

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

Summary: Ms X complains about the Council's delay in carrying out an annual review and reassessment of her child's Education Health and Care Plan causing distress and uncertainty. We found there was service failure by the Council due to the delay in carrying out the Education Health and Care Plan reassessment. We have recommended a suitable remedy in this case and so have completed our investigation.

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## **The complaint**

1. I have called the complainant Ms X. She complains there were failings in the way the Council dealt with the annual review of her son's (whom I shall refer to as Y) Education, Health and Care Plan (EHC Plan) in December 2022. In particular Ms X says the Council:
  - Failed to complete the annual review within the required timescales so she had to raise concerns with the Council that Y's school placement was at risk as he was not getting the support needed.
  - Failed to provide her with a copy of the professionals reports before issuing the draft EHC Plan so she could comment on the document.
  - Failed to hold a review meeting with NHS professionals involved in Y's health care needs before issuing the EHC Plan.
  - Has removed how some provision listed in Y's previous EHC Plan will be specifically provided in the new EHC Plan issued in August 2023.
2. Ms X says the Council's actions have caused distress and uncertainty to her and Y.

## **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. 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

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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)

5. The Local Government Act 1974 sets out our powers but also imposes restrictions on what we can investigate.
6. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (Local Government Act 1974, sections 26B and 34D, as amended)
7. We cannot investigate complaints about what happens in schools. (Local Government Act 1974, Schedule 5, paragraph 5(b), as amended)
8. The law says we cannot normally investigate a complaint when someone can appeal to a tribunal about the same matter. 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)
9. We cannot investigate a complaint if someone has appealed to a tribunal. (Local Government Act 1974, section 26(6)(a), as amended)
10. 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.
11. 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)

### **What I have and have not investigated**

12. I have investigated Ms X's concerns from December 2022 onwards about the Council's delay in carrying out the annual review and reassessment and a failure to provide reports. I have not investigated any concerns Ms X may have about issues before the annual review planned for December 2022. This is because any complaints about matters before then are late as it was open to Ms X to have complained to us about them before now.
13. I have not investigated Ms X's concerns about the failure to hold an NHS review meeting and contents of the EHC Plan issued in August 2023. This is because once the Council issued the final EHC Plan in August 2023 Ms X could have appealed to the SEND Tribunal if she disagreed with the contents, provision, and placement in the EHC Plan. I consider it reasonable to expect Ms X to use her right of appeal because only the SEND Tribunal can instruct the Council to make changes to the EHC Plan. Any concerns Ms X may have about the input of the NHS professionals goes to the contents of the EHC Plan which can be considered as part of an appeal to the SEND tribunal.

### **How I considered this complaint**

14. I spoke to Ms X and considered the information she provided with her complaint. I made enquiries with the Council and considered its response along with relevant law and guidance.
15. Ms X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

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16. 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.

## **What I found**

### **Law and guidance**

#### **Education, Health and Care Plans**

17. 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 SEND Tribunal can do this.
18. Parents have a right to appeal to the SEND Tribunal if a council refuses to carry out an assessment, or they disagree with the special education provision, or the school named in the child's EHC Plan. Parents also have the right of appeal following an annual review on decisions to amend or cease a plan.
19. The Council is responsible for making sure that arrangements specified in the EHC Plan are put in place. We can look at complaints about this, such as where support set out in the EHC Plan has not been provided, or where there have been delays in the process.

#### **Due Diligence**

20. The Ombudsman does recognise it is not practical for councils to keep a 'watching brief' on whether schools are providing all the special educational provision for every pupil with an EHC Plan. The Ombudsman does consider that councils should be able to demonstrate due diligence in discharging this important legal duty and as a minimum have systems in place to:
- check the special educational provision is in place when a new or substantially different EHC Plan is issued or there is a change in placement;
  - check the provision at least annually via the review process; and
  - investigate complaints or concerns that provision is not in place at any time.

#### **Arrangements for reviewing an EHC Plan**

21. Councils must review EHC Plan's at least every 12 months. A council can delegate responsibility to a school to arrange the annual review.
22. Councils must decide whether to maintain the EHC Plan in its current form, amend it, or cease to maintain it within four weeks of the review meeting. The Council should issue the final EHC Plan or decide not to amend the EHC Plan at all as soon as practicable and within eight weeks of the date it sent the plan to the parents/young person with the proposed amendments. Decisions to amend or cease a plan can be appealed to the SEND Tribunal.

