

# Report

on an investigation into  
complaint no 11 009 120 against  
London Borough of Bromley

8 October 2012

# Investigation into complaint no 11 009 120 against London Borough of Bromley

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The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainant or other individuals. The names used in this report are therefore not the real names.

## Key to names used

**Miss Peters**, the complainant

**N**, her son

## **Report summary**

### **Subject**

N has special educational needs recognised by a Statement. These include selective mutism and severe anxiety. The Council failed to make parts of the provision required by the Statement for periods of between two terms and a year while he was in Year 11 and afterwards. It also took 15 months after issuing a proposed Statement to issue the final version. This prevented Miss Peters from appealing against the Council's decision. The Council's failures caused unnecessary additional uncertainty that contributed to N's anxieties and absences from school and reduced his choices at post-16.

### **Finding**

Maladministration causing injustice.

### **Recommended remedy**

I consider the Council should:

- apologise to N and Miss Peters for the failings I have identified
- pay N £3,500, and
- pay Miss Peters £3,500.



## Introduction

1. Miss Peters complains that the Council delayed issuing a final Statement of Special Educational Needs for her son, N.
2. She further complains that an annual review meeting in July 2010 and a transition meeting in December 2010 were based on a draft Statement.
3. Finally she complains that the Council failed to make the provision specified in the previous Statement in the forms of:
  - a key worker trained in selective mutism;
  - specialist training for staff; and
  - speech and language therapy (SALT).
4. As part of his investigation my investigator has:
  - considered the complainant's written complaint and the evidence sent to support it;
  - made written enquiries of the Council and considered its responses; and
  - spoken to the complainant and her representative on the telephone.

## Legal and administrative background

5. The Ombudsman investigates complaints of maladministration causing injustice. When I find maladministration causing injustice, I can ask the Council to take action to remedy that injustice. Special Educational Needs Code of Practice 2001, paragraphs 8:132 and 8:134
6. The SEN Code<sup>1</sup> requires a council to issue a final Statement within eight weeks of the proposed Statement, although there may be exceptional reasons why this is not possible. The SEN Code also requires a Statement to be amended as necessary by 15 February in the year of a phase transfer, such as from Year 11 to Year 12 where a council intends to maintain the Statement.

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<sup>1</sup> Special Educational Needs Code of Practice 2001, paragraphs 8:132 and 8:134

## Investigation

7. Miss Peters has previously made two complaints against the Council that were upheld by the Ombudsman. Complaint 05B18877 covered the period 2005-07 and Complaint 08 019 902 covered the period 2008-09. These complaints concerned issues of delay and failure to make the provision required by her son's Statement of Special Educational Needs.
8. Miss Peters' son, N, transferred from Year 11 to Year 12 in September 2011. He was due to receive 25 hours of education per week in Year 11, six of these hours in a maintained mainstream secondary school.
9. Miss Peters said that an annual review was held in respect of N's Statement in July 2009, and that the annual review recommended amendments to the Statement. She alleged that the Council did not issue an amended Statement, and that an annual review held in July 2010 and a transition meeting held in December 2010 were based on a draft Statement. She said the effect of the Council's failure to amend the Statement was to frustrate her right of appeal to a First-tier Tribunal, which she wished to exercise as she says the Council had omitted items it had previously been directed to include by a First-tier Tribunal.
10. Miss Peters also alleged the Council failed to make the speech and language therapy (SALT) provision specified in the Statement.
11. The Statement required a key worker to provide support to assist N to attend school, and this key worker was required to have a specialization in selective mutism. She said the key worker had left her post in July 2010 and that the Council did not appoint a replacement. Miss Peters said that the Statement required specialist training for staff who would teach N, but that this was withdrawn from December 2010 and the Council had taken no steps to source replacement training.
12. Miss Peters said she conducted her correspondence with the Council via a solicitor as she said the Council had previously considered her to be a vexatious complainant, but that the Council had ignored her solicitor's correspondence. She disputed that she had previously been a vexatious complainant.
13. Miss Peters said the effect on herself and N was to cause stress-related illnesses and to reduce his school attendance. She also said N's home tutors continued to provide tuition for him, but that this was insecure as the Council had not confirmed it would pay them. Miss Peters wanted the arrangements for N's post-16 tuition to be confirmed, and for the Council to compensate N for the failures she alleged.
14. Regarding the alleged delay in issuing the Statement, the Council issued an amended final Statement on 6 October 2009 following an appeal to a First-tier

