

The Ombudsman's final decision

Summary: Mrs X complained the Council failed to properly assess her child's Education, Health, and Care needs within statutory timescales. There were delays which caused avoidable distress for Mrs X and her child. The Council agreed to pay a financial remedy to Mrs X. It will also provide an update to the Ombudsman about the progress it has made in clearing its backlog for Education, Health, and Care needs assessments.

The complaint

1. Mrs X complains the Council failed to properly assess her child D's Education, Health, and Care (EHC) needs within statutory timescales, after it agreed to carry out a needs assessment in April 2023. She also says the Council's response to her complaint about this was unclear and provided no timescales for when it would resolve the issues.
2. Because of this Mrs X says D missed Special Educational Needs (SEN) support during the delays and then was issued with a final EHC Plan that was unsuitable. Mrs X also says this caused distress, frustration, and time and trouble for her. She wants the Council to:
 - improve its services to ensure it carries out quality EHC needs assessments within statutory timescales; and
 - improve how it communicates with families of children with SEN.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I refer to this as 'injustice'. If there has been fault which has caused significant injustice, or that could cause injustice to others in the future we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)
4. We cannot investigate a complaint if someone has appealed to a tribunal about the same matter. We also cannot investigate a complaint if in doing so we would overlap with the role of a tribunal to decide something which has been or could have been referred to it to resolve using its own powers. (Local Government Act 1974, section 26(6)(a), as amended)

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5. 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)
 6. The Ombudsman’s view, based on caselaw, is that ‘service failure’ is an objective, factual question about what happened. A finding of service failure does not imply blame, intent or bad faith on the part of the council involved. 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)
 7. 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)

How I considered this complaint

8. I considered:
 - information provided by Mrs X and her written response to my queries;
 - documentation from the Council;
 - relevant law and guidance; and
 - the Ombudsman’s [Guidance on Jurisdiction](#) and [Guidance on Remedies](#).
9. Mrs X and the Council had opportunity to comment on my draft decision. I considered any comments received before making a final decision.
10. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children’s Services and Skills (Ofsted).

What I found

What should have happened

Education, Health, and Care assessments and plans

11. A child or young person with special educational needs (SEN) may have an Education, Health, and Care (EHC) Plan. This sets out the child’s needs and what arrangements should be made to meet them.
12. 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 family 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.

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- 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 of the request for assessment.
 - 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.
13. As part of the assessment councils must gather advice from relevant professionals (SEND Regulation 6(1)). This includes advice and information from an Educational Psychologist (EP), and other professionals specified in the Regulations. Those consulted have a maximum of six weeks to provide the advice.

Appeal rights

14. 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.
15. There is a right of appeal to the SEND Tribunal about a final EHC Plan, against the description of the child's SEN, the SEN provision specified, or the school or placement specified. The right of appeal only arises when the Council issues the final plan.
16. The courts have established that if someone has appealed to the SEND Tribunal, the law says we cannot investigate any matter which was part of, was connected to, or could have been part of, the appeal to the tribunal. (R (on application of Milburn) v Local Government and Social Care Ombudsman [2023] EWCA Civ 207)
17. Therefore, if a family appeals to the Tribunal about the SEN provision or school placement in a final EHC Plan, we cannot investigate the EHC assessment process that led to that final plan because that is connected to the issue that has been appealed. We can, however, look at matters that do not have a right of appeal, are not connected to an appeal, or are not a consequence of an appeal. This includes delays in the assessment process before an appeal right started.

What happened

18. Mrs X asked the Council to carry out an EHC needs assessment for D in March 2023. Seven weeks later, the Council told her it had agreed to carry out an assessment.
19. In June 2023, the Council wrote to Mrs X to explain the assessment would be delayed because of a lack of available Educational Psychologists (EPs) to carry out an assessment. The Council estimated an EP assessment would take place in late-November 2023. In response to this Mrs X made a complaint about the lack of EPs, and the delays in D's assessment.
20. The Council responded to Mrs X's complaint at Stage 1 of its complaints process in July 2023, then at Stage 2 in August 2023. In response to her complaint, the Council accepted it had not met statutory timescales in assessing D and apologised for the distress caused. It said it expected to assign an EP to assess D in early-November. It said after this, if it decided D needed an EHC Plan, it planned to finalise this within six weeks of the EP assessment. It also explained the following steps it was taking to address the shortage of EPs.
- Securing extra funding for recruitment to help reduce the backlog, improve communication, and meet statutory timescales.