#### **Reassessment of EHC Plans**

23. The council must decide whether to conduct a reassessment of a child or young person's EHC Plan if this is requested by the child's parent, the young person or their educational placement. The council may also decide to complete a reassessment if it thinks one is necessary.
24. The council can refuse a request for a reassessment if less than six months have passed since a previous EHC needs assessment. It can also refuse a request if it

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does not think it is necessary, for example because it does not feel a child or young person's needs have changed significantly.

25. The council must tell the child's parent or the young person whether it will complete an EHC needs reassessment within 15 calendar days of receiving the request. If the decision is not to reassess, the council must also provide information about the right to appeal that decision to the tribunal.
26. If the council agrees to an EHC needs reassessment, it has 14 weeks to issue the final EHC Plan from the date it agreed to reassess to the date it issues the final amended EHC Plan.

### **Events leading to the complaint**

27. What follows is a brief chronology of key events. It does not contain all the information I reviewed during my investigation.

### **Background information**

28. Y has been diagnosed with severe Autistic Spectrum Disorder, a learning disability and ADHD. Y is pre-verbal with sensory, social communication and interaction issues and other medical conditions. Y has an EHC Plan issued in 2016. In 2021 Ms X appealed to the SEND Tribunal following an annual review in 2020. The Council agreed for Y to attend an independent specialist school (school) from September 2021.

### **Annual Review December 2022**

29. Y's annual review was due to be held in December 2022, but Ms X asked for a reassessment of Y's needs. The Council agreed to the reassessment and started a new EHC needs assessment process. The Council held an Education Placement Review in December instead of the annual review meeting due to the decision to reassess Y. The Council accepts there was a delay in completing the reassessment because of a lack of education psychologists (EP) to carry out the assessment.
30. The Council and school carry out education meetings each term. At the meeting in March 2023 the school raised concerns about Y because of his significant behavioural changes and lack of school progress. The school said it had already decided to arrange for extra support through an EP and OT to help Y and the school team.
31. A Council EP completed a report on Y on 25 April 2023 and advised Y needed 1:1 support unless receiving video interaction provision when 2:1 support was required. The Council completed the reassessment and issued a draft EHC Plan for Y in May 2023.
32. Ms X raised concerns Y's school placement may break down as she felt he needed more support. Ms X considered removing Y from the school. But decided to keep Y at the placement and asked for extra staff for him.
33. The Council and school held a meeting in June 2023 to discuss Y's placement and support which Ms X was unable to attend. The school agreed to put forward information and costings for the Council to consider. The Council says it had no evidence then that Y needed 2:1 support other than when receiving the video interaction.
34. The Council held an annual review meeting with Ms Y in July 2023 to discuss Y's needs and it issued Y's final EHC Plan on 15 August 2023 with Y to remain at the school.

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35. In October 2023 following discussions with the school, EP, and health professionals the Council agreed to provide 2:1 funding for targeted times in Y's placement.

### **The Council's response to Ms X's complaints**

#### **Delay in carrying out the annual review**

36. Ms X complained to the Council about the delay in carrying out the annual review. The Council explained the annual review had not gone ahead because Ms X asked for a reassessment as she considered Y's EHC needs required updating. The Council agreed to the reassessment. This superseded the annual review process and is why it did not go ahead. The Council apologised to Ms X if it had not fully explained to her the reason for the annual review not continuing although it was aware she had spoken to officers about it.
37. Although the annual review did not go ahead the Council advises it has taken action to improve its annual review processes and to the EHC Assessment Pre-16 service. This has resulted in increased management capacity and extra EHC Coordinators. And so, the Council has reduced caseloads and all cases, including those considered complex, are being more effectively managed. The extra staffing also includes officers who are working specifically on annual reviews and who have responsibility for amending/writing EHC Plans following annual reviews. The Council says this has reduced the backlog of outstanding reviews and it is dealing with annual reviews within the statutory processes. It says the increased staffing is leading to service improvement with EHC Coordinators proactively involved in the annual review process.

#### **My assessment**

38. The Council has apologised to Ms X if she considered it had not fully explained to her it was carrying out the reassessment of Y's EHC needs rather than hold an annual review. I consider the apology is suitable action for the Council to take as it was acting on Ms X's request for a reassessment of the EHC needs which was the outcome she was seeking.