Tribunal. This Statement would therefore have been due for review in October 2010 even if a need had not been created earlier by the departure of the key worker. The Council confirmed in its response to my investigator's enquiries that this Statement had become outdated by the autumn of 2010. By this time, the key worker had left and the provision required in part 3 of that Statement was no longer being met. Miss Peters explained that N's extreme anxiety about school settings was such that he was unable to communicate with staff at his school. She said the key worker was not to be a member of the school staff. This would mean he or she could thus communicate with N, who would not otherwise speak directly to school staff. She said the effect of the loss of the key worker was to reduce N's ability to communicate at school and to cause him additional stress. One of the aims stated in the reviews held at N's school and in his own contribution on 10 December 2010 for the transition review was to achieve reintegration to enable him to study in the school's sixth form. N wrote on 10 December 2010 that he found it difficult to attend school when several members of staff with whom he was not familiar were present in his lessons.

15. Miss Peters' solicitors threatened legal action and a proposed Statement was issued on 14 October 2010. The evidence suggests that Miss Peters did not receive the proposed Statement until 27 October 2010, more than 13 weeks after the key worker left.
16. The Council issued the final Statement on 29 December 2011 following notice of legal action by Miss Peters' solicitors. This date was ten months after the phase transfer deadline, 14 months after the proposed Statement had been issued, 17 months after the key worker left and more than two years since the date of the previous Statement. This previous Statement was that which the Council confirmed to my investigator it had considered outdated 14 months earlier.
17. The Council's view was that it was impossible to know which school or provider would need to be named on the Statement as N was due to transfer to post-16 provision. Miss Peters' solicitors pointed out to the Council that there is no requirement to name a provider in part 4 of the Statement. The Council's view was that it had gone to considerable time and expense in trying to meet N's needs. It said it had offered Miss Peters regular meetings with the head of its SEN service. The Council also took the view that Miss Peters had specified requirements that were difficult to meet. However, notes provided by the Council show that she consistently raised the issue of the key worker at meetings held at N's school that Council officers attended. It is also the case that no Year 11 pupil has any certainty as to his or her post-16 destination until GCSE results are known in late August each year.
18. No key worker was provided between September 2010 and June 2011 when N was in Year 11. This was required by part 3 of his Statement and the Council did not amend that Statement. This Statement continued to be in force until December 2011, some six months after he left Year 11.

19. The Council took the view that Miss Peters had not specified a key worker for N in her plan for the time when he transferred to post-16 provision. But she explained that his extreme anxiety related to school settings, not to other settings. She also raised the issue of the key worker consistently at meetings at the school that were attended by Council officers.
20. The Council confirmed that the specialist training contract was not renewed after December 2010. The Council's view was that Miss Peters had not specified what effect the withdrawal of the training had. The specialist training was withdrawn without the Statement being amended. As already referred to above, the Council did not issue a new Statement until 29 December 2011. The key worker had left in July 2010. The Council also said it had been difficult to find a replacement key worker when the previous one left. The correspondence provided by the Council also confirmed that a number of staff members were introduced to N during Year 11 and as he prepared for his examinations. His attendances at school declined during the year.
21. The correspondence confirmed that Miss Peters declined to accept a replacement speech and language therapist in January 2011 when the training contract was renewed, on the grounds that she was trained in primary phase work. In response to the draft key facts, Miss Peters said the speech and language therapist also lacked the selective mutism specialism required by N's Statement. An email exchange with the Council on 6 January 2011 shows the Council provided the proposed speech and language therapist's details and Miss Peters replied that she did not have the specialism required by the Statement. The Statement required "speech and language therapy to be delivered in a mode and frequency as advised by a speech and language therapist specialising in selective mutism and language impairment". I have seen no evidence that another speech and language therapist with the correct specialism was offered by the Council before the new Statement was issued on 29 December 2011.
22. The Council took the view that Miss Peters had often set conditions on matters of detail that caused difficulty in securing solutions acceptable to all parties. It said huge amounts of senior officer time had been expended in dealing with issues regarding N's education. Miss Peters said she had been given no choice because of the Council's failings and that all her contact with the Council had been through her solicitors as the Council had previously considered her to be vexatious.



