

## **The Ombudsman's final decision**

Summary: Miss X complained the Council failed to carry out an Education, Health and Care needs assessment and to issue an Education, Health and Care Plan for her son, Y, in line with statutory timescales. The Council was at fault. It agreed to pay Miss X £575 to recognise the uncertainty and frustration caused to her.

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## **The complaint**

1. Miss X complained the Council failed to carry out an Education, Health and Care needs assessment and to issue an Education, Health and Care Plan for her son, Y, in line with the timescales set out in the statutory guidance. Miss X said this caused her frustration and Y to miss out on the specialist provision he needs. Miss X wanted the Council to apologise, to issue an EHC Plan for Y and pay her compensation for the distress and time and trouble caused to her and Y.

## **The Ombudsman's role and powers**

2. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word fault to refer to these. Service failure can happen when an organisation fails to provide a service as it should have done because of circumstances outside its control. We do not need to show any blame, intent, flawed policy or process, or bad faith by an organisation to say service failure (fault) has occurred. (Local Government Act 1974, sections 26(1), as amended)
3. There may be circumstances where we conclude service failure has occurred and caused an injustice to the complainant despite the best efforts of the council. This still amounts to fault. We may recommend a remedy for the injustice caused and/or that the council makes service improvements. (R (on the application of ER) v CLA (LGO) [2014] EWCA civ 1407)
4. The First-tier Tribunal (Special Educational Needs and Disability) considers appeals against council decisions regarding special educational needs. We refer to it as the SEND Tribunal in this decision statement.
5. If we are satisfied with an organisation's actions or proposed actions, we can complete our investigation and issue a decision statement. (Local Government Act 1974, section 30(1B) and 34H(i), as amended)
6. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children's Services and Skills (Ofsted).

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## How I considered this complaint

7. I read the documents provided by Miss X and discussed the complaint with her on the phone.
8. I considered the documents the Council sent in response to my enquiries.
9. Miss X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

## What I found

### Relevant legislation and statutory guidance

10. A child or young person with special educational needs may have an Education, Health and Care (EHC) Plan. This document sets out the child's needs and what arrangements should be made to meet them. The EHC Plan is set out in sections. We cannot direct changes to the sections about their needs, education, or the name of the educational placement. Only the tribunal or the council can do this.
11. Statutory guidance 'Special educational needs and disability code of practice: 0 to 25 years' ('the Code') sets out the process for carrying out EHC assessments and producing EHC Plans. The guidance is based on the Children and Families Act 2014 and the SEN Regulations 2014. It says the following:
  - Where the council receives a request for an EHC needs assessment it must decide whether to agree to the assessment and send its decision to the parent of the child or the young person within six weeks;
  - The process of assessing needs and developing EHC Plans "must be carried out in a timely manner". Steps must be completed as soon as practicable;
  - If the council goes on to carry out an assessment, it must decide whether to issue an EHC Plan or refuse to issue a Plan within 16 weeks; and
  - If the council goes on to issue an EHC Plan, the whole process from the point when an assessment is requested until the final EHC Plan is issued must take no more than 20 weeks (unless certain specific circumstances apply).
12. As part of the assessment, councils must gather advice from relevant professionals (SEND Regulation 6(1)). This includes psychological advice and information from an Educational Psychologist (EP). Those consulted have a maximum of six weeks to provide the advice.

### What happened

13. Miss X's son has autism spectrum disorder which impacts all areas of his learning and development. Y was due to start school in September 2023.
14. Miss X asked the Council to complete an EHC needs assessment for Y at the beginning of March 2023.
15. The Council agreed to complete an assessment six weeks later in April 2023 and wrote to Miss X to tell her it would begin the assessment process. If it decided to issue an EHC Plan it should therefore have done so by the end of July. It said that there would be a delay in completing the statutory assessments due to capacity issues in the Educational Psychology (EP) service. It said because of the delays it would not be able to complete the EHC needs assessment process within the statutory 20-week timescale and apologised.
16. The Council wrote to Miss X in mid-June 2023 and apologised for the continued delays in the EHC needs assessment. It set out the actions it had taken which

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included recruiting further EPs and introducing more efficient EP assessments and advice.