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- Asking part time EPs employed by the Council if they can provide more capacity.
 - Advertising to encourage external EP organisations and private EPs to join the Council's private EP list, and privately commissioning EPs from agencies.
 - Advertising to recruit more permanent EPs for the longer term.
21. In October 2023, Mrs X brought her complaint to the Ombudsman.
 22. In November 2023, the Council assigned an EP to assess D. The EP sent their assessment report to the Council three weeks later.
 23. In December 2023, the Council issued a draft EHC Plan for D. Mrs X did not agree with the content of the plan, but asked the Council to finalise it so she could appeal to the SEND Tribunal. The Council issued a final plan in January 2024, ten months after Mrs X asked for the assessment. Mrs X told us she had appealed to the Tribunal about the SEN provision and the school placement in the plan.

My findings

Parts of the complaint I have not investigated

24. Mrs X said the Council did not carry out D's EHC assessment properly and did not seek enough advice. As explained at paragraph 17, I cannot investigate how the Council carried out the assessment and sought advice from professionals. This is connected to the SEN provision and school placement the Council decided to put in the final EHC Plan, which Mrs X has appealed. Any injustice Mrs X or D may have experienced due to the assessment not being carried out properly is the same as the injustice which Mrs X seeks to remedy via the Tribunal process.

EHC needs assessment delay

25. We expect councils to follow statutory timescales set out in the Regulations and Code. We are likely to find fault where there are significant breaches of those timescales.
26. The Council should have completed its assessment and decided whether to issue an EHC Plan within 16 weeks. However, 37 weeks after Mrs X asked for an assessment, this was still not complete, as the Council had not yet received advice from an EP.
27. EHC Plan assessments **must** include advice from an EP. The EP should provide this within six weeks of the Council requesting it. The EP's advice was 24 weeks late. The Council is responsible for commissioning and acting on the EP advice and information. The delay in receiving the advice was due to a nationwide shortage of EPs. The Ombudsman can make findings of fault where there is a failure to provide a service, regardless of the reasons for that service failure. While I accept there are justifiable reasons the EP advice took longer than it should have, the delay was nonetheless fault.
28. After the Council received the EP advice, it issued D's final EHC Plan just over six weeks later. In total, the Council took 44 weeks to assess D and issue their final EHC Plan, instead of the 20 weeks set out in the Regulations and Code. This was a delay of 24 weeks, or nearly 6 months, which was fault. This also frustrated Mrs X's right to appeal to the SEND Tribunal about the content of the plan because she could not do so until the Council issued a final plan.
29. In response to a previous Ombudsman investigation ([22003903](#)), in April 2023 the Council provided us with evidence of the actions it was taking to increase EP capacity and reduce waiting times for EHC assessments. I am satisfied the

Council continued to make further efforts to address this, as set out in its July 2023 complaint response to Mrs X, described at paragraph 20. I therefore have not made further recommendations for actions the Council should take, other than to update us on the assessment backlog.

30. Although the Council accepted fault, it did not offer any remedy for the injustice caused to Mrs X and D by the delay. I cannot say whether the delay before the EP gave their advice in November 2023 meant D lost out on SEN provision. This is because EP advice forms a key source of information for the Council to decide what provision to include in a child's EHC Plan. The EP advice reflected D's needs as they were in November 2023, not necessarily as they would have been in June 2023 if there was no delay. I therefore cannot say what the EP advice would have been or what the Council would have taken from that advice for inclusion in D's EHC plan, if there had been no delay. However, I consider the delay caused distress, frustration, and uncertainty to Mrs X and D. The Council should remedy this injustice.

Complaint response

31. Mrs X said the Council's response to her complaint about this was unclear and provided no timescales for when it would resolve the issues. When the Council first told Mrs X about the EP delays, it did not provide a timescale. However, after she queried this the Council responded a week later to provide an estimate.
32. My view is the Council responded to Mrs X's complaint in good time, fully explained the reasons for the delay, and the steps it was taking to address it. The Council was clear about the estimated timescales for D's assessment and met these timescales. I have not found fault with how the Council responded to the complaint.

Agreed action

33. Within one month of our final decision the Council will pay Mrs X £600 to recognise the distress, frustration and uncertainty caused to her and D by the Council's failure to meet statutory timescales. This is calculated at roughly £100 for each month of delay.
34. Within three months of our final decision the Council will provide an update to the Ombudsman about the progress it has made in clearing its backlog for EHC needs assessments. This will include a copy of its latest updated action plan to increase EP capacity and reduce waiting times for EHC assessments.
35. The Council will provide us with evidence it has complied with the above actions.

Final decision

36. I have completed my investigation. There was fault by the Council which caused avoidable distress for D and Mrs X. The Council agreed to pay a financial remedy to Mrs X. It will also provide an update to the Ombudsman about the progress it has made in clearing its backlog for EHC needs assessments.

Investigator's decision on behalf of the Ombudsman