## Conclusions

23. There was considerable delay by the Council in issuing the Statement. Given the withdrawal of the key worker in July 2010, a replacement should have been sought or the Statement should have been amended within eight weeks. However, it seems that it was only after Miss Peters' solicitors threatened legal action that a proposed Statement was issued on 14 October 2010 and received by Miss Peters on 27 October 2010. Miss Peters explained that N's extreme anxiety about school settings was such that he was unable to communicate with staff at his school. She said that the key worker was not to be a member of the school staff. This meant that he or she could thus communicate with N, who would not otherwise speak to school staff. She said that the effect of the loss of the key worker was to reduce N's ability to communicate and to cause him additional stress. In N's case, his absences from school became more frequent during Year 11. The emails between Miss Peters and staff at N's school refer to this stress and the absences.
24. Although the Council took the view that because Miss Peters had not specified a key worker for N in her plan for the time when he transferred to post-16 provision, this diminished her case that he needed the key worker in Year 11, she explained that his extreme anxiety related to school settings, not to other settings. I do not accept the Council's view that any difficulties in recruiting a new key worker justified such a lengthy period without provision, particularly as I have seen no evidence of consistent effort by the Council to recruit one. Miss Peters also raised the issue of the key worker consistently at meetings at the school that were attended by Council officers. I therefore consider that the Council's failure to provide the key worker between September 2010 and June 2011 was maladministration. Miss Peters took the view that the key worker should have been provided until the Statement was amended in December 2011. However, N had left his school in June 2011. Therefore, while it would be correct that the Council's delay in issuing a new Statement meant it was obliged to continue the provision specified in the previous one, it would not have been practical to do so as N was no longer a pupil at the school. I cannot therefore say that the Council's failure to provide the key worker after June 2011 caused N further injustice over and above that I have otherwise identified. Nor can I say with certainty that this failure was the sole cause of stress-related illnesses and absences from school for N, nor that there was a definite sole causal link to his examination difficulties. However, his inability to communicate can only have been made worse and thus more frustrating and distressing by the lack of the key worker. I therefore consider, on the balance of probabilities, the Council's failure to provide the key worker contributed to N's absences from school and that this caused him injustice in the form of anxiety, uncertainty and negative impact on his likelihood of being able to reintegrate into his school's sixth form as he wished. I also consider this failure to provide the key worker caused injustice to Miss Peters in the form of outrage and contributed to her stress.

25. The law requires a council to issue a final Statement within eight weeks of the proposed Statement, although there may be exceptional reasons why this is not possible. The law also requires a Statement to be amended as necessary by 15 February in the year of a phase transfer. N was in Year 11 at this time and due to transfer to post-16 provision. Yet the Council did not issue the final Statement until 29 December 2011 following notice of legal action by Miss Peters' solicitors. This date was ten months after the phase transfer deadline, 14 months after the proposed Statement had been issued, 17 months after the key worker left and more than two years since the date of the previous Statement. The Council had considered this previous Statement outdated 14 months earlier. It does not appear to me that the annual review of July 2010 would have been held on the basis of a draft Statement as it would only have been the departure of the key worker that month that would have created a need to amend it before October 2010. However, the transfer planning meeting of December 2010 would have been held on the basis of the draft Statement of 14 October 2010. It seems to me that it ought to have been possible to issue the final Statement and to hold the transfer planning meeting before 15 February 2011.
26. Despite the Council's view was that it was impossible to know which school or provider would need to be named on the Statement as N was due to transfer to post-16 provision, no Year 11 pupil has any certainty as to his or her post-16 destination until GCSE results are known in late August each year. The effect of such logic would be to ensure that no Year 11 pupil with a Statement could have that Statement amended by 15 February in the year of transfer. I do not consider this reason justifies the delay.
27. The Council also took the view that Miss Peters had specified requirements that were difficult to meet and that it had offered her monthly meetings with the head of the SEN service and expended considerable time and effort in trying to meet N's needs. It took the view that she had effectively prevented him continuing at his school's sixth form when an agreement was within reach.
28. Miss Peters chose to correspond with the Council via her solicitors. She said this was because she did not want the Council to consider her vexatious. The correspondence between the solicitors and the Council shows the solicitors responded promptly to the proposed Statement issued on 27 October 2010 and consistently pressed the Council to issue the final Statement, to the point of threatening legal action before it was issued in December 2011. While it might have been acceptable for the Council to take slightly longer than the usual time to issue the final Statement, particularly if it felt it could reach a mutually acceptable agreement with Miss Peters, the delay of 15 months was clearly excessive. However, as it also took the view that it had had "difficulties in dealing with [Miss Peters'] somewhat mercurial temperament" and there had been a "long and tortuous relationship" with her, it would have been open to it to issue the Statement much earlier as the logic of its view is that it would have been difficult in any case to reach an agreement. The SEN Code requires that a Statement is

issued by 15 February in the year a child transfers from one phase of education to another to allow any appeal to a First-tier Tribunal to take place before the transfer date in the summer. The Council did not do this. It also provided no evidence that showed Miss Peters prevented it issuing the Statement or that she sought to do so.