17. Y started school in September 2023. Miss X complained to the Council in September. She said the Council had failed to seek EP advice as part of the EHC needs assessment and failed to issue its decision in line with the timelines in the statutory guidance.
18. The Council upheld Miss X's complaint and apologised for the delay in the EP assessment. It said there was a waiting list of approximately four months until Y would be assessed. It reiterated the actions it was taking to reduce the backlog for EP assessments.
19. Miss X told the Council she was dissatisfied with its response and it had not provided a resolution to her complaint.
20. The Council replied and reiterated its previous response. It said Y was on the waiting list for an EP assessment and the wait was approximately three months.
21. Y was assessed by the EP and the Council received the EP report in November 2023. The Council considered the EP report and agreed to issue an EHC Plan for Y at the end of November 2023. It wrote to Miss X and told her of its decision.
22. The Council issued a draft EHC Plan at the beginning of December 2023 and sent it to Miss X for her comments.
23. The Council issued a final EHC Plan for Y on 2 January 2024, 43 weeks after Miss X made the application for the EHC needs assessment. The Plan named the type of school Y should attend.
24. Miss X told me she has started mediation about the content of sections B, F and I of the Plan. Miss X can appeal to the SEND Tribunal if she remains dissatisfied with the content of Y's Plan following mediation. Miss X has told me she intends to use her appeal rights to the Tribunal.

#### **Action taken by the Council in relation to EP delays**

25. We are currently investigating other cases against this Council where there were delays in commissioning EP reports. In response to our enquiries on this and other cases the Council has told us the actions it is taking to increase capacity and improve the timelines of assessments. It said it has explored ways in which EP assessments can be completed more efficiently as well as examining internal and external options, and has asked part time staff to increase working hours. It said it:
  - had introduced a new efficient EP assessment and report writing processes, with a reduced four-week deadline (previously six weeks) when a new assessment was allocated with 95% of four-week deadlines currently being met;
  - had seen a 36% increase in EP EHC assessments completed by its core staff in the academic year 2022-2023, without a staffing increase;
  - planned to use agency/locum EPs to reduce the waiting list for EP assessments. It had an existing contract with one recruitment agency and had activated a second contract in September 2023, with delivery already reducing waiting times; and
  - had expanded its Educational Psychology Service team. It said it was hoping to recruit nine additional full time equivalent (FTE) EPs and three additional trainee EPs by 2025. It said 3.6 FTE EPs had recently been appointed for start

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dates in September 2024 and September 2025 (who were currently Trainee Educational Psychologists undergoing qualification) with further recruitment planned for April 2024.

26. I am satisfied the Council is making efforts to mitigate the impact of the nationwide shortage of EPs on its service users. We will continue to monitor the effectiveness of these actions through our casework.

### **My findings**

27. Miss X applied for an EHC needs assessment for Y, and the Council agreed to complete the assessment within the timeframe set by the statutory guidance. However, due to high demand for EP assessments, and insufficient capacity within the service, the EP assessment was significantly delayed. As the Council could not complete the needs assessment without the EP assessment it caused a delay in the overall assessment process. The Council issued the final plan 23 weeks later than the statutory guidance allows. That was service failure and caused Miss X frustration and uncertainty. The Council has already apologised to Miss X for the injustice caused by the delay.
28. I cannot say what injustice the delay may have caused to Y, as his EHC Plan is subject to further scrutiny through mediation and the SEND Tribunal.
29. I have set out the actions the Council has already taken to improve its service, and so I have not made any further service improvement recommendations.

### **Agreed action**

30. Within one month of this decision the Council will pay Miss X £575 for the frustration and uncertainty caused to her by the five-month delay in obtaining the EP report. This remedy is calculated at roughly £100 per month from the date the Council should have issued the final EHC Plan in July 2023 until the date it issued the final Plan in January 2024.
31. The Council will provide us with evidence it has complied with the above actions.

### **Final decision**

32. I have completed my investigation. I found fault causing injustice and the Council agreed to my recommendation to remedy that injustice.

### **Investigator's decision on behalf of the Ombudsman**