

The Ombudsman's final decision

1. Summary: Miss X complained about delays in the assessment process for her daughter, Y's, Education, Health and Care (EHC) plan. Miss X also complained the Council has not provided enough alternative education while Y could not attend school. Miss X complained about the content and information collated for Y's EHC plan. Miss X says this has caused distress to Y and she has missed education. Miss X says funding Y's education has put her under financial pressure and she has been put to time and trouble to complain. There was fault in the Council's delay in the EHC process and the Council has not provided sufficient alternative education or reviewed the education offer for Y.
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The complaint

2. Miss X complained about delays in the assessment process for her daughter, Y's, Education, Health and Care (EHC) plan. Miss X also complained the Council has not provided sufficient alternative education while Y was unable to attend school. Miss X complained about the content and information collated for Y's EHC plan. Miss X says this has caused distress to Y and she has missed out on education. Miss X stated she has been put under financial pressure funding Y's education and has taken time and trouble to complain.

What I have investigated

3. I have investigated the delays in the EHC plan assessment process and the alternative provision between May 2021 and May 2022. The final section of this statement contains my reasons for not investigating the rest of the complaint.

The Ombudsman's role and powers

4. 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*)
5. 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 an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
6. 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*)

7. 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.
8. Under the information sharing agreement between the Local Government and Social Care Ombudsman and the Office for Standards in Education, Children's Services and Skills (Ofsted), we will share this decision with Ofsted.

How I considered this complaint

9. I read Miss X's complaint and spoke to her about it on the phone.
10. I considered the information provided by Miss X and the Council.
11. 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

Background information

12. A child with special educational needs 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. The EHC plan is set out in sections. We cannot direct changes to the sections about education, or name a different school. Only the tribunal can do this.
13. There is a right of appeal to the SEND Tribunal against a decision not to assess, issue or amend an EHC Plan or about the content of the final EHC Plan. Parents must consider mediation before deciding to appeal. An appeal right is only engaged once a decision not to assess, issue or amend a plan has been made and sent to the parent or a final EHC Plan has been issued.
14. 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:
 - where a council receives a request for an EHC needs assessment it must give its decision within six weeks whether to agree to the assessment;
 - 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;
 - 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); and
 - councils must give the child's parent or the young person 15 days to comment on a draft EHC plan.
15. 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 and we may recommend a remedy for the injustice caused. (*R (on the application of ER) v CLA (LGO) [2014] EWCA civ 1407*)

16. Councils must arrange suitable education at school or elsewhere for pupils who are out of school because of exclusion, illness or for other reasons, if they would not receive suitable education without such arrangements. [The provision generally should be full-time unless it is not in the child's interests.] (*Education Act 1996, section 19*). We refer to this as section 19 or alternative education provision.
17. This applies to all children of compulsory school age living in the local council area, whether or not they are on the roll of a school. (*Statutory guidance 'Alternative Provision' January 2013*)

What happened

18. This is a summary of events, outlining key facts and does not cover everything that has occurred in this case.
19. Y has Special Educational Needs (SEN) and anxiety. She was on a significantly reduced timetable but has not accessed school since May 2021 due to her anxiety
20. The Council confirmed the school notified it Y was not accessing education in September 2021. Y did not access any education until November 2021. Since then, she had an alternative education package totalling two hours a week. The education package was increased to four hours in March 2022. During this period, Miss X states she paid for a variety of education subscriptions and resources.
21. Miss X contacted the Council to request an EHC plan for Y in September 2021. In October 2021, the Council confirmed it would complete an EHC needs assessment. The Council requested reports from professionals including educational psychology (EP). The Council gave professionals the statutory six-week timescale to respond. It confirmed it would inform Miss X of its decision to issue a plan or not within 16 weeks from the date the referral was received. The letter explained the EP service was experiencing delays.
22. Miss X complained to the Council about delays to EP advice in the needs assessment in November 2021. She stated demand on the service is not an exemption to extend the statutory timescale and as Y was number 128 on a list of 132 people, the Council would miss the statutory timescales. Miss X also complained about the Council refusing to commission speech and language therapist (SALT) and occupational therapy (OT) assessments and not considering funding independent assessments.
23. The Council responded to Miss X's complaint in December 2021. The Council explained the delay in making a decision about issuing a plan was because of not receiving educational psychology advice. The Council confirmed a final EHC plan would also be delayed. The Council confirmed it would not pay for independent reports. The Council upheld Miss X's complaint but did not provide any remedy for the delay.
24. Miss X asked the Council to escalate her complaint to stage two. The Council confirmed at the end of December it would do so and completed the stage two response at the end of January 2022. The response upheld the complaint about the delay in receiving the EP report and stated this was beyond its control. The Council apologised for the delay but offered no remedy.
25. The Council wrote to Miss X in March 2022 confirming it considered it necessary to issue an EHC plan. It issued a draft EHC plan later that month. Miss X had the

opportunity to comment on the draft plan and wrote to the Council requesting changes. The Council met with Miss X in April 2022 to discuss changes she had requested.

