

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

Summary: Mrs X complained the Council delayed completing her child Y's Education, Health and Care (EHC) needs assessment and issuing Y's final EHC Plan. The Council was at fault. The Council has agreed to apologise and make a payment to Mrs X to acknowledge the frustration and uncertainty the delays caused her.

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## **The complaint**

1. Mrs X complained the Council delayed completing her child's Education, Health and Care (EHC) needs assessment and issuing a final EHC Plan. In particular it failed to consider commissioning a private Educational Psychologist report. This caused her distress and frustration and delayed her right of appeal.

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

2. 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**)
3. 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**)
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 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.

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## How I considered this complaint

7. I have considered:
  - the information provided by Mrs X and discussed the complaint with her.
  - information provided by the Council in response to our initial enquiries.
  - the relevant law and guidance and the Ombudsman's guidance on remedies.
8. Mrs X and the Council had the opportunity to comment on my draft decision. I considered any comments I received before making a final decision.

## What I found

### Education, Health and Care plan (EHC) Plan

9. 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.
10. 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 decide whether to agree to the assessment and send its decision to the parent of the child or 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.
  - as part of the EHC assessment councils must gather advice from relevant professionals. This includes psychological advice and information from an Educational Psychologist (EP). The Code of Practice states the EP should normally be employed or commissioned by the local authority. Those consulted have a maximum of six weeks to provide the advice;
  - 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.
  - 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).
11. There is a right of appeal to the SEND Tribunal about the special educational provision and school or placement named in a child's EHC Plan. This appeal right is only engaged once the final EHC Plan has been issued.

### What happened

12. In December 2022 Mrs X requested an EHC needs assessment for her child, Y. In January 2023 the Council agreed to carry this out.
13. Mrs X complained to the Council in April 2023 as she was still waiting for Educational Psychologist's (EP) advice which was due by early March. She said she was recently told there would be a further eight week delay. Mrs X asked the Council to consider privately commissioning EP advice and she provided details of a Clinical Psychologist.

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14. The Council responded to Mrs X's complaint in May 2023. It apologised for the delay and explained the Council was affected by a significant increase in requests for EHC needs assessments and it did not have sufficient EP capacity to meet demand. It said it would not commission the EP she sourced as it was obliged to commission its own EP advice. It explained it had been commissioning private psychologists to extend its pools of EPs to carry out assessments. It had been advertising to encourage organisations and private educational psychologists to work with its EP team. It said it currently had 20 agency EPs working to reduce waiting times even further. Even so it still had a waiting list.
  15. In early July 2023 the EP submitted their report to the Council.
  16. Mrs X remained unhappy and the Council responded at the second stage of its complaints process in July 2023. The Council apologised again and explained it was working hard to increase EP capacity whilst maintaining the quality of assessments. This included commissioning agency EPs and advertising to encourage organisations and Independent Educational Psychologists to join its associate EP list and go through its quality assurance processes.
  17. It explained the SEND code of practice stated advice must be sought from an Educational Psychologist who should normally be employed or commissioned by the local authority and that was the approach it adopted. It noted Mrs X had sourced a Clinical Psychologist but explained that even if they were commissioned it would still need an EP assessment. It said the Council had since agreed to issue Y with an EHC Plan and advised it would continue to build EP capacity and the capacity of the EHC team to improve timeliness once assessments were completed.
  18. The Council issued Y's final EHC Plan in August 2023.

### **Other cases**

19. We are currently investigating other cases against this Council where there were delays in commissioning EP reports. In response to our enquiries on those other cases the Council told us the actions it was 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. As well as asking 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.
  - had expanded its Educational Psychology Service. 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 dates in September 2024 and September 2025 (who were currently Trainee Educational Psychologists undergoing qualification) with further recruitment planned for April 2024.

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## **My findings**

20. We expect councils to follow statutory timescales set out in the law and the Code. We are likely to find fault where there are significant breaches of those timescales.
21. The Council agreed to carry out an EHC needs assessment for Y in January 2023 which was within the six week statutory timescale from the date of request. It then had to progress the assessment 'in a timely manner' so it could issue Y's final EHC Plan within 20 weeks of the assessment request. However, EHC needs assessments **must** include advice from an EP, which should be received within six weeks of the Council requesting it. The EP did not provide their advice until July 2023. This delay was fault.
22. There is a national 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. Y's wait to be seen by an EP meant their EHC needs assessment took longer than the statutory timescales allow for. The Council was at fault as Y's plan was issued after 33 weeks, which is 13 weeks longer than the statutory timescales allow for.
23. I cannot say to what extent Y missed out on provision because of the delays. This is because the EP advice reflected Y's needs at the time of the assessment, not necessarily as they would have been when it was originally due. I therefore cannot say what the EP advice would have been or what the Council would have taken from that advice for inclusion in Y's EHC Plan. If Mrs X disagrees with the content of the final EHC Plan, it is open to her to appeal this to the Tribunal.
24. However, the delays in the EHC needs assessment process caused Mrs X uncertainty and frustration while she awaited Y's final EHC Plan and meant her appeal right was delayed.
25. Mrs X was unhappy the Council would not commission a private EP report. The Council explained how it was already commissioning agencies and private EPs to reduce the wait for EP assessments. The Council did not agree to contact the particular Clinical Psychologist Mrs X suggested as it would still have needed to await input from an Educational Psychologist, as this is a requirement under the Regulations. It was not at fault.
26. I am satisfied the Council is making efforts to mitigate the impact of the nation-wide shortage of EPs on its service users. We will continue to monitor the effectiveness of these actions through our casework.

## **Agreed action**

27. Within one month of the final decision, the Council has agreed to apologise and pay Mrs X £325 to acknowledge the frustration and uncertainty she experienced due to the delay in completing Y's EHC Plan. That equates to £100 per month for the delay.
28. The Council should provide us with evidence it has complied with the above actions.

## **Final decision**

29. I have completed my investigation. The Council was at fault causing an injustice which it has agreed to remedy.

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