of 36 weeks of unremedied delay (taking the assessment start date from his telephone call of 15 May 2015) with more weeks of delay if the start date is taken from 7 April 2015. Mr X says that he had to pay for the provision and the money sat on his credit card for two years accruing compound interest at a rate of 16% and the interest amounts to over £5,000. He has also spent around 800 hours dealing with the Council's fault and obstruction

and this equates to about £40,000 in lost income. The loss of income, in turn, which he says occurred in the latter half of 2017, caused further financial difficulties and created problems when trying to re-mortgage to consolidate the debt and to raise more funds for Child B more cheaply. Specifically, Mr X incurred a penalty for re-mortgaging early, only because of the Council's delays in issuing Child B's EHC Plan and providing funding.

171. In addition, Mr X says the Council should reimburse him the money he paid between September 2017 and January 2018, caused by the delayed Tribunal hearing in relation to the February/June 2017 EHC Plans.

## Consideration of Mr X's injustice

172. The primary injustice is a financial one. But we also recognise the avoidable strain and distress caused to Mr X and his family by the faults identified.

173. Mr X has paid for his son's educational support which the Council, but for its delay of 41 weeks, would have had to provide. Based on the annual personal budget of £29,593 agreed on 02 August 2016, we calculate this lost support amounts to £19,343.00, based on a pro-rata calculation of 34 weeks of lost financial support (the Council having already reimbursed Mr X for 7 weeks of delay).

174. In addition, Mr X claims that he has had to borrow money on his credit card with compound interest. He has also had to re-mortgage his property, with financial penalties for early redemption to consolidate the debt at more favorable interest rates. Because of the time and effort he has had to take in ensuring a reluctant Council provide appropriately for his son, he has lost opportunities to work.

175. It is apparent that Mr X has sought to achieve the best for his son. We understand that he has incurred costs which he argues have only risen because of fault by the Council. Had an EHC Plan been issued by the date it should have been, 19 October 2015, we accept that Mr X would have been in a better financial position. He would only have had to make up the shortfall (rather than the full cost of the PRT) between what the Council agreed to provide with what he considered was necessary for his son.

176. We will consider claims of unnecessary costs incurred where there is a direct link between a council's fault and the claimed costs. But there must be a very clear and direct link. The costs must only have arisen because a complainant had no other choices available or no other cheaper way to raise the necessary funds to provide the support the council should have paid for.

177. In respect of loss of earnings, it is the case that parents often are required to make difficult choices in meeting their family's needs or find themselves working but also challenging a council to make appropriate provision. We do not underestimate the struggles for parents in these circumstances. But it is in the nature of family life that sometimes parents find themselves juggling the demands on their time.

178. In circumstances where a parent has no other choice but to give up work to care fulltime for a dependent, which a council should be providing for, we may recommend a payment for loss of earnings. But Mr X was not in this position; he had a choice and he would have been aware that a loss of income, while also financing special provision for his son, would cause financial hardship. So, we cannot conclude that we should make any recommendations in respect of Mr X's loss of earnings.

179. We accept, however, that Mr X paid for the PRT treatment for Child B between 19 October 2015 and 2 August 2016 because of the delay by the Council in finalising the Plan. We recommend a reimbursement of this cost of £19,343.00, contingent on Mr X providing itemised receipts and evidence of expenditure for this period. The financial figure is based on the pro-rata budget the Council would have made available for the provision had it not delayed in completing the EHC Plan.

180. However, Mr X 's interest on his credit cards and the penalty charges for an early redemption of his mortgage, were not caused solely by the Council's fault. The loss of an income would have had a significant bearing on the family finances, albeit the effects of this may not have been felt immediately. There was also a shortfall between what the Council agreed to finance and the actual cost of providing the PRT treatment both at school and at home. Mr X had to meet this shortfall but, without working, this was likely to cause financial hardship at some point. We cannot therefore conclude that Mr X's loan or re-mortgaging costs have occurred solely and directly because of the Council's faults.

181. But, we recognise that the value of the money Mr X has paid for his son's provision is now less. Mr X considers that we should put him back in the position he would have been, but for the Council's faults. Therefore, we should recommend the repayment of the actual cost of borrowing for him. But our guidance on remedies recommends interest on repayments at the retail price index and, in the circumstances of this case, is a fair approach.

182. We recognise the avoidable distress caused by the Council's fault and this will be reflected in the recommended remedy for this injustice. Our guidance is normally for payments between £300 to £1000 and depends on the severity and length of time of the avoidable distress. We consider that the circumstances of this case fall within the higher end of that scale.

183. The failure to issue a statement in February 2017, which complied with the requirements of the *Code* has caused injustice, as it meant Mr X could not pursue a timely appeal.

## Recommendations

184. 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)***

185. We understand the Council has started to amend information about its local offer on its website. Within three months of the final report, we also recommend the following:

a) The Council should apologise to Mr X and his family for the faults we have identified;

b) The Council should reimburse him £19,343.00, to recognise the money the Council would have paid had it not delayed in completing the EHC Plan. This payment is contingent on itemised receipts and proof of expenditure from Mr X. Interest should be paid to this at the retail price index rate for the period from June 2016, when Mr X first raised a complaint about the backpayment, to February 2019 (this is the date the most recent retail price index figure is available). This amounts to an uplift of 8.3% and total payment of £20,948.47;

c) The Council should pay £1,000 for Mr X and his family's distress caused by its avoidable delays and its failures in the review and complaints process;

d) The Council should pay £500 for Mr X's time and trouble in pursuing his complaint with the Council. This is more than we would normally recommend in recognition of the efforts, which Mr X has had to go to, in challenging the Council's complaint responses and highlighting its legal obligations;

e) The Council should review its procedures when it receives a notification under Section 24 of the *Children and Families Act 2014* that a child in its area may have special educational needs, to ensure that it consults parents and other professionals so to reach a decision within 6 weeks;

f) The Council should explain, on its website and in written guidance to parents/carers, how requests for a statutory assessment, be they made by telephone or in writing, will be dealt with in accordance with the legislation and *Special Educational Needs Code of Practice*. If the Council wants a request for an EHC needs assessment in writing, this must be explained to the applicant, with reference to its written policy. Where an applicant has difficulty in submitting a written request, the Council should have procedures to help the applicant complete the required form;

g) The Council should make available on its website its standard form for making requests for a statutory assessment. The test for whether the Council should consider whether to carry out a statutory assessment of SEN is that a child *may* have special educational needs which require provision. It does not need to establish that the child does have such needs. The threshold is low, and the Council should reflect this in its local offer, and on its website.

h) The Council should ensure that its Panels, which make key decisions about whether to proceed with an EHC needs assessment or not, or whether to issue an EHC Plan, keep proper records of their meetings, provide clear reasons for their decisions and they record the information and reports they have considered;

i) The Council should offer training to its complaint team in respect of the statutory timescales for EHC assessments and how it should remedy avoidable delays in its EHC Plan process, taking into account the findings made in this report; and

j) If other parents, because of this report, complain to the Council about delays in their child's EHC Plan process, the Council should be willing to consider these in the light of the findings on this case.

## Decision

186. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mr X and his son. The Council should take the actions we have recommended to remedy that injustice.