26. The Council issued Y's final EHC plan in May 2022. Miss X stated the content of the plan was not correct and some changes agreed in April had not been included. Miss X also said the plan had been issued prior to a panel meeting to decide the type of education placement most suitable for Y. The Council accepted Miss X's request to amend the plan and issued an updated version in June after the panel meeting confirmed the education placement.
27. Miss X is not satisfied with the Council's response and has asked the Ombudsman to investigate. Miss X would like the Council to accept its failures, apologise and reimburse costs of providing Y's education.
28. In response to my enquiries the Council accepted the delay in the EHC plan process. The Council also stated Y's school arranged alternative provision and as the school commissioned the support, the school was responsible for reviewing the alternative provision.

My findings

29. It is clear from documentation, and the Council accepts, there was a delay in issuing Y's EHC plan. Once the Council agreed to assess Y's needs it should have issued the final EHC plan by the end of January 2022. It did not issue a draft plan until March 2022. The Council did not issue the final plan until May 2022, and this required further revision after it failed to make the changes it had agreed to. This was significantly outside the 20-week timeframe.
30. The Ombudsman takes the view that Council must abide by the statutory and legislative requirements under the SEN legislation and guidance. The Council's failure to meet the requirement amounts to fault. The fault caused Miss X and Y an injustice because of the delay and uncertainty. Y has missed provision specified in the EHC plan and added anxiety already associated with education for Y. The delay issuing the final EHC plan also delayed Miss X's ability to exercise her right of appeal to the SEND tribunal.
31. The Council is responsible for deciding what education is suitable when a child is out of school. Education should be full-time, unless the physical or mental health of the child is such that full-time education would not be in his or her best interests. There is no fixed definition of full-time education, but it should be equivalent to the education they would receive in school. It is recognised that where a child receives one to one tuition, the hours of face-to-face provision could be fewer as the provision is more concentrated.
32. The Council stated it became aware Y was not able to attend school in September 2021 and the school determined two hours provision per week was suitable. The Education Act confirms it is the Council's responsibility to arrange suitable education for children when a child or young person is out of school. There is no evidence the Council considered Y's particular needs or her ability to engage with full-time provision.
33. I consider the failure to properly consider and record how it was decided Y should receive only two hours of tuition amounts to fault. As does the failure to review this provision. The Council should review the provision offered regularly to ensure it continues to be appropriate and it is providing a suitable education. Failure to do so is fault and has caused Y an injustice as she has not received appropriate

education for two academic terms. Miss X has also been caused injustice as she has funded additional education for Y for those terms.

34. The Ombudsman has published guidance to explain how we calculate remedies for people who have suffered injustice as a result of fault by a Council. Our primary aim is to put people back in the position they would have been in if the fault by the Council had not occurred.
35. When a young person has missed education as a result of fault by the Council, we may recommend the Council makes a symbolic payment to acknowledge the education they have missed and help them to catch up. We usually recommend a payment of between £200 and £600 per school month to acknowledge the impact of that loss, to be used for the young person's educational benefit.
36. As Y has had some educational provision, I consider any payment should be at the lower end of the scale. The Council became aware of Y not accessing education in September 2021. The school provided some support until the Council issued the EHCP in May 2022 but as detailed above there was no review or consideration of suitability or increased provision.

Agreed action

37. To remedy the outstanding injustice caused to Miss X and Y by the fault I have identified, the Council has agreed take the following action within 4 weeks of my final decision:
 - Apologise to Y and Miss X for the delay in the EHC process and failing to review the alternative education provision.
 - Pay Miss X £1625 for not ensuring Y received appropriate education for two academic terms and the delay in the EHC process. This money should be used to benefit Y.
38. The Council should provide evidence of the actions taken to satisfy the recommendations.

Final decision

39. I have completed my investigation. I have found fault by the Council leading to an injustice. The Council has agreed to take action to remedy that injustice.

Parts of the complaint that I did not investigate

40. I am not investigating Miss X's complaint about the content of Y's EHCP. That is because Miss X can appeal against the EHC plan to the SEND tribunal.

Investigator's final decision on behalf of the Ombudsman