29. Conversely, the solicitors suggested on 25 May 2011 the Council might issue the Statement without naming a school. It was at this point in May 2011 that Miss Peters presented a "Plan B" that did not involve N continuing at his school's sixth form. Given that the email correspondence between Miss Peters and the school shows N was struggling to attend the school in May 2011, even for examinations, at a time when he had had no key worker for almost a year, her suggestion was not unreasonable. Nor was the solicitors' suggestion that the Council might issue the Statement without naming a school unreasonable. I do not therefore consider Miss Peters proposal of a "Plan B" prevented the Council issuing the Statement.
30. The evidence I have seen indicates the Council delayed issuing a final Statement for N for at least 15 months between late September 2010 (which was eight weeks after the key worker left) and 29 December 2011. I consider this delay by the Council was maladministration causing injustice to N in the form of avoidable uncertainty and distress between 15 February 2011 and 29 December 2011 as to what provision would be made for him and, from September 2011, whether that provision would be secure. I consider this lengthy delay also caused Miss Peters injustice in the form of loss of opportunity to appeal to a First-tier Tribunal, outrage and distress as N began his post-16 studies without the issue of his provision having been resolved.
31. The Council confirmed that the specialist training contract was not renewed after December 2010 and took the view that Miss Peters had not specified what effect the withdrawal of the training had. While there might be circumstances where such training was no longer required near the end of a pupil's time at a school, the specialist training was withdrawn in this case without the Statement being amended. The Council did not issue a new Statement until 29 December 2011, well after N completed Year 11. I therefore consider the withdrawal of the specialist training without amending the Statement was maladministration by the Council. The key worker had left in July 2010. The evidence I have seen also confirmed that a number of staff members were introduced to N as he prepared for his examinations. It therefore seems likely that specialist training would have been required and that the lack of any such training would have caused an injustice to N in the form of avoidable anxiety that staff would understand his needs. Although the Council would have been required by the terms of the previous Statement to provide the training until December 2011, I do not consider this would have been practical because N was no longer a pupil at the school named in part 4 of that Statement. Therefore, I do not consider this failure caused an additional injustice to N.

32. The evidence I have seen confirmed that Miss Peters declined to accept a replacement speech and language therapist in January 2011 when the previous contract ended on the grounds that she was trained in primary phase work and did not have the specialism in selective mutism required by N's Statement. I have seen no evidence that an appropriately qualified speech and language therapist was provided by the Council before it issued the new Statement on 29 December 2011. This was maladministration by the Council in the form of failure to make the provision required by the Statement for a period of 12 months. In this case, it does not seem reasonable to assume that N leaving Year 11 in June 2011 would have removed the need for the speech and language therapy. This is because, where the key worker and training were required to aid integration to a secondary school that he no longer attended after June 2011, N was likely to have ongoing speech and language needs due to his selective mutism in any setting. I consider the loss of provision caused N a further injustice in the loss of opportunity to benefit from strategies designed by an appropriately qualified specialist to improve his verbal communication.
33. Although the Council felt Miss Peters had unreasonably caused the Council to use up huge amounts of time and resources in dealing with issues around N's education, she was entitled to complain of the failings I have identified, which caused injustice to N and herself. I consider the Council's failure to address the issues she complained of caused her further injustice in the form of time and trouble by having to bring her complaint to me.

### **Finding**

34. Maladministration causing injustice.

### **Recommended remedy**

35. I consider the Council should apologise to N and Miss Peters for the delay of 15 months in issuing the final Statement and for its failure to provide a key worker for three terms, training for staff for two terms and a speech and language therapist specialising in selective mutism for 12 months.
36. I consider the Council should pay N £1,500 for the stress, anxiety and unnecessary uncertainty its failures caused him. I also consider it should pay N £2,000 for the loss of opportunity caused by its actions to reintegrate into school in a critical year when choices for post-16 were being made and for reduced choices available to him. These payments total £3,500.
37. I consider the Council should pay Miss Peters £1,500 for the stress and unnecessary uncertainty caused by its actions. In view of the fact that this was the third occasion she has had to approach the Ombudsman following failings by the Council, I consider the Council should also pay her £1,500 for the justifiable

outrage its actions caused her. I consider it should also pay her £500 for the time and trouble it caused her in having to approach the Ombudsman for a third time. These payments total £3,500.

**Dr Jane Martin  
Local Government Ombudsman  
The Oaks No 2  
Westwood Way  
Westwood Business Park  
Coventry  
CV4 8JB**

**8 October 2012**