#### **Failure to provide reports**

39. Ms X said the Council had failed to make the reassessment reports and information available to her and her case worker via the Council's digital hub. So, they could not comment on the draft EHC Plan.
40. The Council confirmed that following Ms X's complaint it investigated whether there was any missing information on the hub. It found it had not included an OT report from January 2023 in the EHC Plan and it was added to the amended EHC Plan. Ms X asked for a copy of the reports. The Council accepted a slight delay in sending the reports from Y's doctor, the EP, SALT, and OT reports to Ms X. Ms X was then able to attend an annual review meeting in July 2022 to go through the information she considered was missing from the reassessment before the Council finalised the plan.

#### **My assessment**

41. It is unclear whether the reports were available to Ms X to see via the hub. But documents show the Council investigated Ms X's concerns and posted the reports out to her. So, Ms X has been able to see the documents and comment on them before the Council finalised the EHC Plan. I appreciate this will have added to Ms X's frustration over not being access the information sooner in the process and the time taken to complete the reassessment. I refer to the frustration caused to Ms X about accessing documents further in the statement.

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### **Failure to meet the reassessment timescales**

42. Ms X said the Council failed to meet the statutory guidelines set out in the Code for the EHC Plan review which should take no more than 20 weeks. Ms X said this put Y's placement at risk. The Council responded to Ms X's complaints. It said the reassessment needed to follow the same process as Y's first EHC needs assessment. And it needed to draw up of the EHC Plan within the same timescales and rights of appeal. It had agreed to do a full EHC reassessment at the annual review. So, it started this process rather than the annual review.
43. The Council accepts that once it agreed to a reassessment should have been done within 14 weeks according to statutory timescales for reassessments. The Council apologised to Ms X for any distress caused.
44. The Council confirmed the delay had been caused by a lack of educational psychologists. There is a national shortage of EPs, and the Council has seen a significant increase in number of EHC assessments commissioned in its area. The Council confirms it is aiming to recruit more EPs as a priority and expand its EP service. It also looked at ways to complete the EP assessments more efficiently. This includes using agency EPs to reduce the waiting list for EP assessments and implementing a new efficient EP assessment and report writing process.
45. The Council confirmed it held termly placement meetings with the school to discuss Y's placement. So, it was aware of concerns raised about Y's behavioural changes and lack of school progress. The Council noted the school was arranging extra support for Y. And drawing up costings to support the placement and Y's needs for the Council to consider.

### **My assessment**

46. As the Council has accepted and the documents show there were delays to the EHC reassessment agreed at the meeting in December 2022. The Council should have issued final EHC Plan by the end of March 2023 being 14 weeks after it agreed to do reassessment. However, it took the Council until August 2023 to issue the final EHC Plan. This was 40 weeks in total so longer than the guidance recommends.
47. The Council explained the delay was due to a lack of EP's when carrying out EHC Plan needs reassessments. It is unfortunate this reason affected the Council's ability to carry out its duties which I consider amount to service failure. The Council has apologised to Ms X for the delays caused by this service failure. This is suitable action for it to take.
48. We would normally make service improvement recommendations to the Council about its EHC Plan process. However, the Council has already taken such action and following plans drawn up to ensure it improves its service in this area. This is appropriate action for it to take.
49. But the delay in carrying out the reassessment has caused an injustice to Ms X and Y. This is through distress and uncertainty over the outcome of the reassessment. And the frustration in not being able to access documents in a timely way. So, I recommend the Council should provide a remedy to Ms X and Y by making Ms X a payment of £350 to recognise the distress, uncertainty and frustration caused during the delay.
50. The evidence shows the Council was aware of Ms X's concerns about Y's placement and she considered it was at risk. The Council discussed the concerns with the school who arranged additional support. So, I am satisfied the Council

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responded to Ms X's concerns as we would expect it do and demonstrated due diligence about Y's placement. The Council agreed to consider costings for additional support. The Council's decision on the level of support Y needs is part of the EHC Plan issued in August 2023. It was therefore open to Ms X to appeal to the SEND Tribunal if she disagreed with the level of support being provided. However, the Council agreed to fund additional support for Y from October 2023.

### **Agreed action**

51. To remedy the injustice caused by the Council's delay in carrying out the EHC reassessment the Council will make a payment of £350 to Ms X within one month of my final decision. This is in recognition of the delay caused and distress and uncertainty over the outcome of the reassessment. It is also for Ms X's frustration in not being able to access documents in a timely way.
52. The Council should provide us with evidence it has complied with the above actions.

### **Final decision**

53. I have completed my investigation. I have found evidence of service failure by the Council and have recommended a suitable remedy for the injustice caused in this case.

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